DCN 813

OFFICE OF THE SECRETARY OF DEFENSE
1950 DEFENSE PENTAGON
WASHINGTON, DC 20301-1950

ADMINISTRATION &
MANAGEMENT

March 18, 1995

MEMORANDUM FOR THE DIRECTOR, COMMITTEE MANAGEMENT SECRETARIAT (CAM), GENERAL SERVICES ADMINISTRATION

SUBJECT: Renewal of the Charter for the Defense Base Closure and Realignment Commission

Enclosed is a copy of the charter renewing the Defense Base Closure and Realignment Commission which is being filed with you in accordance with P.L. 92-463, the "Federal Advisory Committee Act." This presidential commission was established pursuant to Title XXIX, P.L. 101-510, the "National Defense Authorization Act for FY 1991."

Copies of this charter are also being filed with the Senate Committee on Armed Services, House National Security Committee, and the Library of Congress.

SIGNED

Howard G. Becker
DoD Committee Management Officer

Attachment

bcc: Cindy Kestner, USD(A&T) Admin
Chris Goode, Defense Base Closure & Realignment Commission
Paul Solemen, OASD(Economic & Security)

OFFICE OF THE SECRETARY OF DEFENSE
1950 DEFENSE PENTAGON
WASHINGTON, DC 20301-1950

ADMINISTRATION &
MANAGEMENT

March 18, 1995

Library of Congress
Exchange and Gift Division
Federal Advisory Committee Desk
Washington, D.C. 20540

Gentlemen:

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Sincerely,

SIGNED

Howard G. Becker
DoD Committee Management Officer

Enclosure

OFFICE OF THE SECRETARY OF DEFENSE
1950 DEFENSE PENTAGON
WASHINGTON, DC 20301-1950

ADMINISTRATION &
MANAGEMENT

March 18, 1995

Honorable Strom Thurmond
Chairman
Committee on Armed Services
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

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SIGNED

Howard G. Becker
DoD Committee Management Officer

Enclosure

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1950 DEFENSE PENTAGON
WASHINGTON, DC 20301-1950

ADMINISTRATION &
MANAGEMENT

March 18, 1995

Honorable Floyd Spence
Chairman
Committee on Armed Services
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

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Sincerely,

SIGNED

Howard G. Becker
DoD Committee Management Officer

Enclosure

THE DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION

EXECUTIVE CORRESPONDENCE TRACKING SYSTEM (ECTS) # 950321-5

FROM: BECKER, HOWARD G.	TO: GOODE
TITLE: DOD Comm MANAGEMENT OFFICER	TITLE: DIRECTOR OF ADMIN
ORGANIZATION:	ORGANIZATION: DBCRC
INSTALLATION (s) DISCUSSED:	

OFFICE OF THE CHAIRMAN	FYI	ACTION	INIT	COMMISSION MEMBERS	FYI	ACTION	INIT
CHAIRMAN DIXON				COMMISSIONER CORNELLA			
STAFF DIRECTOR	✓			COMMISSIONER COX			
EXECUTIVE DIRECTOR	✓			COMMISSIONER DAVIS			
GENERAL COUNSEL	✓			COMMISSIONER KLING			
MILITARY EXECUTIVE				COMMISSIONER MONTOYA			
				COMMISSIONER ROBLES			
DIR. CONGRESSIONAL LIAISON				COMMISSIONER STEELE			
DIR. COMMUNICATIONS				REVIEW AND ANALYSIS			
				DIRECTOR OF R & A	✓		
EXECUTIVE SECRETARIAT				ARMY TEAM LEADER			
				NAVY TEAM LEADER			
DIRECTOR OF ADMINISTRATION	✓			AIR FORCE TEAM LEADER			
CHIEF FINANCIAL OFFICER				INTERAGENCY TEAM LEADER	✓		
DIRECTOR OF TRAVEL				CROSS SERVICE TEAM LEADER			
DIR. INFORMATION SERVICES							

TYPE OF ACTION REQUIRED

	Prepare Reply for Chairman's Signature		Prepare Reply for Commissioner's Signature
	Prepare Reply for Staff Director's Signature		Prepare Direct Response
	ACTION: Offer Comments and/or Suggestions	✓	FYI

Subject/Remarks:

FORWARDING LETTERS HE ISSUED IN WHICH HE SENT COPIES OF CHARTER TO RENEW THE DBCRC.

Due Date:	Routing Date: 950321	Date Originated: 950318	Mail Date:

CHARTER

A. Official Designation: Defense Base Closure and Realignment Commission

B. Objective and Scope of Activity: In accordance with the National Defense Authorization Act for FY 1991, there is hereby established a Presidential advisory committee entitled the Defense Base Closure and Realignment Commission, which shall review the recommendations made by the Secretary of Defense regarding base closures and realignments for the time periods and by the dates set down in the Authorization Act. The Commission shall transmit a report of its findings and conclusions to the President, based upon a review and analysis of the Secretary's recommendations, together with the Commission's recommendations for closures and realignments of military installations in the United States.

C. Period of Time Required: This Commission shall continue to function until December 31, 1995, as specified in the Act.

D. Official or Sponsoring Proponent to Whom the Commission Reports: The Commission shall report directly to the President, and provide copies of its reports to the congressional defense committees.

E. Support Agency: The Director of Administration and Management, Office of the Secretary of Defense, shall provide administrative and related support for the Commission.

F. Duties and Responsibilities: The Commission will be composed of eight members appointed by the President, by and with the advice and consent of the Senate. At the time the President nominates individuals for appointment to the Commission for each session of Congress, the President shall designate one such individual to serve as Chairman of the Commission. The functions of the Commission are outlined in B. above and amplified in the Act.

G. Estimated Annual Operating Costs and Manyears: It is estimated that the annual operating costs for the Commission for the calendar years 1991 through 1995 will average $2.65 million. Funding for the operation of the Commission will be appropriated and obtained from the DoD Base Closure Account 1990, as specified in the Act.

H. Number of Meetings: The Commission will meet only during calendar years 1991, 1993, and 1995. During each of those years it will meet as needed, upon the call of the Chairman, to meet the functions and the responsibilities outlined in B. above and amplified in the Act. Ad hoc panels and staff working groups will perform research and analysis functions, as necessary, to carry out the responsibilities of the Commission.

I. Termination Date: The Commission will terminate on December 31, 1995. This charter will be renewed every two years from the date of its establishment, consistent with the Federal Advisory Committee Act.

J. Date Charter is Filed: 18 MAR 1995

CHARTER

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G. Estimated Annual Operating costs and Manyears: It is estimated that the annual operating costs for the Commission will approximate $2,600,000. Additionally, about $410,000 in start-up costs will be required to establish the Commission. Funding for the operation of the Commission will be appropriated and obtained from the DoD Base Closure Account 1990, as specified in the Act.

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J. Date Charter is Filed: 18 MAR 1993

DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION

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J. Date Charter is Filed: 18 MAR 1991

Document Separator

THE DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION

EXECUTIVE CORRESPONDENCE TRACKING SYSTEM (ECTS) # 950321-5

FROM: BECKER, HOWARD G.	TO: GOODE
TITLE: DOD COMM MANAGEMENT OFFICER	TITLE: DIRECTOR OF ADMIN
ORGANIZATION:	ORGANIZATION: DBCRC
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				COMMISSIONER ROBLES			
DIR./CONGRESSIONAL LIAISON				COMMISSIONER STEELE			
DIR./COMMUNICATIONS				REVIEW AND ANALYSIS			
				DIRECTOR OF R & A	✓		
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				NAVY TEAM LEADER			
DIRECTOR OF ADMINISTRATION	✓			AIR FORCE TEAM LEADER			
CHIEF FINANCIAL OFFICER				INTERAGENCY TEAM LEADER	✓		
DIRECTOR OF TRAVEL				CROSS SERVICE TEAM LEADER			
DIR./INFORMATION SERVICES							

TYPE OF ACTION REQUIRED

	Prepare Reply for Chairman's Signature		Prepare Reply for Commissioner's Signature
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OFFICE OF THE SECRETARY OF DEFENSE
1950 DEFENSE PENTAGON
WASHINGTON, DC 20301-1950

March 18, 1995

ADMINISTRATION &
MANAGEMENT

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March 18, 1995

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1950 DEFENSE PENTAGON
WASHINGTON, DC 20301-1950

ADMINISTRATION &
MANAGEMENT

March 18, 1995

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Committee on Armed Services
United States Senate
Washington, D.C. 20510

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J. Date Charter is Filed: 18 MAR 1995

STROM THURMOND, SOUTH CAROLINA, CHAIRMAN

JOHN W. WARNER, VIRGINIA
WILLIAM S. COHEN, MAINE
JOHN MCCAIN, ARIZONA
TRENT LOTT, MISSISSIPPI
DAN COATS, INDIANA
BOB SMITH, NEW HAMPSHIRE
DIRK KEMPTHORNE, IDAHO
KAY BAILEY HUTCHISON, TEXAS
JAMES M. INHOFE, OKLAHOMA
RICK SANTORUM, PENNSYLVANIA

SAM NUNN, GEORGIA
J. JAMES EXON, NEBRASKA
CARL LEVIN, MICHIGAN
EDWARD M. KENNEDY, MASSACHUSETTS
JEFF BINGAMAN, NEW MEXICO
JOHN GLENN, OHIO
ROBERT C. BYRD, WEST VIRGINIA
CHARLES S. ROBB, VIRGINIA
JOSEPH I. LIEBERMAN, CONNECTICUT
RICHARD H. BRYAN, NEVADA

RICHARD L. ALVARD, STAFF DIRECTOR
ARNOLD L. PUNARO, STAFF DIRECTOR FOR THE MINORITY

United States Senate
COMMITTEE ON ARMED SERVICES
WASHINGTON, DC 20510-6050

June 29, 1995

The President
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

Dear Mr. President:

We have reviewed the recommendations of the 1995 Defense Base Closure and Realignment Commission for the closure and realignment of military installations in the United States. We believe that the Commission's recommendations are in the best interests of our national security and should be approved.

There is no question that the implementation of the 1995 Commission's recommendations will be difficult and painful for many communities. At the same time, it is clear that savings generated by closing bases today is essential to the future readiness and force modernization of the military services. While the 1995 Commission made some changes to the list of closures and realignments proposed by the Secretary of Defense, the anticipated savings from its recommendations are slightly more than the level proposed by the Department of Defense. The Commission's recommendations will reduce excess infrastructure in the Department in a balanced and deliberate manner and, at the same time, preserve critical defense capabilities for the future. A significant source of the planned funds for future modernization comes from the expected savings from base closures. There is agreement by Defense Secretary Perry and all the military services that the defense modernization accounts are underfunded.

Mr. President, as two of the principal authors of the Defense Base Closure and Realignment Act of 1990 which set up the base closure process, and the Senators responsible for guiding the Commission's recommendations through the United States Senate, we believe the base closure process should be judged on the merits. The Commission was created to provide an independent review of the Defense Department's recommendations, and it has done so. We know that you agree with us that base closure decisions must be based on what is best for our national security and look forward to working with you in that respect.

Sincerely,

Sam Nunn
Ranking Minority Member

Strom Thurmond
Strom Thurmond
Chairman

Document Separator

Section 2687, Title 10, United States Code

§ 2687. Base closures and realignments

(a) Not withstanding any other provisions of law, no action may be taken to effect or implement—

(1) the closure of any military installation at which at least 300 civilian personnel are authorized to be employed;

(2) any realignment with respect to any installation referred to in paragraph (1) involving a reduction by more than 1,000, or by more than 50 percent, in the number of civilian personnel authorized to be employed at such military installation at the time the Secretary of Defense or the Secretary of the military department concerned notifies the Congress under subsection (b) of the Secretary's plan to close or realign such installation; or

(3) any construction, conversion, or rehabilitation at any military facility other than a military installation referred to in clause (1) or (2) which will or may be required as a result of the relocation of civilian personnel to such facility by reason of any closure or realignment to which clause (1) or (2) applies,

unless and until the provisions of subsection (b) are complied with.

(b) No action described in subsection (a) with respect to the closure of, or a realignment with respect to, any military installation referred to in such subsection may be taken unless and until—

(1) the Secretary of Defense or the Secretary of the military department concerned notifies the Committees on Armed Services of the Senate and House of Representatives, as part of an annual request for authorization of appropriations to such Committees, of the proposed closing or realignment and submits with the notification an evaluation of the fiscal, local economic, budgetary, environmental, strategic, and operational consequences of such closure or realignment; and

(2) a period of 30 legislative days or 60 calendar days, whichever is longer, expires following the day on which the notice and evaluation referred to in clause (1) have been submitted to such committees, during which period no irrevocable action may be taken to effect or implement the decision.

(c) This section shall not apply to the closure of a military installation, or a realignment with respect to a military installation, if the President certifies to the Congress that such closure or realignment must be implemented for reasons of national security or a military emergency.

(d)(1) After the expiration of the period of time provided for in subsection (b)(2) with respect to the closure or realignment of a military installation, funds which would otherwise be available to the Secretary to effect the closure or realignment of that installation may be used by him for such purpose.

(2) Nothing in this section restricts the authority of the Secretary to obtain architectural and engineering services under section 2807 of this title.

(e) In this section:

(1) The term "military installation" means a base, camp, post, station, yard, center, homeport facility for any ship, or other activity under the jurisdiction of the Department of Defense, including any leased facility, which is located within any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, the Virgin Islands, or Guam. Such term does not include any facility used primarily for civil works, rivers and harbors projects, or flood control projects.

(2) The term "civilian personnel" means direct-hire, permanent civilian employees of the Department of Defense.

(3) The term "realignment" includes any action which both reduces and relocates functions and civilian personnel positions, but does not include a reduction in force resulting from workload adjustments, reduced personnel or funding levels, skill imbalances, or other similar causes.

(4) The term "legislative day" means a day on which either House of Congress is in session.

(As amended Pub.L. 98-525, Title XIV, § 1405(41), Oct. 19, 1984, 98 Stat. 2624; Pub.L. 99-145, Title XII, § 1202(a), Nov. 8, 1985, 99 Stat. 717; Pub.L. 100-180, Div. A, Title XII, § 1231(17), Dec. 4, 1987, 101 Stat. 1161; Pub.L. 101-510, Div. A, Title XXIX, § 2911, Nov. 5, 1990, 104 Stat. 1819.)

TITLE XXIX — DEFENSE BASE CLOSURES AND REALIGNMENTS

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TITLE XXIX — DEFENSE BASE CLOSURES AND REALIGNMENTS

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TITLE XXIX — DEFENSE BASE CLOSURES AND REALIGNMENTS

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DEFENSE BASE CLOSURE AND REALIGNMENT ACT OF 1990 AND RELATED PROVISIONS

(Title XXIX of P.L. 101-510, approved Nov. 5, 1990, 10 U.S.C. 2687 note, as amended through P.L. 103-)

TITLE XXIX — DEFENSE BASE CLOSURES AND REALIGNMENTS

PART A — Defense Base Closure and Realignment Commission

10 USC 2687 note.

SEC. 2901. SHORT TITLE AND PURPOSE

(a) Short Title. — This part may be cited as the "Defense Base Closure and Realignment Act of 1990".

(b) Purpose. — The purpose of this part is to provide a fair process that will result in the timely closure and realignment of military installations inside the United States.

10 USC 2687 note.

SEC. 2902. THE COMMISSION

(a) Establishment. — There is established an independent commission to be known as the "Defense Base Closure and Realignment Commission".

(b) Duties. — The Commission shall carry out the duties specified for it in this part.

(c) Appointment. — (1)(A) The Commission shall be composed of eight members appointed by the President, by and with the advise and consent of the Senate.

President.

(B) The President shall transmit to the Senate the nominations for appointment to the Commission —

(i) by no later than January 3, 1991, in the case of members of the Commission whose terms will expire at the end of the first session of the 102nd Congress;

(ii) by no later than January 25, 1993, in the case of members of the Commission whose terms will expire at the end of the first session of the 103rd Congress; and

(iii) by no later than January 3, 1995, in the case of members of the Commission whose terms will expire at the end of the first session of the 104th Congress.

(C) If the President does not transmit to Congress the nominations for appointment to the Commission on or before the date specified for 1993 in clause (ii) of subparagraph (B) or for 1995 in clause (iii) of such subparagraph, the process by which military installations may be selected for closure or realignment under this part with respect to that year shall be terminated.

(2) In selecting individuals for nominations for appointments to the Commission, the President should consult with —

(A) the Speaker of the House of Representatives concerning the appointment of two members;

(B) the majority leader of the Senate concerning the appointment of two members;

(C) the minority leader of the House of Representatives concerning the appointment of one member; and

(D) the minority leader of the Senate concerning the appointment of one member.

(3) At the time the President nominates individuals for appointment to the Commission for each session of Congress referred to in paragraph (1)(B), the President shall designate one such individual who shall serve as Chairman of the Commission.

(d) Terms. — (1) Except as provided in paragraph (2), each member of the Commission shall serve until the adjournment of Congress sine die for the session during which the member was appointed to the Commission.

(2) The Chairman of the Commission shall serve until the confirmation of a successor.

(e) Meetings. — (1) The Commission shall meet only during calendar years 1991, 1993, and 1995.

Public Information.

(2)(A) Each meeting of the Commission, other than meetings in which classified information is to be discussed, shall be open to the public.

(B) All the proceedings, information, and deliberations of the Commission shall be open, upon request, to the following:

(i) The Chairman and the ranking minority party member of the Subcommittee on Readiness, Sustainability, and Support of the Committee on Armed Services of the Senate, or such other members of the Subcommittee designated by such Chairman or ranking minority party member.

(ii) The Chairman and the ranking minority party member of the Subcommittee on Military Installations and Facilities of the Committee on Armed Services of the House of Representatives, or such other members of the Subcommittee designated by such Chairman or ranking minority party member.

(iii) The Chairmen and ranking minority party members of the Subcommittees on Military Construction of the Committees on Appropriations of the Senate and of the House of Representatives, or such other members of the Subcommittees designated by such Chairmen or ranking minority party members.

(f) Vacancies. — A vacancy in the Commission shall be filled in the same manner as the original appointment, but the individual appointed to fill the vacancy shall serve only for the unexpired portion of the term for which the individual's predecessor was appointed.

(g) Pay and Travel Expenses. — (1)(A) Each member, other than the Chairman, shall be paid at a rate equal to the daily equivalent of the minimum annual rate of basic pay payable for level IV of the Executive Schedule under section 5315 of title 5, United States Code, for each day (including travel time) during which the member is engaged in the actual performance of duties vested in the Commission.

(B) The Chairman shall be paid for each day referred to in subparagraph (A) at a rate equal to the daily equivalent of the minimum annual rate of basic

pay payable for level III of the Executive Schedule under section 5314 of title 5, United States Code.

(2) Members shall receive travel expenses, including per diem in lieu of subsistence, in accordance with sections 5702 and 5703 of title 5, United States Code.

(h) Director of Staff. — (1) The Commission shall, without regard to section 5311(b) of title 5, United States Code, appoint a Director who has not served on active duty in the Armed Forces or as a civilian employee of the Department of Defense during the one-year period preceding the date of such appointment.

(2) The Director shall be paid at the rate of basic pay payable for level IV of the Executive Schedule under section 5315 of title 5, United States Code.

(i) Staff. — (1) Subject to paragraphs (2) and (3), the Director, with the approval of the Commission, may appoint and fix the pay of additional personnel.

(2) The Director may make such appointments without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, and any personnel so appointed may be paid without regard to the provisions of chapter 51 and subchapter III of chapter 53 of that title [sections 5101 et seq. and 5331 et seq., respectively, of Title 5] relating to classification and General Schedule pay rates, except that an individual so appointed may not receive pay in excess of the annual rate of basic pay payable for GS-18 of the General Schedule.

(3)(A) Not more than one-third of the personnel employed by or detailed to the Commission may be on detail from the Department of Defense.

(B)(i) Not more than one-fifth of the professional analysts of the Commission staff may be persons detailed from the Department of Defense to the Commission.

(ii) No person detailed from the Department of Defense to the Commission may be assigned as the lead professional analyst with respect to a military department or defense agency.

(C) A person may not be detailed from the Department of Defense to the Commission if, within 12 months before the detail is to begin, that person participated personally and substantially in any matter within the Department of Defense concerning the preparation of recommendations for closures or realignments of military installations.

(D) No member of the Armed Forces, and no officer or employee of the Department of Defense, may —

(i) prepare any report concerning the effectiveness, fitness, or efficiency of the performance on the staff of the Commission of any person detailed from the Department of Defense to that staff;

(ii) review the preparation of such a report; or

(iii) approve or disapprove such a report.

(4) Upon request of the Director, the head of any Federal department or agency may detail any of the personnel of that department or agency to the

Commission to assist the Commission in carrying out its duties under this part.

(5) The Comptroller General of the United States shall provide assistance, including the detailing of employees, to the Commission in accordance with an agreement entered into with the Commission.

(6) The following restrictions relating to the personnel of the Commission shall apply during 1992 and 1994:

(A) There may not be more than 15 persons on the staff at any one time.

(B) The staff may perform only such functions as are necessary to prepare for the transition to new membership on the Commission in the following year.

(C) No member of the Armed Forces and no employee of the Department of Defense may serve on the staff.

(j) Other Authority. — (1) The Commission may procure by contract, to the extent funds are available, the temporary or intermittent services of experts or consultants pursuant to section 3109 of title 5, United States Code.

(2) The Commission may lease space and acquire personal property to the extent funds are available.

(k) Funding. — (1) There are authorized to be appropriated to the Commission such funds as are necessary to carry out its duties under this part. Such funds shall remain available until expended.

(2) If no funds are appropriated to the Commission by the end of the second session of the 101st Congress, the Secretary of Defense may transfer, for fiscal year 1991, to the Commission funds from the Department of Defense Base Closure Account established by section 207 of Public Law 100-526 [set out as a note under this section]. Such funds shall remain available until expended.

(l) Termination. — The Commission shall terminate on December 31, 1995.

(m) Prohibition against Restricting Communications. — Section 1034 of title 10, United States Code, shall apply with respect to communications with the Commission.

10 USC 2687 note.

SEC. 2903. PROCEDURE FOR MAKING RECOMMENDATIONS FOR BASE CLOSURES AND REALIGNMENTS

(a) Force-Structure Plan. — (1) As part of the budget justification documents submitted to Congress in support of the budget for the Department of Defense for each of the fiscal years 1992, 1994, and 1996, the Secretary shall include a force-structure plan for the Armed Forces based on an assessment by the Secretary of the probable threats to the national security during the six-year period beginning with the fiscal year for which the budget request is made and of the anticipated levels of funding that will be available for national defense purposes during such period.

(2) Such plan shall include, without any reference (directly or indirectly) to military installations inside the United States that may be closed or realigned under such plan —

(A) a description of the assessment referred to in paragraph (1);

(B) a description (i) of the anticipated force-structure during and at the end of each such period for each military department (with specifications of the number and type of units in the active and reserve forces of each such department), and (ii) of the units that will need to be forward based (with a justification thereof) during and at the end of each such period; and

(C) a description of the anticipated implementation of such force-structure plan.

(3) The Secretary shall also transmit a copy of each such force-structure plan to the Commission.

Federal Register, publication.

(b) Selection Criteria. — (1) The Secretary shall, by no later than, December 31, 1990, publish in the Federal Register and transmit to the congressional defense committees the criteria proposed to be used by the Department of Defense in making recommendations for the closure or realignment of military installations inside the United States under this part. The Secretary shall provide an opportunity for public comment on the proposed criteria for a period of at least 30 days and shall include notice of that opportunity in the publication required under the preceding sentence.

Federal Register, publication.

(2)(A) The Secretary shall, by no later than February 15, 1991, publish in the Federal Register and transmit to the congressional defense committees the final criteria to be used in making recommendations for the closure or realignment of military installations inside the United States under this part. Except as provided in subparagraph (B), such criteria shall be the final criteria to be used, along with the force-structure plan referred to in subsection (a), in making such recommendations unless disapproved by a joint resolution of Congress enacted on or before March 15, 1991.

(B) The Secretary may amend such criteria, but such amendments may not become effective until they have been published in the Federal Register, opened to public comment for at least 30 days, and then transmitted to the congressional defense committees in final form by no later than January 15 of the year concerned. Such amended criteria shall be the final criteria to be used, along with the force-structure plan referred to in subsection (a), in making such recommendations unless disapproved by a joint resolution of Congress enacted on or before February 15 of the year concerned.

Federal Register, publication.

(c) DoD Recommendations. — (1) The Secretary may, by no later than April 15, 1991, March 15, 1993 and *March 1, 1995*, publish in the Federal Register and transmit to the congressional defense committees and to the Commission a list of the military installations inside the United States that the Secretary recommends for closure or realignment on the basis of the force-structure plan and the final criteria referred to in subsection (b)(2) that are applicable to the year concerned.

(2) The Secretary shall include, with the list of recommendations published and transmitted pursuant to paragraph (1), a summary of the selection process that resulted in the recommendation for each installation, including a justification for each recommendation. *The Secretary shall transmit the matters referred to in the preceding sentence not later than 7 days after the date of transmittal to the congressional defense committees and the Commission of the list referred to in paragraph (1).*

(3)*(A)* In considering military installations for closure or realignment, the Secretary shall consider all military installations inside the United States equally without regard to whether the installation has been previously considered or proposed for closure or realignment by the Department.

(B) In considering military installations for closure or realignment, the Secretary nay not take into account for any purpose any advance conversion planning undertaken by an affected community with respect to the anticipated closure or realignment of an installation.

(C) For purposes of subparagraph (B), in the case of a community anticipating the economic effects of a closure or realignment of a military installation, advance conversion planning —

(i) shall include community adjustment and economic diversification planning undertaken by the community before an anticipated selection of a military installation in or near the community for closure or realignment; and

(ii) may include the development of contingency redevelopment plans, plans for economic development and diversification, and plans for the joint use (including civilian and military use, public and private use, civilian dual use, and civilian shared use) of the property or facilities of the installation after the anticipated closure or realignment.

(4) In addition to making all information used by the Secretary to prepare the recommendations under this subsection available to Congress (including any committee or member of Congress), the Secretary shall also make such information available to the Commission and the Comptroller General of the United States.

(5)(A) Each person referred to in subparagraph (B), when submitting information to the Secretary of Defense or the Commission concerning the closure or realignment of a military installation, shall certify that such information is accurate and complete to the best of that person's knowledge and belief.

(B) Subparagraph (A) applies to the following persons:

(i) The Secretaries of the military departments.

(ii) The heads of the Defense Agencies.

(iii) Each person who is in a position the duties of which include personal and substantial involvement in the preparation and submission of information and recommendations concerning the closure or realignment of military installations, as designated in regulations which the Secretary of Defense shall prescribe, regulations

which the Secretary of each military department shall prescribe for personnel within that military department, or regulations which the head of each Defense Agency shall prescribe for personnel within that Defense Agency.

(6) Any information provided to the Commission by a person described in paragraph (5)(B) shall also be submitted to the Senate and the House of Representatives to be made available to the Members of the House concerned in accordance with the rules of that House. The information shall be submitted to the Senate and the House of Representatives within 24 hours after the submission of the information to the Commission.

Public information.

(d) Review and Recommendations by the Commission. — (1) After receiving the recommendations from the Secretary pursuant to subsection (c) for any year, the Commission shall conduct public hearings on the recommendations. *All testimony before the Commission at a public hearing conducted under this paragraph shall be presented under oath.*

Reports.

(2)(A) The Commission shall, by no later than July 1 of each year in which the Secretary transmits recommendations to it pursuant to subsection (c), transmit to the President a report containing the Commission's findings and conclusions based on a review and analysis of the recommendations made by the Secretary, together with the Commission's recommendations for closures and realignments of military installations inside the United States.

(B) Subject to subparagraph (C), in making its recommendations, the Commission may make changes in any of the recommendations made by the Secretary if the Commission determines that the Secretary deviated substantially from the force-structure plan and final criteria referred to in subsection (c)(1) in making recommendations.

(C) In the case of a change described in subparagraph (D) in the recommendations made by the Secretary, the Commission may make the change only if the Commission —

(i) makes the determination required by subparagraph (B);

(ii) determines that the change is consistent with the force-structure plan and final criteria referred to in subsection (c)(1);

(iii) publishes a notice of the proposed change in the Federal Register not less than *45 days* before transmitting its recommendations to the President pursuant to paragraph (2); and

(iv) conducts public hearings on the proposed change.

(D) Subparagraph (C) shall apply to a change by the Commission in the Secretary's recommendations that would —

(i) add a military installation to the list of military installations recommended by the Secretary for closure;

(ii) add a military installation to the list of military installations recommended by the Secretary for realignment; or

(iii) increase the extent of a realignment of a particular military installation recommended by the Secretary.

(3) The Commission shall explain and justify in its report submitted to the President pursuant to paragraph (2) any recommendation made by the

Commission that is different from the recommendations made by the Secretary pursuant to subsection (c). The Commission shall transmit a copy of such report to the congressional defense committees on the same date on which it transmits its recommendations to the President under paragraph (2).

(4) After July 1 of each year in which the Commission transmits recommendations to the President under this subsection, the Commission shall promptly provide, upon request, to any Member of Congress information used by the Commission in making its recommendations.

Reports.

(5) The Comptroller General of the United States shall —

(A) assist the Commission, to the extent requested, in the Commission's review and analysis of the recommendations made by the Secretary pursuant to subsection (C); and

(B) by no later than April 15 of each year in which the Secretary makes such recommendations, transmit to the Congress and to the Commission a report containing a detailed analysis of the Secretary's recommendations and selection process.

(E) In making recommendations under this paragraph, the Commission may not take into account for any purpose any advance conversion planning undertaken by an affected community with respect to the anticipated closure or realignment of a military installation.

Reports.

(e) Review by the President. — (1) The President shall, by no later than July 15 of each year in which the Commission makes recommendations under subsection (d), transmit to the Commission and to the Congress a report containing the President's approval or disapproval of the Commission's recommendations.

(2) If the President approves all the recommendations of the Commission, the President shall transmit a copy of such recommendations to the Congress, together with a certification of such approval.

(3) If the President disapproves the recommendations of the Commission, in whole or in part, the President shall transmit to the Commission and the Congress the reasons for that disapproval. The Commission shall then transmit to the President, by no later than August 15 of the year concerned, a revised list of recommendations for the closure and realignment of military installations.

(4) If the President approves all of the revised recommendations of the Commission transmitted to the President under paragraph (3), the President shall transmit a copy of such revised recommendations to the Congress, together with a certification of such approval.

(5) If the President does not transmit to the Congress an approval and certification described in paragraph (2) or (4) by September 1 of any year in which the Commission has transmitted recommendations to the President under this part, the process by which military installations may be selected for closure or realignment under this part with respect to that year shall be terminated.

10 USC 2687 note.

SEC. 2904. CLOSURE AND REALIGNMENT OF MILITARY INSTALLATIONS

(a) In General. — Subject to subsection (b), the Secretary shall —

(1) close all military installations recommended for closure by the Commission in each report transmitted to the Congress by the President pursuant to section 2903(e);

(2) realign all military installations recommended for realignment by such Commission in each such report;

(3) initiate all such closures and realignments no later than two years after the date on which the President transmits a report to the Congress pursuant to section 2903(e) containing the recommendations for such closures or realignments; and

(4) complete all such closures and realignments no later than the end of the six-year period beginning on the date on which the President transmits the report pursuant to section 2903(e) containing the recommendations for such closures or realignments.

(b) Congressional Disapproval. — (1) The Secretary may not carry out any closure or realignment recommended by the Commission in a report transmitted from the President pursuant to section 2903(e) if a joint resolution is enacted, in accordance with the provisions of section 2908, disapproving such recommendations of the Commission before the earlier of —

(A) the end of the 45-day period beginning on the date on which the President transmits such report; or

(B) the adjournment of Congress sine die for the session during which such report is transmitted.

(2) For purposes of paragraph (1) of this subsection and subsections (a) and (c) of section 2908, the days on which either House of Congress is not in session because of adjournment of more than three days to a day certain shall be excluded in the computation of a period.

10 USC 2687 note.

SEC. 2905. IMPLEMENTATION

(a) In General. — (1) In closing or realigning any military installation under this part, the Secretary may —

(A) take such actions as may be necessary to close or realign any military installation, including the acquisition of such land, the construction of such replacement facilities, the performance of such activities, and the conduct of such advance planning and design as may be required to transfer functions from a military installation being closed or realigned to another military installation, and may use for such purpose funds in the Account or funds appropriated to the Department of Defense for use in planning and design, minor construction, or operation and maintenance;

Community action programs.

(B) provide —

(i) economic adjustment assistance to any community located near a military installation being closed or realigned, and

(ii) community planning assistance to any community located near a military installation to which functions will be transferred as a result of the closure or realignment of a military installation, if the Secretary of Defense determines that the financial resources available to the community (by grant or otherwise) for such purposes are inadequate, and may use for such purposes funds in the Account or funds appropriated to the Department of Defense for economic adjustment assistance or community planning assistance;

Environmental protection.

(C) carry out activities for the purposes of environmental restoration and mitigation at any such installation, and shall use for such purposes funds in the Account;

(D) provide outplacement assistance to civilian employees employed by the Department of Defense at military installations being closed or realigned, and may use for such purpose funds in the Account or funds appropriated to the Department of Defense for outplacement assistance to employees; and

(E) reimburse other Federal agencies for actions performed at the request of the Secretary with respect to any such closure or realignment, and may use for such purpose funds in the Account or funds appropriated to the Department of Defense and available for such purpose.

Environmental protection.

(2) In carrying out any closure or realignment under this part, the Secretary shall ensure that environmental restoration of any property made excess to the needs of the Department of Defense as a result of such closure or realignment be carried out as soon as possible with funds available for such purpose.

(b) Management and Disposal of Property. — (1) The Administrator of General Services shall delegate to the Secretary of Defense, with respect to excess and surplus *real property, facilities, and personal property* located at a military installation closed or realigned under this part —

(A) the authority of the Administrator to utilize excess property under section 202 of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 483);

(B) the authority of the Administrator to dispose of surplus property under section 203 of that Act (40 U.S.C. 484);

(C) the authority of the Administrator to grant approvals and make determinations under section 13(g) of the Surplus Property Act of 1944 [50 U.S.C. App. 1622(g)]; and

(D) the authority of the Administrator to determine the availability of excess or surplus real property for wildlife conservation purposes in accordance with the Act of May 19, 1948 (16 U.S.C. 667b).

(2)(A) Subject to subparagraph (C) *and paragraphs (3), (4), (5), and (6)*, the Secretary of Defense shall exercise the authority delegated to the Secretary pursuant to paragraph (1) in accordance with —

(i) all regulations in effect on the date of the enactment of this Act [Nov. 5, 1990] governing the utilization of excess property and the

disposal of surplus property under the Federal Property and Administrative Services Act of 1949; and

(ii) all regulations in effect on the date of the enactment of this Act governing the conveyance and disposal of property under section 13(g) of the Surplus Property Act of 1944 [50 U.S.C. App. 1622(g)].

(B) The Secretary, after consulting with the Administrator of General Services, may issue regulations that are necessary to carry out the delegation of authority required by paragraph (1).

(C) The authority required to be delegated by paragraph (1) to the Secretary by the Administrator of General Services shall not include the authority to prescribe general policies and methods for utilizing excess property and disposing of surplus property.

(D) The Secretary of Defense may transfer real property or facilities located at a military installation to be closed or realigned under this part, with or without reimbursement, to a military department or other entity (including a nonappropriated fund instrumentality) within the Department of Defense or the Coast Guard.

(E) Before any action may be taken with respect to the disposal of any surplus real property or facility located at any military installation to be closed or realigned under this part, the Secretary of Defense shall consult with the Governor of the State and the heads of the local governments concerned for the purpose of considering any plan for the use of such property by the local community concerned.

(3)(A) Not later than 6 months after the date of approval of the closure of a military installation under this part, the Secretary, in consultation with the redevelopment authority with respect to the installation, shall —

(i) inventory the personal property located at the installation; and

(ii) identify the items (or categories of items) of such personal property that the Secretary determines to be related to real property and anticipates will support the implementation of the redevelopment plan with respect to the installation.

(B) If no redevelopment authority referred to in subparagraph (A) exists with respect to an installation, the Secretary shall consult with —

(i) the local government in whose jurisdiction the installation is wholly located; or

(ii) a local government agency or State government agency designated for the purpose of such consultation by the chief executive officer of the State in which the installation is located.

(C)(i) Except as provided in subparagraphs (E) and (F), the Secretary may not carry out any of the activities referred to in clause (ii) with respect to an installation referred to in that clause until the earlier of —

(I) one week after the date on which the redevelopment plan for the installation is submitted to the Secretary;

(II) the date on which the redevelopment authority notifies the Secretary that it will not submit such a plan;

(III) twenty-four months after the date of approval of the closure of the installation; or

(IV) ninety days before the date of the closure of the installation.

(ii) The activities referred to in clause (i) are activities relating to the closure of an installation to be closed under this part as follows:

(I) The transfer from the installation of items of personal property at the installation identified in accordance with subparagraph (A).

(II) The reduction in maintenance and repair of facilities or equipment located at the installation below the minimum levels required to support the use of such facilities or equipment for nonmilitary purposes.

(D) Except as provided in paragraph (4), the Secretary may not transfer items of personal property located at an installation to be closed under this part to another installation, or dispose of such items, if such items are identified in the redevelopment plan for the installation as items essential to the reuse or redevelopment of the installation. In connection with the development of the redevelopment plan for the installation, the Secretary shall consult with the entity responsible for developing the redevelopment plan to identify the items of personal property located at the installation, if any, that the entity desires to be retained at the installation for reuse or redevelopment of the installation.

(E) This paragraph shall not apply to any personal property located at an installation to be closed under this part if the property —

(i) is required for the operation of a unit, function, component, weapon, or weapons system at another installation;

(ii) is uniquely military in character, and is likely to have no civilian use (other than use for its material content or as a source of commonly used components);

(iii) is not required for the reutilization or redevelopment of the installation (as jointly determined by the Secretary and the redevelopment authority);

(iv) is stored at the installation for purposes of distribution (including spare parts or stock items); or

(v)(I) meets known requirements of an authorized program of another Federal department or agency for which expenditures for similar property would be necessary, and (II) is the subject of a written request by the head of the department or agency.

(F) Notwithstanding subparagraphs (C)(i) and (D), the Secretary may carry out any activity referred to in subparagraph (C)(ii) or (D) if the Secretary determines that the carrying out of such activity is in the national security interest of the United States.

(4)(A) The Secretary may transfer real property and personal property located at a military installation to be closed under this part to the redevelopment authority with respect to the installation.

(B)(i)(I) Except as provided in clause (ii), the transfer of property under subparagraph (A) may be for consideration at or below the estimated fair market value of the property transferred or without consideration. Such

consideration may include consideration in kind (including goods and services), real property and improvements, or such other consideration as the Secretary considers appropriate. The Secretary shall determine the estimated fair market value of the property to be transferred under this subparagraph before carrying out such transfer.

(II) The Secretary shall prescribe regulations that set forth guidelines for determining the amount, if any, of consideration required for a transfer under this paragraph. Such regulations shall include a requirement that, in the case of each transfer under this paragraph for consideration below the estimated fair market value of the property transferred, the Secretary provide an explanation why the transfer is not for the estimated fair market value of the property transferred [including an explanation why the transfer cannot be carried out in accordance with the authority provided to the Secretary pursuant to paragraph (1) or (2)].

(ii) The transfer of property under subparagraph (A) shall be without consideration in the case of any installation located in a rural area whose closure under this part will have a substantial adverse impact (as determined by the Secretary) on the economy of the communities in the vicinity of the installation and on the prospect for the economic recovery of such communities from such closure. The Secretary shall prescribe in the regulations under clause (i)(II) the manner of determining whether communities are eligible for the transfer of property under this clause.

(iii) In the case of a transfer under subparagraph (A) for consideration below the fair market value of the property transferred, the Secretary may recoup from the transferee of such property such portion as the Secretary determines appropriate of the amount, if any, by which the sale or lease of such property by such transferee exceeds the amount of consideration paid to the Secretary for such property by such transferee. The Secretary shall prescribe regulations for determining the amount of recoupment under this clause.

(C)(i) The transfer of personal property under subparagraph (A) shall not be subject to the provisions of sections 202 and 203 of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 483, 484) if the Secretary determines that the transfer of such property is necessary for the effective implementation of a redevelopment plan with respect to the installation at which such property is located.

(ii) The Secretary may, in lieu of the transfer of property referred to in subparagraph (A), transfer property similar to such property (including property not located at the installation) if the Secretary determines that the transfer of such similar property is in the interest of the United States.

(D) The provisions of section 120(h) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 [42 U.S.C. 9620 (h)] shall apply to any transfer of real property under this paragraph.

(E) The Secretary may require any additional terms and conditions in connection with a transfer under this paragraph as such Secretary considers appropriate to protect the interests of the United States.

(5)(A) Except as provided in subparagraph (B), the Secretary shall take such actions as the Secretary determines necessary to ensure that final determinations under paragraph (1) regarding whether another department or agency of the Federal Government has identified a use for any portion of a military installation to be closed under this part, or will accept transfer of any portion of such installation, are made not later than 6 months after the date of approval of closure of that installation.

(B) The Secretary may, in consultation with the redevelopment authority with respect to an installation, postpone making the final determinations referred to in subparagraph (A) with respect to the installation for such period as the Secretary determines appropriate if the Secretary determines that such postponement is in the best interests of the communities affected by the closure of the installation.

(6)(A) Except as provided in this paragraph, nothing in this section shall limit or otherwise affect the application of the provisions of the Stewart B. McKinney Homeless Assistance Act (42 U.S.C. 11301 et seq.) to military installations closed under this part.

(B)(i) Not later than the date on which the Secretary of Defense completes the determination under paragraph (5) of the transferability of any portion of an installation to be closed under this part, the Secretary shall —

(I) complete any determinations or surveys necessary to determine whether any building or property referred to in clause (ii) is excess property, surplus property, or unutilized or underutilized property for the purpose of the information referred to in section 501(a) of such Act [42 U.S.C. 11411(a)]; and

(II) submit to the Secretary of Housing and Urban Development information on any building or property that is so determined.

(ii) The buildings and property referred to in clause (i) are any buildings or property located at an installation referred to in that clause for which no use is identified, or of which no Federal department or agency will accept transfer, pursuant to the determination of transferability referred to in that clause.

(C) Not later than 60 days after the date on which the Secretary of Defense submits information to the Secretary of Housing and Urban Development under subparagraph (B)(ii), the Secretary of Housing and Urban Development shall —

(I) identify the buildings and property described in such information that are suitable for use to assist the homeless;

(ii) notify the Secretary of Defense of the buildings and property that are so identified;

(iii) publish in the Federal Register a list of the buildings and property that are so identified, including with respect to each building or property the information referred to in section 501(c)(1)(B) of such Act; and

(iv) make available with respect to each building and property the information referred to in section 501(c)(1)(C) of such Act in accordance with such section 501(c)(1)(C).

(D) Any buildings and property included in a list published under subparagraph (C)(iii) shall be treated as property available for application for use to assist the homeless under section 501(d) of such Act.

(E) The Secretary of Defense shall make available in accordance with section 501(f) of such Act any buildings or property referred to in subparagraph (D) for which —

(i) a written notice of an intent to use such buildings or property to assist the homeless is received by the Secretary of Health and Human Services in accordance with section 501(d)(2) of such Act;

(ii) an application for use of such buildings or property for such purpose is submitted to the Secretary of Health and Human Services in accordance with section 501(e)(2) of such Act; and

(iii) the Secretary of Health and Human Services —

(I) completes all actions on the application in accordance with section 501(e)(3) of such Act; and

(II) approves the application under section 501(e) of such Act..

(F)(i) Subject to clause (ii), a redevelopment authority may express in writing an interest in using buildings and property referred to in subparagraph (D), or use such buildings and property, in accordance with the redevelopment plan with respect to the installation at which such buildings and property are located as follows:

(I) If no written notice of an intent to use such buildings or property to assist the homeless is received by the Secretary of Health and Human Services in accordance with section 501(d)(2) of such Act during the 60-day period beginning on the date of the publication of the buildings and property under subparagraph (C)(iii).

(II) In the case of buildings and property for which such notice is so received, if no completed application for use of the buildings or property for such purpose is received by the Secretary of Health and Human Services in accordance with section 501(e)(2) of such Act during the 90-day period beginning on the date of the receipt of such notice.

(III) In the case of building(s) and property for which such application is so received, if the Secretary of Health and Human Services rejects the application under section 501(e) of such Act.

(ii) Buildings and property shall be available only for the purpose of permitting a redevelopment authority to express in writing an interest in the use of such buildings and property, or to use such buildings and property, under clause (i) as follows:

(I) In the case of buildings and property referred to in clause (i)(I), during the one-year period beginning on the first day after the 60-day period referred to in that clause.

(II) In the case of buildings and property referred to in clause (i)(II), during the one-year period beginning on the first day after the 90-day period referred to in that clause.

(III) In the case of buildings and property referred to in clause (i)(III), during the one-year period beginning on the date of the rejection of the application referred to in that clause.

(iii) A redevelopment authority shall express an interest in the use of buildings and property under this subparagraph by notifying the Secretary of Defense, in writing, of such an interest.

(G)(i) Buildings and property available for a redevelopment authority under subparagraph (F) shall not be available for use to assist the homeless under section 501 of such Act while so available for a redevelopment authority.

(ii) If a redevelopment authority does not express an interest in the use of buildings or property, or commence the use of buildings or property, under subparagraph (F) within the applicable time periods specified in clause (ii) of such subparagraph, such buildings or property shall be treated as property available for use to assist the homeless under section 501(a) of such Act.

(7)(A) Subject to paragraph (C), the Secretary may contract with local governments for the provision of police services, fire protection services, airfield operation services, or other community services by such governments at military installations to be closed under this part if the Secretary determines that the provision of such services under such contracts is in the best interests of the Department of Defense.

(B) The Secretary may exercise the authority provided under this paragraph without regard to the provisions of chapter 146 of title 10, United States Code.

(C) The Secretary may not exercise the authority under subparagraph (A) with respect to an installation earlier than 180 days before the date on which the installation is to be closed.

(D) The Secretary shall include in a contract for services entered into with a local government under this paragraph a clause that requires the use of professionals to furnish the services to the extent that professionals are available in the area under the jurisdiction of such government.

(c) Applicability of National Environmental Policy Act of 1969. — (1) The provisions of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) shall not apply to the actions of the President, the Commission, and, except as provided in paragraph (2), the Department of Defense in carrying out this part.

(2)(A) The provisions of the National Environmental Policy Act of 1969 shall apply to actions of the Department of Defense under this part (i) during the process of property disposal, and (ii) during the process of relocating functions from a military installation being closed or realigned to another military installation after the receiving installation has been selected but before the functions are relocated.

(B) In applying the provisions of the National Environmental Policy Act of 1969 to the processes referred to in subparagraph (A), the Secretary of Defense and the Secretary of the military departments concerned shall not have to consider —

(i) the need for closing or realigning the military installation which has been recommended for closure or realignment by the Commission;

(ii) he need for transferring functions to any military installation which has been selected as the receiving installation; or

(iii) military installations alternative to those recommended or selected.

(3) A civil action for judicial review, with respect to any requirement of the National Environmental Policy Act of 1969 to the extent such Act is applicable under paragraph (2), of any act or failure to act by the Department of Defense during the closing, realigning, or relocating of functions referred to in clauses (i) and (ii) of paragraph (2)(A), may not be brought more than 60 days after the date of such act or failure to act.

(d) Waiver. — The Secretary of Defense may close or realign military installations under this part without regard to —

(1) any provision of law restricting the use of funds for closing or realigning military installations included in any appropriations or authorization Act; and

(2) sections 2662 and 2687 of title 10, United States Code.

(e) Transfer Authority in Connection with Payment of Environmental Remediation Costs. — *(1)(A) Subject to paragraph (2) of this subsection and section 120(h) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 [42 U.S.C. 9620(h)], the Secretary may enter into an agreement to transfer by deed real property or facilities referred to in subparagraph (B) with any person who agrees to perform all environmental restoration, waste management, and environmental compliance activities that are required for the property or facilities under Federal and State laws, administrative decisions, agreements (including schedules and milestones), and concurrences.*

(B) The real property and facilities referred to in subparagraph (A) are the real property and facilities located at an installation closed or to be closed under this part that are available exclusively for the use, or expression of an interest in a use, of a redevelopment authority under subsection (b)(6)(F) during the period provided for that use, or expression of interest in use, under that subsection.

(C) The Secretary may require any additional terms and conditions in connection with an agreement authorized by subparagraph (A) as the Secretary considers appropriate to protect the interests of the United States.

(2) A transfer of real property or facilities may be made under paragraph (1) only if the Secretary certifies to Congress that —

(A) the costs of all environmental restoration, waste management, and environmental compliance activities to be paid by the recipient of the property

or facilities are equal to or greater than the fair market value of the property or facilities to be transferred, as determined by the Secretary; or

(B) if such costs are lower than the fair market value of the property or facilities, the recipient of the property or facilities agrees to pay the difference between the fair market value and such costs.

(3) As part of an agreement under paragraph (1), the Secretary shall disclose to the person to whom the property or facilities will be transferred any information of the Secretary regarding the environmental restoration, waste management, and environmental compliance activities described in paragraph (1) that relate to the property or facilities. The Secretary shall provide such information before entering into the agreement.

(4) Nothing in this subsection shall be construed to modify, alter, or amend the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601 et seq.) or the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.).

(5) Section 330 of the National Defense Authorization Act for Fiscal Year 1993 (Public Law 102-484; 10 U.S.C.2687 note) shall not apply to any transfer under this subsection to persons or entities described in subsection (a)(2) of section 330.

(6) The Secretary may not enter into an agreement to transfer property or facilities under this subsection after the expiration of the five-year period beginning on the date of the enactment of the National Defense Authorization Act for Fiscal Year 1994.

10 USC 2687 note.

SEC. 2906. ACCOUNT

(a) In General. — (1) There is hereby established on the books of the Treasury an account to be known as the "Department of Defense Base Closure Account 1990" which shall be administered by the Secretary as a single account.

(2) There shall be deposited into the Account —

(A) funds authorized for and appropriated to the Account;

(B) any funds that the Secretary may, subject to approval in an appropriation Act, transfer to the Account from funds appropriated to the Department of Defense for any purpose, except that such funds may be transferred only after the date on which the Secretary transmits written notice of, and justification for, such transfer to the congressional defense committees;

(C) except as provided in subsection (d), proceeds received from the transfer or disposal of any property at a military installation closed or realigned under this part; *and*

(D) proceeds received after September 30, 1995, from the transfer or disposal of any property at a military installation closed or realigned under title II of the Defense Authorization Amendments and Base Closure and Realignment Act (Public Law 100-526; 10 U.S.C. 2687 note).

(b) Use of Funds. — *(1) The Secretary may use the funds in the Account only for the purposes described in section 2905 or, after September 30, 1995, for environmental restoration and property management and disposal at installations closed or realigned under title II of the Defense Authorization Amendments and Base Closure and Realignment Act (Public Law 100-526: 10 U.S.C. 2687 note).*

(2) When a decision is made to use funds in the Account to carry out a construction project under section 2905(a) and the cost of the project will exceed the maximum amount authorized by law for a minor military construction project, the Secretary shall notify in writing the congressional defense committees of the nature of, and justification for, the project and the amount of expenditures for such project. Any such construction project may be carried out without regard to section 2802(a) of title 10, United States Code.

(c) Reports. — (1)*(A)* No later than 60 days after the end of each fiscal year in which the Secretary carries out activities under this part, the Secretary shall transmit a report to the congressional defense committees of the amount and nature of the deposits into, and the expenditures from, the Account during such fiscal year and of the amount and nature of other expenditures made pursuant to section 2905(a) during such fiscal year.

(B) The report for a fiscal year shall include the following:

(i) The obligations and expenditures from the Account during the fiscal year, identified by subaccount, for each military department and Defense Agency.

(ii) The fiscal year in which appropriations for such expenditures were made and the fiscal year in which funds were obligated for such expenditures.

(iii) Each military construction project for which such obligations and expenditures were made, identified by installation and project title.

(iv) A description and explanation of the extent, if any, to which expenditures for military construction projects for the fiscal year differed from proposals for projects and funding levels that were included in the justification transmitted to Congress under section 2907(1), or otherwise, for the funding proposals for the Account for such fiscal year, including an explanation of—

(I) any failure to carry out military construction projects that were so proposed; and

(II) any expenditures for military construction projects that were not so proposed.

(2) Unobligated funds which remain in the Account *after the termination of the authority of the Secretary to carry out a closure or realignment under this part* shall be held in the Account until transferred by law after the congressional defense committees receive the report transmitted under paragraph (3).

(3) No later than 60 days *after the termination of the authority of the Secretary to carry out a closure or realignment under this part*, the Secretary shall transmit to the congressional defense committees a report containing an accounting of —

(A) all the funds deposited into and expended from the Account or otherwise expended under this part; and

(B) any amount remaining in the Account.

(d) Disposal or Transfer of Commissary Stores and Property Purchased with Nonappropriated Funds. — (1) If any real property or facility acquired, constructed, or improved (in whole or in part) with commissary store funds or nonappropriated funds is transferred or disposed of in connection with the closure or realignment of a military installation under this part, a portion of the proceeds of the transfer or other disposal of property on that installation shall be deposited in the reserve account established under section 204(b)(4)(C) of the Defense Authorization Amendments and Base Closure and Realignment Act (10 U.S.C. 2687 note).

(2) The amount so deposited shall be equal to the depreciated value of investment made with such funds in the acquisition, construction, or improvement of that particular real property or facility. The depreciated value of the investment shall be computed in accordance with regulations prescribed by the Secretary of Defense.

(3) The Secretary may use amounts in the account (in such an aggregate amount as is provided in advance in appropriation Acts) for the purpose of acquiring, constructing, and improving —

(A) commissary stores; and

(B) real property and facilities for nonappropriated fund instrumentalities.

(4) As used in this subsection:

(A) The term "commissary store funds" means funds received from the adjustment of, or surcharge on, selling prices at commissary stores fixed under section 2685 of title 10, United States Code.

(B) The term "nonappropriated funds" means funds received from a nonappropriated fund instrumentality.

(C) The term "nonappropriated fund instrumentality" means an instrumentality of the United States under the jurisdiction of the Armed Forces (including the Army and Air Force Exchange Service, the Navy Resale and Services Support Office, and the Marine Corps exchanges) which is conducted for the comfort, pleasure, contentment, or physical or mental improvement of members of the Armed Forces.

(e) Account Exclusive Source of Funds for Environmental Restoration Projects. — Except for funds deposited into the Account under subsection (a), funds appropriated to the Department of Defense may not be used for purposes described in section 2905(a)(1)(C). The prohibition in this subsection shall expire upon the termination of the authority of the Secretary to carry out a closure or realignment under this part.

10 USC 2687 note.

SEC. 2907. REPORTS

As part of the budget request for fiscal year 1993 and for each fiscal year thereafter for the Department of Defense, the Secretary shall transmit to the congressional defense committees of Congress —

(1) a schedule of the closure and realignment actions to be carried out under this part in the fiscal year for which the request is made and an estimate of the total expenditures required and cost savings to be achieved by each such closure and realignment and of the time period in which these savings are to be achieved in each case, together with the Secretary's assessment of the environmental effects of such actions; and

(2) a description of the military installations, including those under construction and those planned for construction, to which functions are to be transferred as a result of such closures and realignments, together with the Secretary's assessment of the environmental effects of such transfers.

10 USC 2687 note.

SEC. 2908. CONGRESSIONAL CONSIDERATION OF COMMISSION REPORT

(a) Terms of the Resolution. — For purposes of section 2904(b), the term "joint resolution" means only a joint resolution which is introduced within the 10-day period beginning on the date on which the President transmits the report to the Congress under section 2903(e), and —

(1) which does not have a preamble;

(2) the matter after the resolving clause of which is as follows: "That Congress disapproves the recommendations of the Defense Base Closure and Realignment Commission as submitted by the President on ____", the blank space being filled in with the appropriate date; and

(3) the title of which is as follows: "Joint resolution disapproving the recommendations of the Defense Base Closure and Realignment Commission.".

(b) Referral. — A resolution described in subsection (a) that is introduced in the House of Representatives shall be referred to the Committee on Armed Services of the House of Representatives. A resolution described in subsection (a) introduced in the Senate shall be referred to the Committee on Armed Services of the Senate.

(c) Discharge. — If the committee to which a resolution described in subsection (a) is referred has not reported such a resolution (or an identical resolution) by the end of the 20-day period beginning on the date on which the President transmits the report to the Congress under section 2903(e), such committee shall be, at the end of such period, discharged from further consideration of such resolution, and such resolution shall be placed on the appropriate calendar of the House involved.

(d) Consideration. — (1) On or after the third day after the date on which the committee to which such a resolution is referred has reported, or has been

discharged [under subsection (c)] from further consideration of, such a resolution, it is in order (even though a previous motion to the same effect has been disagreed to) for any Member of the respective House to move to proceed to the consideration of the resolution. A member may make the motion only on the day after the calendar day on which the Member announces to the House concerned the Member's intention to make the motion, except that, in the case of the House of Representatives, the motion may be made without such prior announcement if the motion is made by direction of the committee to which the resolution was referred. All points of order against the resolution (and against consideration of the resolution) are waived. The motion is highly privileged in the House of Representatives and is privileged in the Senate and is not debatable. The motion is not subject to amendment, or to a motion to postpone, or to a motion to proceed to the consideration of other business. A motion to reconsider the vote by which the motion is agreed to or disagreed to shall not be in order. If a motion to proceed to the consideration of the resolution is agreed to, the respective House shall immediately proceed to consideration of the joint resolution without intervening motion, order, or other business, and the resolution shall remain the unfinished business of the respective House until disposed of.

(2) Debate on the resolution, and on all debatable motions and appeals in connection therewith, shall be limited to not more than 2 hours, which shall be divided equally between those favoring and those opposing the resolution. An amendment to the resolution is not in order. A motion further to limit debate is in order and not debatable. A motion to postpone, or a motion to proceed to the consideration of other business, or a motion to recommit the resolution is not in order. A motion to reconsider the vote by which the resolution is agreed to or disagreed to is not in order.

(3) Immediately following the conclusion of the debate on a resolution described in subsection (a) and a single quorum call at the conclusion of the debate if requested in accordance with the rules of the appropriate House, the vote on final passage of the resolution shall occur.

(4) Appeals from the decisions of the Chair relating to the application of the rules of the Senate or the House of Representatives, as the case may be, to the procedure relating to a resolution described in subsection (a) shall be decided without debate.

(e) Consideration by Other House. — (1) If, before the passage by one House of a resolution of that House described in subsection (a), that House received from the other House a resolution described in subsection (a), then the following procedures shall apply:

(A) The resolution of the other House shall not be referred to a committee and may not be considered in the House receiving it except in the case of final passage as provided in subparagraph (B)(ii).

(B) With respect to a resolution described in subsection (a) of the House receiving the resolution —

(i) the procedure in that House shall be the same as if no resolution had been received from the other House; but

(ii) the vote on final passage shall be on the resolution of the other House.

(2) Upon disposition of the resolution received from the other House, it shall no longer be in order to consider the resolution that originated in the receiving House.

(f) Rules of the Senate and House. — This section is enacted by Congress —

(1) as an exercise of the rulemaking power of the Senate and House of Representatives, respectively, and as such it is deemed a part of the rules of each House, respectively, but applicable only with respect to the procedure to be followed in that House in the case of a resolution described in subsection (a), and it supersedes other rules only to the extent that it its inconsistent with such rules; and

(2) with full recognition of the constitutional right of either House to change the rules (so far as relating to the procedure of that House) at any time, in the same manner, and to the same extent as in the case of any other rule of that House.

10 USC 2687 note.

SEC. 2909. RESTRICTION ON OTHER BASE CLOSURE AUTHORITY

(a) In General. — Except as provided in subsection (c), during the period beginning on the date of the enactment of this Act [Nov. 5, 1990] and ending on December 31, 1995, this part shall be the exclusive authority for selecting for closure or realignment, or for carrying out any closure or realignment of, a military installation inside the United States.

(b) Restriction. — Except as provided in subsection (c), none of the funds available to the Department of Defense may be used, other than under this part, during the period specified in subsection (a) —

(1) to identify, through any transmittal to the Congress or through any other public announcement or notification, any military installation inside the United States as an installation to be closed or realigned or as an installation under consideration for closure or realignment; or

(2) to carry out any closure or realignment of a military installation inside the United States.

(c) Exception. — Nothing in this part affects the authority of the Secretary to carry out —

(1) closures and realignments under title II of Public Law 100-526; and

(2) closures and realignments to which section 2687 of title 10, United States Code, is not applicable, including closures and realignments carried out for reasons of national security or a military emergency referred to in subsection (c) of such section.

10 USC 2687 note.

SEC. 2910. DEFINITIONS

As used in this part:

(1) The term "Account" means the Department of Defense Base Closure Account 1990 established by section 2906(a)(1).

(2) The term "congressional defense committees" means the Committees on Armed Services and the Committees on Appropriations of the Senate and of the House of Representatives.

(3) The term "Commission" means the Commission established by section 2902.

(4) The term "military installation" means a base, camp, post, station, yard, center, homeport facility for any ship, or other activity under the jurisdiction of the Department of Defense, including any leased facility. Such term does not include any facility used primarily for civil works, rivers and harbors projects, flood control, or other projects not under the primary jurisdiction or control of the Department of Defense.

(5) The term "realignment" includes any action which both reduces and relocates functions and civilian personnel positions but does not include a reduction in force resulting from workload adjustments, reduced personnel or funding levels, or skill imbalances.

(6) The term "Secretary" means the Secretary of Defense.

(7) The term "United States" means the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, American Samoa, and any other commonwealth, territory, or possession of the United States.

(8) The term "date of approval", with respect to a closure or realignment of an installation, means the date on which the authority of Congress to disapprove a recommendation of closure or realignment, as the case may be, of such installation under this part expires.

(9) The term "redevelopment authority", in the case of an installation to be closed under this part, means any entity (including an entity established by a State or local government) recognized by the Secretary of Defense as the entity responsible for developing the redevelopment plan with respect to the installation or for directing the implementation of such plan.

(10) The term "redevelopment plan", in the case of an installation to be closed under this part, means a plan that —

(A) is agreed to by the local redevelopment authority with respect to the installation; and

(B) provides for the reuse or redevelopment of the real property and personal property of the installation that is available for such reuse and redevelopment as a result of the closure of the installation.

PART B — Other Provisions Relating to Defense Base Closures and Realignments

10 USC 2687 note.

SEC. 2921. CLOSURE OF FOREIGN MILITARY INSTALLATIONS

(a) Sense of Congress. — It is the sense of the Congress that —

(1) the termination of military operations by the United States at military installations outside the United States should be accomplished at the discretion of the Secretary of Defense at the earliest opportunity;

(2) in providing for such termination, the Secretary of Defense should take steps to ensure that the United States receives, through direct payment or otherwise, consideration equal to the fair market value of the improvements made by the United States at facilities that will be released to host countries;

(3) the Secretary of Defense, acting through the military component commands or the sub-unified commands to the combatant commands, should be the lead official in negotiations relating to determining and receiving such consideration; and

(4) the determination of the fair market value of such improvements released to host countries in whole or in part by the United States should be handled on a facility-by-facility basis.

(b) Residual Value. — (1) For each installation outside the United States at which military operations were being carried out by the United States on October 1, 1990, the Secretary of Defense shall transmit, by no later than June 1, 1991, an estimate of the fair market value, as of January 1, 1991, of the improvements made by the United States at facilities at each such installation.

(2) For purposes of this section:

(A) The term "fair market value of the improvements" means the value of improvements determined by the Secretary on the basis of their highest use.

(B) The term "improvements" includes new construction of facilities and all additions, improvements, modifications, or renovations made to existing facilities or to real property, without regard to whether they were carried out with appropriated or nonappropriated funds.

(c) Establishment of Special Account. — (1) There is established on the books of the Treasury a special account to be known as the "Department of Defense Overseas Military Facility Investment Recovery Account". Except as provided in subsection (d), amounts paid to the United States, pursuant to any treaty, status of forces agreement, or other international agreement to which the United States is a party, for the residual value of real property or improvements to real property used by civilian or military personnel of the Department of Defense shall be deposited into such account.

(2) Money deposited in the Department of Defense Overseas Military Facility Investment Recovery Account shall be available to the Secretary of

Defense for payment, as provided in appropriation Acts, of costs incurred by the Department of Defense in connection with —

(A) facility maintenance and repair and environmental restoration at military installations in the United States; and

(B) facility maintenance and repair and compliance with applicable environmental laws at military installations outside the United States that the Secretary anticipates will be occupied by the Armed Forces for a long period.

(3) Funds in the Department of Defense Overseas Facility Investment Recovery Account shall remain available until expended.

(d) Amounts Corresponding to the Value of Property Purchased with Nonappropriated Funds. — (1) In the case of a payment referred to in subsection (c)(1) for the residual value of real property or improvements at an overseas military facility, the portion of the payment that is equal to the depreciated value of the investment made with nonappropriated funds shall be deposited in the reserve account established under section 204(b)(4)(C) of the Defense Authorization Amendments and Base Closure and Realignment Act. The Secretary may use amounts in the account (in such an aggregate amount as is provided in advance by appropriation Acts) for the purpose of acquiring, constructing, or improving commissary stores and nonappropriated fund instrumentalities.

(2) As used in this subsection:

(A) The term "nonappropriated funds" means funds received from —

(i) the adjustment of, or surcharge on, selling prices at commissary stores fixed under section 2685 of title 10, United States Code; or

(ii) a nonappropriated fund instrumentality.

(B) The term "nonappropriated fund instrumentality" means an instrumentality of the United States under the jurisdiction of the Armed Forces (including the Army and Air Force Exchange Service, the Navy Resale and Services Support Office, and the Marine Corps exchanges) which is conducted for the comfort, pleasure, contentment, or physical or mental improvement of members of the Armed Forces.

(e) Negotiations for Payments-in-Kind. — Before the Secretary of Defense enters into negotiations with a host country regarding the acceptance by the United States of any payment-in-kind in connection with the release to the host country of improvements made in the United States at military installations in the host country, the Secretary shall submit a written notice to the congressional defense committees containing a justification for entering into negotiations for payments-in-kind with the host country and the types of benefit options to be pursued by the Secretary in the negotiations.

(f) Report on Status and Use of Special Account. — Not later than January 15 of each year, the Secretary of Defense shall submit to the congressional defense committees a report on the operations of the Department of Defense Overseas Military Facility Investment Recovery

Account during the preceding fiscal year and proposed uses of funds in the special account during the next fiscal year. The report shall include the following:

(1) The amount of each deposit in the account during the preceding fiscal year, and the source of the amount.

(2) The balance in the account at the end of that fiscal year.

(3) The amounts expended from the account by each military department during that fiscal year.

(4) With respect to each military installation for which money was deposited in the account as a result of the release of real property or improvements of the installation to a host country during that fiscal year —

(A) the total amount of the investment of the United States in the installation, expressed in terms of constant dollars of that fiscal year;

(B) the depreciated value (as determined by the Secretary of a military department under regulations to be prescribed by the Secretary of Defense) of the real property and improvements that were released; and

(C) the explanation of the Secretary for any difference between the benefits received by the United States for the real property and improvements and the depreciated value (as so determined) of that real property and improvements.

(5) A list identifying all military installations outside the United States for which the Secretary proposes to make expenditures from the Department of Defense Overseas Facility Investment Recovery Account under subsection (c)(2)(B) during the next fiscal year and specifying the amount of the proposed expenditures for each identified military installation.

(6) A description of the purposes for which the expenditures proposed under paragraph (5) will be made and the need for such expenditures.

SEC. 2922. MODIFICATION OF THE CONTENT OF BIANNUAL REPORT OF THE COMMISSION ON ALTERNATIVE UTILIZATION OF MILITARY FACILITIES

(a) Uses of Facilities. — Section 2819(b) of the National Defense Authorization Act, Fiscal Year 1989 (Public Law 100-456; 102 Stat. 2119; 10 U.S.C. 2391 note) is amended —

(1) in paragraph (2), by striking out "minimum security facilities for nonviolent prisoners" and inserting in lieu thereof "Federal confinement or correctional facilities including shock incarceration facilities";

(2) by striking out "and" at the end of paragraph (3);

(3) by redesignating paragraph (4) as paragraph (5); and

(4) by inserting after paragraph (3) the following new paragraph (4):

(4) identify those facilities, or parts of facilities, that could be effectively utilized or renovated to meet the needs of States and local jurisdictions for confinement or correctional facilities; and".

10 USC 2391 note.

(b) Effective Date. — The amendments made by subsection (a) shall take effect with respect to the first report required to be submitted under section 2819 the National Defense Authorization Act, Fiscal Year 1989, after September 30, 1990.

SEC. 2923. FUNDING FOR ENVIRONMENTAL RESTORATION AT MILITARY INSTALLATIONS SCHEDULED FOR CLOSURE INSIDE THE UNITED STATES

(a) Authorization of Appropriations. — There is hereby authorized to be appropriated to the Department of Defense Base Closure Account for fiscal year 1991, in addition to any other funds authorized to be appropriated to that account for that fiscal year, the sum of $100,000,000. Amounts appropriated to that account pursuant to the preceding sentence shall be available only for activities for the purpose of environmental restoration at military installations closed or realigned under title II of Public Law 100-526, as authorized under section 204(a)(3) of that title.

10 USC 2687 note.

(b) Exclusive Source of Funding. — (1) Section 207 of Public Law 100-526 is amended by adding at the end the following:

"(b) Base Closure Account to be Exclusive Source of Funds for Environmental Restoration Projects. — No funds appropriated to the Department of Defense may be used for purposes described in section 204(a)(3) except funds that have been authorized for and appropriated to the Account. The prohibition in the preceding sentence expires upon the termination of the authority of the Secretary to carry out a closure or realignment under this title.".

(2) The amendment made by paragraph (1) does not apply with respect to the availability of funds appropriated before the date of the enactment of this Act.

10 USC 2687 note.

(c) Task Force Report. — (1) No later than 12 months after the date of the enactment of this Act [Nov. 5, 1990], the Secretary of Defense shall submit to Congress a report containing the findings and recommendations of the task force established under paragraph (2) concerning —

(A) ways to improve interagency coordination, within existing laws, regulations, and administrative policies, of environmental response actions at military installations (or portions of installations) that are being closed, or are scheduled to be closed, pursuant to title II of the Defense Authorization Amendments and Base Closure and Realignment Act (Public Law 100-526); and

(B) ways to consolidate and streamline, within existing laws and regulations, the practices, policies, and administrative procedures of relevant Federal and State agencies with respect to such environmental response actions so as to enable those actions to be carried out more expeditiously.

(2) There is hereby established an environmental response task force to make the findings and recommendations, and to prepare the report, required by paragraph (1). The task force shall consist of the following (or their designees):

(A) The Secretary of Defense, who shall be chairman of the task force.

(B) The Attorney General.

(C) The Administrator of the General Services Administration.

(D) The Administrator of the Environmental Protection Agency.

(E) The Chief of Engineers, Department of the Army.

(F) A representative of a State environmental protection agency, appointed by the head of the National Governors Association.

(G) A representative of a State Attorney general's office, appointed by the head of the National Association of Attorney Generals.

(H) A representative of a public-interest environmental organization, appointed by the Speaker of the House of Representatives.

10 USC 2687 note.

SEC. 2924. COMMUNITY PREFERENCE CONSIDERATION IN CLOSURE AND REALIGNMENT OF MILITARY INSTALLATIONS

In any process of selecting any military installation inside the United States for closure or realignment, the Secretary of Defense shall take such steps as are necessary to assure that special consideration and emphasis is given to any official statement from a unit of general local government adjacent to or within a military installation requesting the closure or realignment of such installation.

SEC. 2925. RECOMMENDATIONS OF THE BASE CLOSURE COMMISSION

(a) Norton Air Force Base. — (1) Consistent with the recommendations of the Commission on Base Realignment and Closure, the Secretary of the Air Force may not relocate, until after September 30, 1995, any of the functions that were being carried out at the ballistics missile office at Norton Air Force Base, California, on the date on which the Secretary of Defense transmitted a report to the Committees on Armed Services of the Senate and House of Representatives as described in section 202(a)(1) of Public Law 100-526.

(2) This subsection shall take effect as of the date on which the report referred to in subsection (a) was transmitted to such Committees.

(b) General Directive. — Consistent with the requirements of section 201 of Public Law 100-526, the Secretary of Defense shall direct each of the Secretaries of the military departments to take all actions necessary to carry out the recommendations of the Commission on Base Realignment and Closure and to take no action that is inconsistent with such recommendations.

10 USC 2687 note.

SEC. 2926. CONTRACTS FOR CERTAIN ENVIRONMENTAL RESTORATION ACTIVITIES

(a) Establishment of Model Program. — Not later than 90 days after the date of enactment of this Act [Nov. 5, 1990], the Secretary of Defense shall establish a model program to improve the efficiency and effectiveness of the base closure environmental restoration program.

(b) Administrator of Program. — The Secretary shall designate the Deputy Assistant Secretary of Defense for Environment as the Administrator of the model program referred to in subsection (a). The Deputy Assistant Secretary shall report to the Secretary of Defense through the Under Secretary of Defense for Acquisition.

Reports.

(c) Applicability. — This section shall apply to environmental restoration activities at installations selected by the Secretary pursuant to the provisions of subsection (d)(1).

(d) Program Requirements. — In carrying out the model program, the Secretary of Defense shall:

(1) Designate for the model program two installations under his jurisdiction that have been designated for closure pursuant to the Defense Authorization Amendments and Base Closure and Realignment Act (Public Law 100-526) and for which preliminary assessments, site inspections, and Environmental Impact Statements required by law or regulation have been completed. The Secretary shall designate only those installations which have satisfied the requirements of section 204 of the Defense Authorization Amendments and Base Closure and Realignment Act (Public Law 100-526).

(2) Compile a prequalification list of prospective contractors for solicitation and negotiation in accordance with the procedures set forth in title IX of the Federal Property and Administrative Services Act (Public Law 92-582; 40 U.S.C. 541 et seq., as amended). Such contractors shall satisfy all applicable statutory and regulatory requirements. In addition, the contractor selected for one of the two installations under this program shall indemnify the Federal Government against all liabilities, claims, penalties, costs, and damages caused by (A) the contractor's breach of any term or provision of the contract; and (B) any negligent or willful act or omission of the contractor, its employees, or its subcontractors in the performance of the contract.

(3) Within 180 days after the date of enactment of this Act, solicit proposals from qualified contractors for response action [as defined under section 101 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601)] at the installations designated under paragraph (1). Such solicitations and proposals shall include the following:

(A) Proposals to perform response action. Such proposals shall include provisions for receiving the necessary

authorizations or approvals of the response action by appropriate Federal, State, or local agencies.

(B) To the maximum extent possible, provisions offered by single prime contractors to perform all phases of the response action, using performance specifications supplied by the Secretary of Defense and including any safeguards the Secretary deems essential to avoid conflict of interest.

(4) Evaluate bids on the basis of price and other evaluation criteria.

(5) Subject to the availability of authorized and appropriated funds to the Department of Defense, make contract awards for response action within 120 days after the solicitation of proposals pursuant to paragraph (3) for the response action, or within 120 days after receipt of the necessary authorizations or approvals of the response action by appropriate Federal, State, or local agencies, whichever is later.

(e) Application of Section 120 of CERCLA. — Activities of the model program shall be carried out subject to, and in a manner consistent with, section 120 (relating to Federal facilities) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9620).

(f) Expedited Agreements. — The Secretary shall, with the concurrence of the Administrator of the Environmental Protection Agency, assure compliance with all applicable Federal statutes and regulations and, in addition, take all reasonable and appropriate measures to expedite all necessary administrative decisions, agreements, and concurrences.

(g) Report. — The Secretary of Defense shall include a description of the progress made during the preceding fiscal year in implementing and accomplishing the goals of this section within the annual report to Congress required by section 2706 of title 10, United States Code.

(h) Applicability of Existing Law. — Nothing in this section affects or modifies, in any way, the obligations or liability of any person under other Federal or State law, including common law, with respect to the disposal or release of hazardous substances or pollutants or contaminants as defined under section 101 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601).

Document Separator

THE DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION

THE SELECTION CRITERIA

The current base closure process was created by legislation approved in 1990 and amended in 1991 and 1992. It requires the Secretary of Defense to propose criteria that must be used by the Pentagon in making recommendations for closure and realignment. The proposed criteria were published in the *Federal Register* on December 15, 1992.

There are eight criteria. The four that receive priority consideration are grouped under the category of military value. Other important criteria address return on investment as well as the impact that closures or realignments might have on a local economy, its environment and infrastructure.

MILITARY VALUE

1. Current and future mission requirements and the impact of operational readiness of the Department of Defense's total force.

2. The availability and condition of land, facilities, and associated airspace at both the existing and potential receiving locations.

3. The ability to accommodate contingency, mobilization, and future total force requirements at both the existing and potential receiving locations.

4. The cost and manpower implications.

RETURN ON INVESTMENT

5. The extent and timing of potential costs and savings, including the number of years, beginning with the date of completion of closure or realignment, for the savings to exceed costs.

LOCAL ECONOMIC AND ENVIRONMENTAL IMPACT

6. The economic impact on local communities.

7. The ability of both the existing and potential receiving communities' infrastructures to support forces, missions and personnel.

8. The environmental impact.

Federal Government under 41 U.S.C. 46–48c and 41 CFR 51–2.6.

I certify that the following actions will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

a. The action will not result in any additional reporting, recordkeeping or other compliance requirements.

b. The action will not have a serious economic impact on any contractors for the service listed.

c. The action will result in authorizing small entities to provide the service procured by the Government.

Accordingly, the following service is hereby added to the Procurement List: Commissary Shelf Stocking & Custodial, Fitzsimmons Army Medical Center, Denver, Colorado.

This action does not affect contracts awarded prior to the effective date of this addition or options exercised under those contracts.

E.R. Alley, Jr.,

Deputy Executive Director.

[FR Doc. 91–3704 Filed 2–14–91; 8:45 am]

BILLING CODE 6820–33–M

Procurement List Proposed Additions

AGENCY: Committee for Purchase from the Blind and Other Severely Handicapped.

ACTION: Proposed additions to procurement list.

SUMMARY: The Committee has received proposals to add to the Procurement List commodities to be produced and services to be provided by workshops for the blind or other severely handicapped.

COMMENTS MUST BE RECEIVED ON OR BEFORE: March 18, 1991.

ADDRESSES: Committee for Purchase from the Blind and Other Severely Handicapped, Crystal Square 5, suite 1107, 1755 Jefferson Davis Highway, Arlington, Virginia 22202–3509.

FOR FURTHER INFORMATION CONTACT: Beverly Milkman, (703) 557–1145.

SUPPLEMENTARY INFORMATION: This notice is published pursuant to 41 U.S.C. 47(a)(2) and 41 CFR 51–2.6. Its purpose is to provide interested persons an opportunity to submit comments on the possible impact of the proposed actions.

If the Committee approves the proposed additions, all entities of the Federal Government will be required to procure the commodities and services listed below from workshops for the blind or other severely handicapped. It is proposed to add the following commodities and services to the Procurement List:

Commodities

Case, Ear Plug

6515–01–212–6452,
(Remaining 20 percent of Government's Requirement)

Wash Kit, Personal

7360–00–139–1063

Bag, Parts

8105–LL–B00–0208
8105–LL–B00–0209
8105–LL–B00–0210
8105–LL–B00–9974
8105–LL–B00–9975
(Requirements of Mare Island Naval Shipyard, CA)

Services

Janitorial/Custodial, Department of the Army, Coralville Reservoir, Coralville Lake, Iowa.

Janitorial/Custodial, Internal Revenue Service Center, 3651 South Interregional Highway 35, Austin, Texas

Sending and Oiling Picnic Tables, Deschutes National Forest, Bend Ranger District, Bend, Oregon.

E.R. Alley, Jr.,

Deputy Executive Director.

[FR Doc. 91–3705 Filed 2–14–91; 8:45 am]

BILLING CODE 6820–33–M

DEPARTMENT OF DEFENSE

Office of the Secretary

Department of Defense Selection Criteria for Closing and Realigning Military Installations Inside the United States

AGENCY: Department of Defense (DoD).

ACTION: Final selection criteria.

SUMMARY: The Secretary of Defense, in accordance with section 2903(b), title XXIX, part A of the FY 1991 National Defense Authorization Act, is required to publish the proposed selection criteria to be used by the Department of Defense in making recommendations for the closure or realignment of military installations insikde the United States.

EFFECTIVE DATE: February 15, 1991.

FOR FURTHER INFORMATION CONTACT: Mr. Jim Whittaker or Ms. Patricia Walker, Base Closure and Utilization, OASD(P&L), (703) 614–5358.

SUPPLEMENTARY INFORMATION:

A. Final Selection Criteria

The final criteria to be used by the Department of Defense to make recommendations for the closure or realignment of military installations inside the United States under title XXIX, part A of the National Defense Authorization Act for Fiscal Year 1991 as follows:

In selecting military installations for closure or realignment, the Department of Defense, giving priority consideration to military value (the first four criteria below), will consider:

Military Value

1. The current and future mission requirements and the impact on operational readiness of the Department of Defense's total force.

2. The availability and condition of land, facilities and associated airspace at both the existing and potential receiving locations.

3. The ability to accommodate contingency, mobilization, and future total force requriements at both the existing and potential receiving locations.

4. The cost and manpower implications.

Return on Investment

5. The extent and timing of potential costs and savings, including the number of years, beginning with the date of completion of the closure or realignment, for the savings to exceed the costs.

Impacts

6. The economic impact on communities.

7. The ability of both the existing and potential receiving communities' infrastructure to support forces, missions and personnel.

8. The environmental impact.

B. Analysis of Public Comments

The Department of Defense (DoD) received 169 public comments in response to the proposed DoD selection criteria for closing and realigning military installations inside the United States. The public's comments can be grouped into four topics: General, military value, costs and "payback", and impacts. The following is an analysis of these comments.

(1) General Comments

(a) A substantial number of commentors expressed concern over the proposed criteria's broad nature and similiarity to the 1988 Defense Secretary's Base Realignment and Closure Commission criteria. Many of the comments noted a need for objective measures or factors for the criteria. Some commentors also suggested various standard measures or factors for

the criteria. The inherent mission diversity of the Military Departments and Defense Agencies (DoD components) makes it impossible for DoD to specify detailed criteria, or objective measures or factors that could be applied to all bases within a Military Department or Defense Agency. We have provided the commentors' letters to each Military Department for their consideration. The similarity to the 1988 Base Closure Commission criteria is acknowledged. After reviewing the public comments we concluded that using similar criteria is appropriate.

(b) Many commentors noted that a correlation between force structure and the criteria was not present. The base closure and realignment procedures mandated by title XXIX, part A, of the National Defense Authorization Act for Fiscal Year 1991 (the Act) require that the Secretary of Defense's recommendations for closure and realignment be founded on the force structure plan and the final criteria required by the Act. DoD's analytical and decision processes for applying the final criteria will be based on the force structure plan. The military value criteria provide the connection to the force structure plan.

(c) Many commentors noted the need for more detailed information on how DoD would implement the base closure procedures required by the Act. A recurrent suggestion was to group like bases into categories for analysis. In response to this comment and suggestion, and to respond to the general comments (a) and (b) above, we have issued policy guidance to the Military Departments and Defense Agencies on the base closure process. This guidance requires them to:

• Treat all bases equally: They must consider all bases equally in selecting bases for closure or realignment under the Act, without regard to whether the installation has been previously considered or proposed for closure or realignment by the Department. This policy does not appply to closures or realignments that fall below the thresholds established by the Act or to the 86 bases closed under Public Law 100-526;

• Categorize bases: They must categorize bases with like missions, capabilities and/or attributes for analysis and review, to ensure that like bases are fairly compared with each other; and

• Perform a capacity analysis: They must link force structure changes described in the force structure plan with the existing force and bases structure, to determine if a potential for closure or realignment exists. In the event a determination is made that no excess capacity exists in a category, then there will be no need to continue the analysis of that category, unless there is a military value or other reason to continue the analysis;

• Develop and Use Objective Measures/Factors: They must develop and use objective measures or factors within categories for each criterion, whenever feasible. We recognize that it will not always be possible to develop appropriate objective measures or factors, and that measures/factors (whether they be objective or subjective) may vary for different categories of bases.

(d) A number of commentors recommended assigning specific weights to individual criteria. It would be impossible for DoD to specify weights for each criterion that could be applied across the board to all bases, again due to the mission diversity of the Military Departments and Defense Agencies. It appears from the comments that numbering the criteria may have been mistaken as an order of precedence associated with individual criteria. We do not intend to assign an order of precedence to an individual criterion, other than to give priority to the first four.

(e) Several commentors gave various reasons why a particular installation should be eliminated from any closure or realignment evaluation. Public Law 101-510 directs DoD to evaluate all installations equally, exclusive of those covered under Public Law 100-526 or those falling below the threshold of section 2687, title 10, U.S. Code. Public Law 100-526 implemented the recommendations of the 1988 Defense Secretary's Commission on Base Realignment and Closure. We have issued guidance to the DoD Components instructing them to consider all bases equally, this includes those previously nominated for study in the Defense Secretary's January 29, 1990, base realignment and closure announcement that are above the thresholds established in the Act. Conversely, we did not receive any requests that a particular installation be closed or realigned pursuant to section 2924 of Public Law 101-510.

(f) A number of commentors noted a need for more management controls over data collection to ensure accuracy of data. We agree with this recommendation and have issued guidance that requires the DoD Components to develop and implement internal controls, consistent with their organizational and program structure, to ensure the accuracy of data collection and analyses being performed. This guidance incorporates the lessons learned from the General Accounting Office's review of the 1988 Base Closure Commission's work.

(g) After detailed consideration of all comments, we have determined that some of the criteria may have been unclear. We have revised the criteria for additional clarity.

(h) Some of the early comments we received recommended extending the original December 31, 1990, public comment deadline. We agreed and extended the public comment period to January 24, 1991. In addition, we accepted for consideration 19 public comments received after the January 24, 1991, deadline.

(2) Military Value Comments

(a) A majority of comments received supported DoD's decision to give priority consideration to the military value criteria. In the aggregate, military value refers to the collection of attributes that describe how well a base supports its assigned force structure and missions.

(b) Several commentors recommended that National Guard and Reserve Component forces be included as part of DoD's base closure analysis. The Department's total force concept includes National Guard and Reserve Component forces, and these forces will be reflected in the force structure plan required by the Act for this base closure process. To clarify that point, criteria number one and three were amended.

(c) Some commentors recommended DoD apply the military value criteria without regard to the DoD component currently operating or receiving the services of the base. The commentors noted that this would maximize utilization of Defense assets and therefore improve the national security. We agree with this comment. DoD must retain its best bases and where there is a potential to consolidate, share or exchange assets, that potential will be pursued. We also recognize that this potential does not exist among all categories of bases and that the initial determination of the military value of bases must be made by the DoD Component currently operating the base. Consequently, we have left the military value criteria general in nature and therefore applicable DoD-wide, where appropriate. We have also issued guidance to the DoD Components that encourages inter-service and multi-service asset sharing and exchange. Finally, we will institute procedures to ensure each DoD Component has the opportunity to improve the military value of its base structure through

analysis of potential exchanges of bases with other DoD Components.

(d) Some commentors recommended w[illegible]de the availability of airspace in o[illegible]iderations of military value. We agree and have revised criterion number two accordingly.

(e) Several commentors requested a geographic balance be maintained when considering installations for realignment or closure. DoD is required by Public Law 101–510 to evaluate all installations equally, exclusive of those covered under Public Law 100–526 or those falling below the thresholds of section 2687, title 10, U.S. Code. However, some measures of military value do have a geographic component and therefore military mission requirements can drive geographic location considerations.

(f) Some commentors recommended that the availability of trained civil service employees be considered as well as the capacity of the private sector to support or perform military missions. DoD's civil service employees are an integral part of successful accomplishment of defense missions, as are defense contractors whether they be nationally or locally based. To the extent that the availability of trained civilian or contractor work forces i[illegible]ences our ability to accomplish the [illegible]on, it is already included in criteria [illegible]er one and four.

(g) Several commentors recommended that mobilization potential of bases be considered and that those bases required for mobilization be retained. Contingency and mobilization requirements are an important military value consideration and were already included in criterion number three. The potential to accommodate contingency and mobilization requirements is a factor at both existing and potential receiving locations, and we have amended criterion number three accordingly.

(h) One commentor recommended retaining all bases supporting operation Desert Shield/Storm and another recommended including overseas bases. DoD must balance its future base structure with the forces described in the force structure plan, and not on the current basing situation. Some forces currently supporting Operation Desert Storm are scheduled for drawdown between 1991 and 1997. DoD must adjust its base structure accordingly. Overseas bases will also be closed in the future as we drawdown DoD's overseas forces. However, Congress specifically left [illegible]rseas base closures out of the base [illegible]sure procedures established by the [illegible]ct.

(3) Cost and "Payback" Comments

(a) Some commentors recommended calculating total federal government costs in DoD's cost and "payback" calculations. A number of such comments gave as examples of federal government costs, health care and unemployment costs. The DoD Components annually budget for health care and unemployment costs. We have instructed the DoD Components to include DoD costs for health care and unemployment, associated with closures or realignments, in the cost calculations.

(b) Several commentors noted the absence of a "payback" period and some felt that perhaps eight or ten years should be specified. We decided not to do this; we did not want to rule out making changes that were beneficial to the national security that would have longer returns on investment. The 1988 Base Closure Commission felt that a six-year "payback" unnecessarily constrained their choices. The DoD Componentes have been directed to calculate return on investment for each closure or realignment recommendation, to consider it in their deliberations, and to report it in their justifications. Criterion number five has been amended accordingly.

(c) Some commentors recommended including environmental clean-up costs in base closure cost and payback calculations. Some also noted that the cost of environmental clean-up at a particular base could be so great that the Department should remove the base from further closure consideration.

The DoD is required by law to address two distinctly different types of environmental costs.

The first cost involves the clean-up and disposal of environmental hazards in order to correct past practices and return the site to a safe condition. This is commonly referred to as environmental restoration. DoD has a legal obligation under the Defense Environmental Restoration Program and the Comprehensive Environmental Response, Compensation and Liability Act for environmental restoration at sites, regardless of a decision to close a base. Therefore, these costs will not be considered in DoD's cost calculations. Where installations have unique contamination problems requiring environmental restoration, these will be identified as a potential limitation on near-term community reuse of the installation.

The second cost involves ensuring existing practices are in compliance with the Clean Air, Clean Water, Resource Conservation and Recovery Act, and other environmental acts, in order to control current and future pollution. This is commonly referred to as environmental compliance. Environmental compliance costs can potentially be avoided by ceasing the existing practice through the closure or realignment of a base. On the other hand, environmental compliance costs may be a factor in determining appropriate closure, realignment, or receiving location options. In either case, the environmental compliance costs or cost avoidances may be a factor considered in the cost and return on investment calculations. The Department has issued guidance to the DoD Components on this issue.

(d) Some commentors recommended DoD change the cost and "payback" criteria to include uniform guidelines for calculating costs and savings. We agree that costs and savings must be calculated uniformly. We have improved the Cost of Base Realignment Actions (COBRA) model used by the 1988 Base Closure Commission and have provided it to the DoD Components for calculations of costs, savings, and return on investment.

(4) Impacts Comments

(a) Many commentors were concerned about social and economic impacts on communities and how they would be factored into the decision process. We have issued instructions to the DoD Components to calculate economic impact by measuring the effects on direct and indirest employment for each recommended closure or realignment. These effects will be determined by using statisical information obtained from the Departments of Labor and Commerce. This is consistent with the methodology used by the 1988 Base Closure Commission to measure economic impact. We incorporated the General Accounting Office's suggested improvements for calculation of economic impact. DoD will also determine the direct and indirect employment impacts on receiving bases. We have amended criterion number six to reflect this decision.

(b) The meaning of criterion number seven, "the community support at the receiving locations" was not clear to several commentors. Some wondered if that meant popular support. Others recognized that this criterion referred to a community's infrastructure such as roads, water and sewer treatment plans, schools and the like. To clarify this criterion, we have completely re-written it, while also recognizing that a comparison must be made for both the existing and potential receiving communities.

(c) Many commentors asked how environmental impacts would be considered. As we stated in topic 3(c), DoD will consider certain environmental impacts. In addition, we have instructed the DoD Components to consider, at a minimum, the following elements when analyzing environmental consequences of a closure or realignment action:

- Threatened and endangered species
- Wetlands
- Historic and Archeological sites
- Pollution Control
- Hazardous Materials/Wastes
- Land and Air uses
- Programmed environmental costs/cost avoidances

(d) A number of commenters questioned the meaning of criterion number nine. "The implementation process involved". The intent of this criterion was to describe the implementation plan, its milestones, and the DoD military and civilian employee adjustments (increases and decreases) at each base, that would result through implementation of the closure or realignment. After further consideration, we have determined that developing the implementation plan is a necessary requirement and conclusion of applying the other eight criteria. A description of the implementation plan, while important to the understanding the recommended closure or realignment, is not in itself a specific criterion for decisionmaking. Consequently, we have deleted criterion number nine. We have instructed the Military Departments and Defense Agencies to include a description of their implementation plans for each recommended closure or realignment, as part of the justification to be submitted to the Commission.

C. Previous Federal Register References

(1) 55 FR49679, November 30, 1990: Proposed selection criteria and request for comments.

(2) 55 FR53536, December 31, 1990: Extend comment period on proposed selection criteria.

D. Paperwork Reduction Act

The Paperwork Reduction Act (Pub. L. 96-511) does not apply.

Dated: February 11, 1991.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 91-3645 Filed 2-14-91; 8:45 am]

BILLING CODE 3810-01-M

Department of the Army

Environmental Assessment: Exoatmospheric Discrimination Experiment (EDX) Program

AGENCY: U.S. Army Strategic Defense Command (USASDC); DOD.

COOPERATING AGENCY: Strategy Defense Initiative Organization, DOD U.S. Department of the Navy, DOD.

ACTION: Notice of Availability of finding of no significant impact.

SUMMARY: Pursuant to the Council on Environmental Quality regulations for implementing the procedural provisions of the National Environmental Policy Act (40 CFR parts 1500-1508), Army Regulation 200-2, Chief of Naval Operations Instruction 5090.1, and the Department of Defense (DOD) Directive 6050.1 on Environmental Effects in the United States of DOD actions, the USASDC has conducted an assessment of the potential environmental consequences of conducting EDX program activities for the Strategic Defense Initiative Organization. The Environmental Assessment considered all potential impacts of the proposed action alone and in conjunction with ongoing activities. The finding of no significant impact summarizes the results of the evaluations of EDX activities at the proposed installations. The discussion focuses on those locations where there was a potential for significant impacts and mitigation measures that would reduce the potential impact to a level of no significance. Alternatives to the EDX launch facility were examined early in the siting process but were eliminated as unreasonable. A no-action alternative was also considered. The Environmental Assessment resulted in a finding of no significant impact. Construction will proceed as scheduled, however, due to budgetary constraints, the flight program implementation has been delayed. When the flight schedule becomes firm, this document will be reviewed and revised, as necessary, in light of any changes to the program.

DATES: Written comments are required by March 18, 1991.

POINT OF CONTACT: Mr. D.R. Gallien, Address: U.S. Army Strategic Defense Command, CSSD-EN, Post Office Box 1500, Huntsville, AL 35807-3801, Fax (205) 955-3958.

SUPPLEMENTARY INFORMATION: The USASDC was assigned the mission of acquiring critical mid-course data on ballistic missile re-entry vehicles and decoys; EDX would accomplish this mission. The EDX program would use the ARIES booster to launch a suborbital sensor into space to observe a target ballistic missile re-entry complex during the mid-course phase of its flight. The proposed EDX program would involve nine flights over three years from two different launch sites after October 1993: The target complex would be released from a MINUTEMAN I missile launched from Vandenberg Air Force Base, California and the EDX booster and sensor payload vehicle would be launched from the Kauai Test Facility (KTF), located on the Pacific Missile Range Facility (PMRF), Kauai, Hawaii. Current launch site activities would continue, however, public access through these areas would be limited for a total of less than 1 day over a three year period.

The EDX program would include a number of activities to be conducted at seven different sites. These activities are categorized as design, fabrication/assembly/testing, construction, flight preparation, launch/flight/data collection, payload recovery, sensor payload vehicle refurbishment, data analysis, and site maintenance/disposition. The locations and types of EDX activities are: Vandenberg Air Force Base, California/Western Test Range, flight preparation, launch/flight/data collection; Pacific Missile Range Facility, Kauai, Hawaii, construction, flight preparation, launch/flight/data collection, payload recovery, sensor payload vehicle refurbishment, site maintenance/disposition; Sandia National Laboratories, New Mexico, design, fabrication/assembly/testing; U.S. Army Kwajalein Atoll, Republic of the Marshall Islands, flight preparation, launch/flight/data collection; Hill Air Force Base, Utah, fabrication/assembly/testing; Space Dynamics Laboratory, Utah State University, Logan, Utah, design, fabrication/assembly/testing, data analysis; and Boeing Aerospace and Electronics, Kent Space Center, Kent, Washington, design, fabrication/assembly/testing, sensor payload vehicle refurbishment, data analysis.

To determine the potential for significant environmental impacts as a result of the EDX program, the magnitude and frequency of the tests that would be conducted at the proposed locations were compared to the current activities and existing conditions at those locations. To assess possible impacts, each activity was evaluated in the context of the following environmental components: Air quality, biological resources, cultural resources, hazardous materials/waste, infrastructure, land use, noise, public

Document Separator

February 11, 1995

MEMO TO SENATOR DIXON

From: **Madelyn and David**

RE: **Commission Rules of Procedure**

This folder contains the Rules of Procedure that were adopted by the 1993 Commission at a brief business meeting at the end of their first day of hearings.

We recommend a similar business meeting at the end of our first day of hearings on March 1.

We think these Rules can be used by the 1995 Commission without change. The Rules are brief and straightforward, but we want to make sure that you are familiar and comfortable with them.

This memo discusses several key points about the Rules.

1. Quorums

For public hearings, a quorum shall consist of one or more members designated by the Chairman.

When the Commission meets to consider:

1. the recommendations of the Secretary of Defense;
2. the Commission's report to the President; or
3. a revised list of recommendations for closures and realignments

a quorum shall consist of a majority of members serving at that time.

Discussion

One or more Commissioners can hold a hearing, but at least 5 of 8 Commissioners would have to be present for the Commission to consider and act on any closure or realignment recommendation, including any decision to add a base to the Secretary's list for consideration.

2. Voting

The Rules require that when the Commission meets to consider:

1. the recommendations of the Secretary of Defense;
2. the Commission's report to the President; or
3. a revised list of recommendations for closures and realignments

once a quorum has been established, "a vote shall be required of the Commission to dispense with any of the above responsibilities or to ratify any actions of the Commission."

The Rules go on to state that any action taken by the Commission concerning these three areas of the Commission's responsibilities "will be by a majority vote of the Commission members serving at that time."

The Rules allow for Commissioners to vote in person or by proxy. (See discussion on proxies below.)

The Rules allow for any other issues that may arise during Commission meetings or hearings to be resolved "by a simple majority of Commissioners present."

Discussion

Under the Defense Base Closure and Realignment Act of 1990, as amended, the Commission is charged with reviewing the closures and realignments recommended by the Secretary of Defense. The Commission is authorized to make changes in any of the recommendations made by the Secretary if the Commission determines that the Secretary "deviated substantially" from the force structure plan or selection criteria.

The Secretary's recommendations become the baseline for the Commission's actions. In other words, the burden of proof rests with those wishing to change the Secretary's recommendations. This gives the Secretary's list a certain parliamentary advantage, because the votes of a majority of the Commissioners would be required to make any changes to the Secretary's list. A tie vote on a motion to change the Secretary's recommendations means that the motion would fail, and the Secretary's recommendations would prevail.

For example, at least 5 of the 8 Commissioners would have to vote in favor of a motion:

- to remove a base from the Secretary's list;
- to change one of the recommendations on the Secretary's list; or
- to add a base for consideration to the Secretary's list.

In each of these cases, a tie vote would mean that the motion fails, and the Secretary's recommendation stands.

3. Proxies

The Rules allow proxy voting.

Under Rule 9, a Commissioner may designate another member to vote and otherwise act for the first member when he or she will be absent. However, the absent Commissioner must "issue a written proxy stating the specific or limited purpose for which the proxy can be exercised."

Discussion

The Rule on proxy voting was put in to allow a Commission who might be ill or running late from the airport to cast a vote. Our understanding is that proxy votes were never used.

There is no requirement in the Rule that a Commissioner's proxy be voted by the Chairman. The Rule simply says that "A member of the Commission may designate another member..." -- presumably any other member -- to vote the proxy.

Note that the Rule requires "a written proxy stating the specific or limited purpose for which the proxy can be exercised." There is no definition of "specific or limited", but it is clear that the intent of the Rule is not to allow a blanket proxy. An absent Commissioner cannot give to another Commissioner the ability to vote a proxy on an issue in any way that the Commissioner determines appropriate at the time.

Given the public scrutiny of all of the votes which the Commission will take, we think it is unlikely that proxies will be needed or used, but we have no objection to leaving the Rule as it is.

However, we recommend that it be made clear that proxies must be given in writing for a specific and limited purpose in much the same way that absentee ballots are cast. This could be done orally as an explanation of "specific or limited" when the Rules are adopted by the Commission.

Document Separator

MEMORANDUM

TO: David Lyles
Madelyn Creedon

FROM: Elizabeth King

SUBJECT: Proxy rules for commissioners at other commissions

All of the following commissions have internal procedures regarding proxy voting by commissioners. None have published statutory requirements or regulations. Because the guidelines at these commissions are internal, no one with whom I spoke would send me a copy of their procedures. However, below is a summary of what I learned in telephone conversations.

In my conversations, I defined proxy voting as an absent commissioner giving a commissioner who would be present at a meeting the power to vote, without telling the commissioner which way to cast the vote.

Federal Election Commission

Contact: Marjorie Emmons 202-219-4145
Works in the commissioners' office

Number needed to vote: 4 out of 6, a majority required by statute

Voting procedure:

Commissioners receive most matters for decision in the mail. If all commissioners agree, the decision is made on paper and no meeting is required. If one commissioner objects to an action, a meeting is held to discuss and vote on the matter. No proxy voting is allowed at these meetings. If a commissioner does not attend, he cannot vote.

Federal Energy Regulatory Commission

Contact: Michael Schots 202-208-0597
Office of General Counsel

Two voting procedures:

1. Notation process: Commissioners receive information on matters for decision in the mail and they return their votes by mail.

2. Sunshine meetings: Commissioners gather in person to vote on an issue. Proxy voting is not allowed. If a commissioner does not attend, she cannot vote.

Federal Communications Commission

Contact: Sheldon Gutmann 202-418-1720
Office of General Counsel

Number needed for a vote:

FCC has five commissioners. Only requires a majority of a quorum, or two, to decide an issue. The majority of a quorum rule may have resulted because the FCC continued for a long period with two vacant commissioner seats.

Two voting procedures:

1. Notation process: Commissioners receive information in mail. Each must approve with signature before action is taken.

2. Agenda meetings: Commissioners gather to vote. FCC allows an absent commissioner to leave their vote on paper with a commissioner present at the agenda meeting. However, at least a quorum, or three, commissioners must be physically present at a meeting to allow the remaining commissioners to leave paper votes.

Mr. Gutmann said that he considered leaving a paper vote proxy voting. When I explained my definition of a proxy vote as simply the power to cast another's vote, Mr. Gutmann said that the FCC had not focused on that distinction but he was fairly certain the FCC would not allow that type of proxy voting.

Defense Nuclear Facilities Safety Board

Contact: Andy Anderson 202-208-6400
General Counsel

Number needed to vote:

Three commissioners, so a majority equals a quorum

Voting procedure:

Commissioners vote on all decisions in person. An absentee commissioner may vote by paper. Mr. Anderson says they usually fax a ballot to the commissioner asking him to vote and make comments. Proxy voting, or leaving the power to vote with an attending commissioner, is not allowed.

Federal Trade Commission

Contact: Benjamin Berman 202-326-2513
Office of the Secretary

Number needed to vote:

Five commissioners. Need majority of a quorum to vote on a decision.

Two procedures for voting:

1. Notation voting: Commissioners receive information on matters for voting by mail and return their votes by mail.

2. Sunshine meetings: Commissioners gather to vote on an issue. Absent commissioners may send a representative to cast her vote but must tell the representative which way to vote, not simply give the power to vote. FTC allows commissioners to attend these meetings by telephone. One commissioner present at the meeting, one commissioner on the telephone, and one representative of an absent commissioner is a valid quorum.

In either of these procedures, if only four commissioners vote and they are evenly divided, FTC considers the tie vote as "no decision".

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the
General Counsel

February 22, 1995

Elizabeth King, Esquire
Defense Base Closure and Realignment
Commission
1700 North Moore Street, Suite 1425
Arlington, Virginia 22209

Dear Ms. King:

This is in response to your letter dated February 6, 1995, addressed to Mr. Benjamin Berman, requesting copies of any written documentation regarding procedures for proxy voting by Commissioners of the Federal Trade Commission. Your letter was subsequently forwarded to this office for appropriate action. I have determined as an exercise of discretion to grant you access to the responsive information with no restrictions on its use.

The responsive information is enclosed.

Sincerely,

Jay C. Shaffer
Acting General Counsel

Enclosure

IV. MOTIONS, CIRCULATIONS, AND VOTING PROCEDURES

A. Overview

Rule 4.14 of the Commission Rules of Practice prescribes the procedures by which the Commission makes decisions. By its terms,

> [m]atters before the Commission for consideration may be resolved either at a meeting under § 4.15 or by written circulation.[36]

The decisionmaking vehicle is the motion, and a Commissioner may at any time propose a course of action in that form. The Commissioners vote on motions either at a Commission meeting or on a written notation basis.

Rule 4.14(c) provides that "any Commission action, either at a meeting or by written circulation, may be taken only with the affirmative concurrence of a majority of the participating Commissioners . . ."[37] Rule 4.14(b) provides that "a majority of the members of the Commission constitutes a quorum for the transaction of business."[38] Thus, when the Commission has four or five members, at least three Commissioners must participate in the decision on any given motion, by voting "yes," "no," or "abstain." The motion is approved only if a majority of the participating Commissioners votes "yes;" otherwise, it fails "for lack of a majority" or "for lack of a second [vote]."

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[36] 16 C.F.R. § 4.14(a).

[37] *Id.* § 4.14(c). Exceptions include instances where a greater majority is required by statute or rule, or where the action involved is taken by a single Commissioner pursuant to a valid delegation of authority. *Id.*

[38] *Id.* § 4.14(b).

B. Agenda Matters, Motions, and Voting Procedures

Matters that warrant face-to-face discussion by the Commissioners are handled as "agenda matters" at open or closed Commission meetings.[39] In practice, the Commission has ordinarily discussed at such meetings matters in which an administrative or federal district court complaint is not accompanied by a consent agreement or decree. Under the Sunshine Act, a "meeting" is defined, with certain exceptions, as

> the deliberations of at least the number of individual agency members required to take action . . . where such deliberations determine or result in the joint conduct or disposition of official agency business. . .[40]

The Rules of Practice provide that "Commission meetings shall be open to public observation unless the Commission determines that portions may be closed pursuant to 5 U.S.C. § 552b(c)."[41] The matters most frequently discussed at open meetings are trade regulation rules; guides and trade practice rules; and policy issues not implicating particular nonpublic enforcement efforts.[42] The Rules of Practice also provide that the

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[39] Commission Minutes, Volume 123, at 277 (October 13, 1971).

[40] 5 U.S.C. § 552b(a)(2); 16 C.F.R. § 4.15(a)(1). A quorum of Commissioners is required to take action at a Commission meeting. However, a Commissioner who is not physically present may authorize a member of his or her staff to report the Commissioner's vote, and thereby count toward a quorum for the purpose of taking action. 16 C.F.R. § 4.14(c). Commissioners participating in a meeting by telephone of course also may be counted toward a quorum for the purpose of taking action.

[41] 16 C.F.R. § 4.15(b)(1).

[42] Any person whose interest may be directly affected if a portion of a meeting is open may request, in writing, that the Commission close that portion for any of the reasons described in the exemptions portion of the Sunshine Act. The Commission "shall vote on such requests if at least one member desires to do so." 16 C.F.R. § 4.15(b)(2).

Commissioner to whom a particular open meeting matter has been assigned

> shall have the authority to make available to the public, prior to consideration of the matter at an open meeting, material sufficient to inform the public of the issues likely to be discussed in connection with that matter.[43]

In practice, however, most Commission meetings are closed, because most matters forwarded to the Commission involve nonpublic investigations, and therefore satisfy one or more of the exemptions from the open meeting requirements of the Sunshine Act.[44] The Commission's practice has been to make certain kinds of determinations only at or after a closed meeting. In particular, the Commission typically convenes a closed meeting to consider any nonadjudicative matter in which the staff have recommended an administrative or federal district court complaint, and the prospective respondents or defendants have not signed a consent agreement or consent decree. All Commission employees may attend nonadjudicative closed meetings.[45] In addition, the Commission discusses adjudicative matters at one of two different types of closed adjudicative meetings. In the first type, the general adjudicative meeting, attendance is limited to the Commissioners, their personal staffs, the General Counsel and his or her staff, and the Secretary and his or her staff.[46] In the second type -- called an "executive session," and typically held after an oral argument -- the Commission has followed the practice of having only the Commissioners attend,

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[43] 16 C.F.R. § 4.15(b)(3).

[44] *See* 5 U.S.C. § 552b(c).

[45] The Rules of Practice provide that "[a]ll Commission employees and consultants [and "[s]tenographers or court reporters"] may attend nonadjudicative portions of any closed meeting . . ." 16 C.F.R. § 4.15(c)(1).

[46] *See* 16 C.F.R. § 4.15(c)(1).

with an attorney or economist advisor to the assigned Commissioner in attendance for the purpose of taking minutes.[47]

The Chairman -- and in his or her absence the most senior Commissioner present -- acts as the presiding official at Commission meetings, and the Commissioner assigned to each matter at a particular meeting moderates the discussion of that matter.[48] Any Commissioner may make a motion concerning such a matter at any time during the meeting. If the motion is seconded, it is discussed, and the presiding official then secures the vote of each Commissioner on the motion.[49] After the motion has been seconded, any Commissioner may move to amend it. If the motion to amend is seconded, it is discussed. Thereafter, the presiding official first secures the vote of each Commissioner on the motion to amend, and then secures the vote of each Commissioner on the underlying motion, as (or as not) amended.

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[47] After the minutes have been approved by the Commission -- pursuant to an adjudicative motion circulated by the assigned Commissioner only to the Commissioners themselves -- they are sealed in an envelope and stored in the safe in the Minutes Section. Commission Minutes, Volume 133, at 372 (November 25, 1979). Executive session minutes are not placed in the minutes books, and are accessible only to Commissioners and their staffs. *See* 16 C.F.R. § 4.15(c)(3).

[48] The Rules of Practice provide that the "presiding officer shall be responsible for preserving order and decorum at meetings and shall have all powers necessary to that end." 16 C.F.R. § 4.15(d).

[49] If the motion is not seconded, it is recorded in the minutes of the meeting as having failed for lack of a second.

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Secretary

October 12, 1994

MEMORANDUM

To: Commission

From: Donald S. Clark DSC
Secretary

Subject: Office of the Secretary Procedures Manual
1994 Edition

I am forwarding with this memorandum the 1994 edition of the Office of the Secretary Procedures Manual -- the SOS Manual -- which describes the procedures our office follows in executing its responsibilities for the Commission decisionmaking process. As you may know, Ben Berman in our office drafted the 1984 edition of the SOS Manual, and it has proven to be a very valuable summary of our procedures. The 1994 edition covers the same areas addressed by the 1984 edition, and in addition includes new discussions of the procedures the Commission has more recently approved. I would like to thank Jay Shaffer, Bonnie Jansen, Ben, Bruce Freedman, and Landis Plummer for their very helpful comments on this edition. I would also like to thank the staff in our office for their consistently excellent work in implementing the procedures described in the manual. I should note that, like the 1984 edition, the 1994 edition is intended for internal use by the Commission and the Commission staff. I would of course be happy to receive any comments you or your advisors may have on any aspect of this edition; it will be updated as necessary to account for those comments and for future changes in procedures.

Part I of the manual summarizes the functions of our office and its organization. Part II provides a summary of the Commission decisionmaking process, including the basic types of Commission matters; the usual chronology such matters follow; and the mechanics by which decisions are made at Commission meetings and through the notational voting process. Parts III and IV provide a more detailed discussion of the decisionmaking process, including assignments; the approval and use of compulsory process; interlocutory motions; Commission meetings; written circulations and notational voting; public record votes; actions taken pursuant to delegated authority; and our normal document processing schedule. Parts V through VII describe the computer reports we provide to your offices; the electronic and paper storage of Commission minutes; the preparation of Commission Opinions and Final Orders; and office terminology.

The manual also contains four appendices. The first describes how the Office of Public Affairs and our office coordinate the public release of official documents, and reflects some procedural modifications developed over the last four years. The second appendix describes the OSCAR.COM computer system, while the third provides an expanded list of types of Commission documents that follows the organization of the Commission Rules of Practice. The fourth appendix includes the public record Notices describing the two sets of procedures the Commission adopted on April 7, 1994.

I hope that the 1994 edition will be of use to you. Please let me know if you have any questions or comments. Thank you for your assistance!

Document Separator

Set up mtg

bring copy of current law
1900 E St, Rm 6A12
20415
Act. Chief of Staff: Services

TO: MATT
FR: CAROLINE
RE: OPM WAIVER OF PAY/RETIREMENT REDUCTION FOR MIILITARY RETIREES
MAY 13, 1992

I spoke with Tom Tucker today to find out who you can meet with to explain our special circumstances regarding our need for a waiver. Tom said Tracy Spencer (202-606-0960) is the person you need to speak with. He works with her and said she is a reasonable and bright person. He agreed that it is smart to take the time to explain to her exactly how we are set up, the importance of our mission, and the many constraints under which we work regarding hiring. She has probably never come across another commission like ours and is used to dealing with normal agencies.

He also wanted to bring to our attention that the law provides for OPM to delegate its authority (to us) to approve individual cases "when an agency can demonstrate that submission of individual requests would be impracticable in a particular emergency." Tom suggested we request this "blanket waiver" given our unique circumstances (time constrainsts, etc.). If we do not have the waiver, each request working through normal channels will take approximately six weeks.

Bernie Gartlan
Larry Lorenz
Geoge Rakowski
606-0950

Thursday
10 a.m.
1900 E. St. N.W.
6th Floor
6A12 - left then right

~~Neal Harwood 606-2826~~

exceptional difficulty - but for unique reasons.

Joyce Edwards
above GS-15
606-2246

$83,502
GS15
$70-80,000

Joyce Edwards
Operations division

2pm

Office of Personnel Management

Federal Personnel Manual System

FPM Letter 553-3

FPM Letter 553-3

Published in advance of incorporation in FPM
Chapter 553
RETAIN UNTIL SUPERSEDED

Washington, D. C. 20415
May 20, 1991

SUBJECT: Submitting Requests for Waiver of Pay/Retirement Reduction for Military or Civilian Retirees in Exceptional Circumstances

Heads of Departments and Independent Establishments:

1. The Federal Employees Pay Comparability Act of 1990 (FEPCA) permits OPM to authorize exceptions to the reduction in pay or retirement benefits normally required for either military or civilian retirees--

- for temporary employment that "is necessary due to an emergency involving a direct threat to life or property or other unusual circumstances" (which may be delegated to agencies); and

- "on a case-by-case basis for employees in positions for which there is exceptional difficulty in recruiting or retaining a qualified employee."

Interim regulations implementing this requirement are contained in 5 CFR Part 553, which was published in the Federal Register on February 14, 1991. This Letter sets out the procedures agencies must follow to submit requests and the policies OPM will follow in authorizing exceptions under the law and regulations. These instructions supersede those contained in section 5-5 of FPM Chapter 550.

General Policy

2. Reemployment of military or civilian retirees without reduction in retirement benefits is intended to be a rare exception. (FEPCA specifically refers to "exceptional" and "unusual" circumstances.) The ability to reemploy annuitants without penalty is only one of many management flexibilities available under FEPCA and other laws and regulations. In each case, an agency needs to consider what authority or combination of authorities will be most productive and cost effective.

3. All cases must be approved individually, whether the request is based on emergency or exceptional recruiting difficulty. Attachment 1 contains complete instructions for submitting individual requests. Except in very unusual circumstances, all cases must be approved by OPM. OPM will entertain requests to delegate authority to approve individual cases only when an agency can demonstrate that submission of individual requests would be impracticable in a particular emergency. Attachment 2 contains instructions for requesting delegation of authority to approve individual cases in exceptional emergency situations. OPM will give prompt consideration to all requests.

4. Because an individual's decision to retire should not be influenced or encouraged by the possibility of subsequent reemployment, OPM will generally accept requests only when the individual is already retired. Exceptions to this policy will be made only as discussed in paragraphs 8 and 9 of attachment 1.

Inquiries: Staffing Policy Division, Career Entry Group, (202) 606-0960 or FTS 266-0960
Code: 553, Reemployment of Military and Civilian Retirees to Meet Exceptional Employment Needs
Distribution: Basic FPM

REQUESTING APPROVAL OF INDIVIDUAL CASES

1. Where to submit requests. Send requests for approval of appointments to positions above GS-15 to the Director, Human Resources Development Group. Send requests for approval of appointments to positions at GS-15 and below to the Associate Director for Career Entry. Each request must include the information required below.

Requirements for All Requests

2. Information about the individual:

- Name;
- Social security number and CSRS or FERS claim number, if any;
- Date of retirement;
- Type of retirement (voluntary, discontinued service, disability, etc.);
- For a military retiree, rank at retirement and type of service (regular or reserve, officer or enlisted);
- Amount of current annuity or retired or retainer pay;
- Analysis of the individual's qualifications that meet the agency's emergency need or critical skills shortage (attach SF-171);
- Certification by the individual that he or she will not accept the job if pay or retirement is reduced; and
- Documentation of bona fide offers of nonfederal employment, if any.

3. Information about the position:

- Title, series, grade, salary, and duty location;
- Type of appointment;
- Position description and description of the qualifications required, including any selective factors or other specific requirements that would justify the submission; and
- Reason for submission (emergency or exceptional recruiting difficulty). If the request is based on temporary hiring in an emergency, provide the information required by paragraphs 4 and 5. If the request is based on exceptional recruiting difficulty, provide the information required by paragraphs 6 and 7.

Additional Information Required for Requests Based on Emergency Situations

4. Description of the emergency:

- The emergency must pose an immediate and direct threat to life or property. A potential or indirect threat (e.g., possibility of increased criminal activity because of a shortage of law enforcement personnel) is not sufficient.

REQUESTING DELEGATION OF AUTHORITY TO APPROVE INDIVIDUAL CASES IN PARTICULAR EMERGENCY SITUATIONS

1. Where to submit requests. Send all requests to the Associate Director for Career Entry. Each request must include the information required below.

2. Description of the emergency:

- The emergency must pose an immediate and direct threat to life or property. A potential or indirect threat (e.g., possibility of increased criminal activity because of a shortage of law enforcement personnel) is not sufficient.

- The emergency must be beyond the scope of the agency's normal responsibilities. An agency that has a continuing responsibility to respond to emergencies that occur on a seasonal basis (e.g., forest fires or hurricanes), is expected to have temporary, seasonal, or on-call staff to meet most needs. A request for exception may be appropriate only when the number of emergencies in a season or the severity of a particular emergency creates a need for temporary employees beyond typical seasonal staffing levels.

3. Description of the positions to be covered by the delegation:

- Include the occupations, grades, and location of the positions to be filled under the delegated authority.

- The positions must be filled in connection with the immediate response effort. OPM will not delegate authority to approve appointments to positions providing administrative or clerical support or long-term followup.

- The work must involve prevention or reduction of the threat to life or property (e.g., treating casualties resulting from a major disaster or military action, cleaning up a major oil spill, or assessing structural soundness following a disaster). OPM will not delegate authority to approve appointments to positions involved in reimbursement or compensation for damage that has already happened.

4. Other conditions to be covered in the delegation, including but not limited to:

- Time limits both for the agency's authority to approve new appointments as exceptions to dual compensation restrictions and for the length of those appointments; and

- Whether and to what level the authority to approve individual appointments may be redelegated within the agency.

* U.S. G.P.O.:1991-282-341:40146

Office of Personnel Management

FPM Letter 553-3

Federal Personnel Manual System

FPM Letter 553-3

Published in advance of incorporation in FPM Chapter 553

RETAIN UNTIL SUPERSEDED

SUBJECT: Submitting Requests for Waiver of Pay/Retirement Reduction for Military or Civilian Retirees in Exceptional Circumstances

Washington, D. C. 20415
May 20, 1991

Heads of Departments and Independent Establishments:

1. The Federal Employees Pay Comparability Act of 1990 (FEPCA) permits OPM to authorize exceptions to the reduction in pay or retirement benefits normally required for either military or civilian retirees--

- for temporary employment that "is necessary due to an emergency involving a direct threat to life or property or other unusual circumstances" (which may be delegated to agencies); and

- "on a case-by-case basis for employees in positions for which there is exceptional difficulty in recruiting or retaining a qualified employee."

Interim regulations implementing this requirement are contained in 5 CFR Part 553, which was published in the Federal Register on February 14, 1991. This Letter sets out the procedures agencies must follow to submit requests and the policies OPM will follow in authorizing exceptions under the law and regulations. These instructions supersede those contained in section 5-5 of FPM Chapter 550.

General Policy

2. Reemployment of military or civilian retirees without reduction in retirement benefits is intended to be a rare exception. (FEPCA specifically refers to "exceptional" and "unusual" circumstances.) The ability to reemploy annuitants without penalty is only one of many management flexibilities available under FEPCA and other laws and regulations. In each case, an agency needs to consider what authority or combination of authorities will be most productive and cost effective.

3. All cases must be approved individually, whether the request is based on emergency or exceptional recruiting difficulty. Attachment 1 contains complete instructions for submitting individual requests. Except in very unusual circumstances, all cases must be approved by OPM. OPM will entertain requests to delegate authority to approve individual cases only when an agency can demonstrate that submission of individual requests would be impracticable in a particular emergency. Attachment 2 contains instructions for requesting delegation of authority to approve individual cases in exceptional emergency situations. OPM will give prompt consideration to all requests.

4. Because an individual's decision to retire should not be influenced or encouraged by the possibility of subsequent reemployment, OPM will generally accept requests only when the individual is already retired. Exceptions to this policy will be made only as discussed in paragraphs 8 and 9 of attachment 1.

Inquiries: Staffing Policy Division, Career Entry Group, (202) 606-0960 or FTS 266-0960

Code: 553, Reemployment of Military and Civilian Retirees to Meet Exceptional Employment Needs

Distribution: Basic FPM

Submission by Agency Head

5. All requests must be submitted by the agency head or a designee at the agency or departmental headquarters level. (In the case of the Department of Defense, requests may be submitted by an official at the headquarters level of the military department or Defense agency.) The requirement for submission by the agency head is contained in FEPCA. There is no provision for OPM to accept requests from field installations or individuals.

Actions Upon Employment of a CSRS or FERS Retiree

6. When a CSRS or FERS retiree is employed under this authority, it is crucial that the individual be informed of the effect of reemployment and that the action be properly documented. We will be issuing separate instructions with this information under the retirement and insurance code.

Constance Berry Newman
Director

Attachments

REQUESTING APPROVAL OF INDIVIDUAL CASES

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2. Information about the individual:

- Name;
- Social security number and CSRS or FERS claim number, if any;
- Date of retirement;
- Type of retirement (voluntary, discontinued service, disability, etc.);
- For a military retiree, rank at retirement and type of service (regular or reserve, officer or enlisted);
- Amount of current annuity or retired or retainer pay;
- Analysis of the individual's qualifications that meet the agency's emergency need or critical skills shortage (attach SF-171);
- Certification by the individual that he or she will not accept the job if pay or retirement is reduced; and
- Documentation of bona fide offers of nonfederal employment, if any.

3. Information about the position:

- Title, series, grade, salary, and duty location;
- Type of appointment;
- Position description and description of the qualifications required, including any selective factors or other specific requirements that would justify the submission; and
- Reason for submission (emergency or exceptional recruiting difficulty). If the request is based on temporary hiring in an emergency, provide the information required by paragraphs 4 and 5. If the request is based on exceptional recruiting difficulty, provide the information required by paragraphs 6 and 7.

Additional Information Required for Requests Based on Emergency Situations

4. Description of the emergency:

- The emergency must pose an immediate and direct threat to life or property. A potential or indirect threat (e.g., possibility of increased criminal activity because of a shortage of law enforcement personnel) is not sufficient.

- The emergency must be beyond the scope of the agency's normal responsibilities. An agency that has a continuing responsibility to respond to emergencies that occur on a seasonal basis (e.g., forest fires or hurricanes), is expected to have temporary, seasonal, or on-call staff to meet most needs. A request for exception may be appropriate only when the number of emergencies in a season or the severity of a particular emergency creates a need for temporary employees beyond typical seasonal staffing levels.

5. Information about the proposed appointment:

- What the proposed appointee will do in the immediate response effort (if that is not evident from the position description); and
- Other factors, such as the number of applicants in relation to the number of temporary workers needed, that support the need to fill the particular position without further delay.

Additional Information Required for Requests Based on Exceptional Recruiting Needs

6. Information about recruiting difficulty:

- Number of vacancies in the series, grade, and location;
- Length of time the particular position has been vacant, and average length of vacancies in such positions;
- Average annual turnover in the series, grade, and location;
- Description of recruiting efforts (type of publicity, sources contacted, geographic scope, etc.);
- Number and quality of applicants responding to those efforts; and
- Number of declinations based on pay/retirement issues (indicate how many specifically cited pay/retirement offset concern, how many cited non-federal job offers which would not require any reduction, and how many cited dissatisfaction with the combined compensation they would receive).

7. Consideration of other staffing alternatives, including but not limited to:

- Reengineering or redistribution of work;
- Contracting;
- Use of a recruitment bonus;
- Training (including formal education), cooperative education, and similar programs to increase the supply of qualified candidates.

Requests Involving Current Employees

8. Upon implementation of FEPCA. For the 180 days following issuance of the interim regulations on February 14, 1991, OPM will consider requests involving currently reemployed annuitants or military retirees when such requests would permit an agency to retain an individual who occupies a position that meets the statutory criteria. Cases submitted under this one-time provision need not meet all the conditions set out in paragraph 9 but must demonstrate that the individual's position meets the conditions set out in paragraphs 3-7.

REQUESTING DELEGATION OF AUTHORITY TO APPROVE INDIVIDUAL CASES IN PARTICULAR EMERGENCY SITUATIONS

1. Where to submit requests. Send all requests to the Associate Director for Career Entry. Each request must include the information required below.

2. Description of the emergency:

- The emergency must pose an immediate and direct threat to life or property. A potential or indirect threat (e.g., possibility of increased criminal activity because of a shortage of law enforcement personnel) is not sufficient.

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3. Description of the positions to be covered by the delegation:

- Include the occupations, grades, and location of the positions to be filled under the delegated authority.

- The positions must be filled in connection with the immediate response effort. OPM will not delegate authority to approve appointments to positions providing administrative or clerical support or long-term followup.

- The work must involve prevention or reduction of the threat to life or property (e.g., treating casualties resulting from a major disaster or military action, cleaning up a major oil spill, or assessing structural soundness following a disaster). OPM will not delegate authority to approve appointments to positions involved in reimbursement or compensation for damage that has already happened.

4. Other conditions to be covered in the delegation, including but not limited to:

- Time limits both for the agency's authority to approve new appointments as exceptions to dual compensation restrictions and for the length of those appointments; and

- Whether and to what level the authority to approve individual appointments may be redelegated within the agency.

* U.S. G.P.O.:1991-282-341:40146

9. To retain an employee for critical work. In very unusual cases, OPM may consider requests for exception to pay or retirement reduction when an agency needs to retain the services of a particular individual who is uniquely qualified for an ongoing project. Requests submitted on this basis must:

- Describe why the project is unusually critical. Include its importance to the agency's mission, potential costs of project failure or delay, any legislative or Presidential deadlines, and any other relevant factors.

- Describe why retaining the individual is critical to the project. Include the knowledges, skills, and abilities possessed by the individual that are essential for successful completion of the project and that could not be acquired by another appointee within a reasonable time. Also explain why the work cannot be assigned to other employees involved with the same project.

- Provide documentation that the individual will retire (or, in the case of a reemployed civilian annuitant or a military retiree employed in a civilian position, will resign from that position) if the exception is not granted. Such documentation might include a bona fide offer of non-federal employment or information about changes in or expiration of benefits (such as retirement, health benefits, or life insurance) or other circumstances to support the claim that the employee cannot or will not delay retirement. The agency must also discuss the possibility of using a retention allowance to retain the employee through completion of the critical project.

- State the length of time needed to complete the project.

reemployment of retirees

H.R. 3979 allows the director of OPM, at the request of the head of an Executive agency, to waive the dual compensation restrictions on reemployment of both Federal civilian and military retirees. OPM may waive these restrictions on a case-by-case basis for employees in positions for which there is exceptional difficulty in recruiting or retaining qualified employees. [redacted]s.

The Committee points out that Congress has waived the dual compensation restrictions for temporary employees of the Census Bureau (Public Law 101-86) and that this waiver has assisted the Census Bureau in its efforts to recruit and retain employees to carry out the 1990 decennial census.

The Committee also believes that this authority would prove useful to the Federal Emergency Management Agency (FEMA). In testimony before the Subcommittee on Compensation and Employee Benefits, Representative Vic Fazio noted that, ". . . FEMA was faced with back to back emergencies stemming from the Loma Prieta earthquake and hurricane Hugo. Those disasters strained [redacted] resources to the brink and the lack of qualified, trained individuals severely limited FEMAs capacity to respond quickly and effectively. It seemed to me that [redacted]-up employees for FEMA for two reasons. They were available immediately and possessed training, management skills, and familiarity with Government procedures that would enable them to hit the ground running." (Serial No. 101-47, p. 319)

The Committee agrees and expects OPM to provide dual compensation waivers to FEMA during similar situations in the future.

time off from duty as an incentive award

The bill permits agencies, subject to regulations to be issued by OPM, to grant employees time off from duty, without loss of pay or charge to leave, as an award in recognition of superior accomplishment or other personal effort that contributes to the quality, efficiency, or economy of Government operations.

uniform allowances

The bill increases the maximum annual allowance available for uniforms to $400 per each employee who is required to wear a uniform during the performance of official duties. The bill also gives OPM regulatory authority to increase the maximum allowance for uniforms.

differential for physical hardship or hazard

Section 5545(d) of title 5, United States Code, provides a physical hardship or hazardous duty differential of up to 25 percent of basic pay. This differential is currently available to employees whose duty involves intermittent or irregular physical hardship or hazard and whose position classification does not already take into account the degree of physical hardship or hazard involved in the performance of normal duties.

Section 108(a) amends section 5532 of title 5, United States Code, by adding a new subsection (g).

Section 5532(g)(1) authorizes the Director of the Office of Personnel Management to waive, at the request of the head of an Executive agency, the application of reductions in retired or retainer pay required by section 5532 on a case-by-case basis for employees in positions for which there is exceptional difficulty in recruiting and retaining a qualified employee. Section 5532(g)(1) also authorizes the Director of the Office of Personnel Management to delegate to the head of an Executive agency authority to waive the application of the preceding provisions of section 5532, on a case-by-case basis, [redacted]

Section 5532(g)(2) requrires the Office of Personnel Management to prescribe regulations for the exercise of any authority under section 5532(g), including criteria for any exercise of authority and procedures for terminating a delegation of authority under section 5532(g)(1)(B).

Section 108(b) of the bill amends section 8344 of title 5, United States Code (relating to duel compensation restrictions on Civil Service Retirement System annuitants), by adding a new subsection (i).

Section 8344(i)(1) authorizes the Director of the Office of Personnel Management to waive, at the request of the head of an Executive agency, the application of dual compensation restrictions in section 8344 on a case-by-case basis for employees in positions for which there is exceptional difficulty in recruiting and retaining qualified employees. Section 8344(i)(1) also authorizes the Director of the Office of Personnel Management to delegate to the head of an agency authority to waive the application of the preceding provisions of section 8344, on a case-by-case basis, for employees serving on a temporary basis but only if, and for so long as, the authority is necessary due to an emergency involving a direct threat to life and property or other unusual circumstances.

Section 8344(i)(2) requires the Office of Personnel Management to prescribe regulations for the exercise of any authority under section 8344(i) including criteria for any exercise of authority and procedures for terminating a delegation of authority under section 8344(i)(1)(B).

Section 8344(i)(3) states that an employee to whom a waiver under section 8344(i) applies shall not be deemed an employee for purposes of chapter 83 of title 5, United States Code, (relating to the Civil Service Retirement System) or chapter 84 of title 5, United States Code, (relating to the Federal Employees Retirement System) while such waiver is in effect.

Section 108(c) of the bill amends section 8468 of title 5, United States Code, (relating to dual compensation restrictions on Federal Employees Retirement System annuitants), by adding a new subsection (f).

Section 8468(f)(1) authorizes the Director of the Office of Personnel Management to waive, at the request of the head of an Executive agency, the application of the dual compensation restrictions in section 8468, on a case-by-case basis, for employees in positions for which there is exceptional

difficulty in recruiting and retaining a qualified employee. Section 8468(f)(1) also authorizes the Director of the Office of Personnel Management to delegate to the head of an Executive agency authority to waive the application of the preceding provisions of section 8468, on a case-by-case basis, for employees serving on a temporary basis, but only if, or for so long as, the authority is necessary due to an emergency involving a direct threat to life or property or other unusual circumstances.

Section 8468(f)(2) requires the Office of Personnel Management to prescribe regulations for the execise of any authority under section 8468(f) including criteria for any exercise of authority and procedures for terminating a delegation of authority under section 8468(f)(1)(B).

Section 8468(f)(3) states that an employee to whom a waiver under section 8468(f) applies shall not be deemed an employee for purposes of chapter 84 of title 5, United States Code, (relating to the Federal Employees Retirement System) or chapter 83 of title 5, United States Code, (relating to the Civil Service Retirement System) while such waiver is in effect.

title ii amendments relating to awards, allowances, differentials, and other related matters

Title II generally contains provisions relating to awards allowances, differentials, and bonuses available to Federal employees.
Section 201. Time off from duty as an incentive award

Section 201 amends section 4502 of title 5, United States Code, by adding a new subsection (e).

Section 4502(e)(1) defines "employee", for purposes of section 4502(e), to include an employee covered by the performance management and recognition system.

Section 4502(e)(2) authorizes the Office of Personnel Management to permit, by regulation, agencies to grant employees time off from duty, without loss of pay or charge to leave, as an award in recognition of superior accomplishment or other personal effort that contributes to the quality, efficiency, or economy of Government operations.
Section 202. Uniform allowances

Section 202(a) of the bill amends section 5901(a) of title 5, United States Code, by increasing from $125 to $400 (or such higher maximum amount as the Office of Personnel Management may establish under section 5902) the uniform allowance amount authorized annually for an employee who is required to wear a uniform while on duty.

Section 202(b) amends title 5, United States Code, by striking the existing sections 5902 and 5903 and inserting the following new sections:
Section 5902. Increase in maximum uniform allowance

Section 5902 authorizes the Office of Personnel Management to adjust, from time to time, the maximum amount for the cost of uniforms and the maximum allowance for uniforms under section 5901 of title 5, United States Code.
Section 5903. Regulations

- list of retirees - spell out w of mouth
- anecdotal evidence informal network
- use format 3 key jobs
- other job offers ⇒ quick decisions
- Documentation to support uniqueness
  proof
  KSA - t.v. presentations
  engineer skills
  Two weeks from receipt of paperwork
  (standard is 20 days)

temporary/ limited employment time

→ Fax draft
606-0390 > ~~Barry~~ Bernie Gartlan
606-1386

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  - base-level
  - major command
  - HQ-level

of
Am. Soc. Mu Eng - PD met w/ Exec. Dir.

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*** THIS SECTION IS CURRENT THROUGH P.L. 102-483, 10/23/92 ***

TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I. CRIMES
CHAPTER 11. BRIBERY, GRAFT, AND CONFLICTS OF INTEREST

18 USCS @ 208 (1993)

@ 208. Acts affecting a personal financial interest

(a) Except as permitted by subsection (b) hereof, whoever, being an officer or employee of the executive branch of the United States Government, or of any independent agency of the United States, a Federal Reserve bank director, officer, or employee, or an officer or employee of the District of Columbia, including a special Government employee, participates personally and substantially as a Government officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which, to his knowledge, he, his spouse, minor child, general partner, organization in which he is serving as officer, director, trustee, general partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest--

Shall be subject to the penalties set forth in section 216 of this title.

(b) Subsection (a) shall not apply--

(1) if the officer or employee first advises the Government official responsible for appointment ot his or her position of the nature and circumstances of the judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter and makes full disclosure of the financial interest and receives in advance a written determination made by such official that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from such officer or employee;

(2) if, by regulation issued by the Director of the Office of Government Ethics, applicable to all or a portion of all officers and employees covered by this section, and published in the Federal Register, the financial interest has been exempted from the requirements of subsection (a) as being too remote or too inconsequential to affect the integrity of the services of the Government officers or employees to which such regulation applies;

(3) in the case of a special Government employee serving on an advisory committee within the meaning of the Federal Advisory Committee Act {5 USCS Appx. @@ 1 et seq.} (including an individual being considered for an appointment to such a position), the official responsible for the employee's appointment, after review of the financial disclosure report filed by the individual pursuant to the Ethics in Government Act of 1978 {5 USCS Appx. @@ 101 et seq.}, certifies

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in writing that the need for the individual's services outweighs the potential for a conflict of interest created by the financial interest involved; or

(4) the financial interest that would be affected by the particular matter involved is that resulting solely from the interest of the officer or employee, or his or her spouse or minor child, in birthrights--

(A) in an Indian tribe, band, nation, or other organized group or community, including any Alaska Native village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians,

(B) in an Indian allotment the title to which is held in trust by the United States or which is inalienable by the allottee without the consent of the United States, or

(C) in an Indian claims fund held in trust or administered by the United States,

if the particular matter does not involve the Indian allotment or claims fund or the Indian tribe, band, nation, organized group or community, or Alaska Native village corporation as a specific party or parties.

(c)(1) For the purpose of paragraph (1) of subsection (b), in the case of class A and B directors of Federal Reserve Banks, the Board of Governors of the Federal Reserve System shall be deemed to be the Government official responsible for appointment.

(2) The potential availability of an exemption under any particular paragraph of subsection (b) does not preclude an exemption being granted pursuant to another paragraph of subsection (b).

(d)(1) Upon request, a copy of any determination granting an exemption under subsection (b)(1) or (b)(3) shall be made available to the public by the agency granting the exemption pursuant to the procedures set forth in section 105 of the Ethics in Government Act of 1978 {5 USCS Appx. @ 105}. In making such determination available, the agency may withhold from disclosure any information contained in the determination that would be exempt from disclosure under section 552 of title 5. For purposes of determinations under subsection (b)(3), the information describing each financial interest shall be no more extensive than that required of the individual in his or her financial disclosure report under the Ethics in Government Act of 1978 {5 USCS Appx. @@ 101 et seq.}.

(2) The Office of Government Ethics, after consultation with the Attorney General, shall issue uniform regulations for the issuance of waivers and exemptions under subsection (b) which shall--

(A) list and describe exemptions; and

(B) provide guidance with respect to the types of interests that are not so substantial as to be deemed likely to affect the integrity of the services the Government may expect from the employee.

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HISTORY: (added Oct. 23, 1962, P.L. 87-849, ∂ 1(a), 76 Stat. 1124; Nov. 16, 1977, P.L. 95-188, Title II, ∂ 205, 91 Stat. 1388.)
(As amended Nov. 30, 1989, P.L. 101-194, Title IV, ∂ 405, 103 Stat. 1751; May 4, 1990, P.L. 101-280, ∂ 5(e), 104 Stat. 159.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

REFERENCES IN TEXT:
"The Alaska Native Claims Settlement Act", referred to in this section, is Act Dec 18, 1971, P.L. 92-203, 85 Stat. 688, which appears generally as 43 USCS ∂∂ 1601 et seq. For full classification of such Act, consult USCS Tables volumes.

EXPLANATORY NOTES:
A prior 18 U.S.C. ∂ 208, Act June 25, 1948, ch 645, 62 Stat. 693, which related to the acceptance of solicitation of a bribe by a judicial officer, was eliminated in the general amendment of this chapter by Act Oct. 23, 1962, P.L. 87-849 and is substantially covered by revised 18 USCS ∂ 201.
Provisions similar to those comprising this section were contained in former 18 USCS ∂ 434 prior to the repeal of such section and the general amendment of this chapter by Act Oct. 23, 1962, P.L. 87-849.

EFFECTIVE DATE OF SECTION:
Section 4 of Act Oct. 23, 1962, P.L. 87-849, 76 Stat. 1126, provided "that this section shall be effective ninety days after its enactment on Oct. 23, 1962;" see 18 USCS ∂ 201note.

AMENDMENTS:
1977. Act Nov. 16, 1977, in subsec. (a) inserted "a Federal Reserve bank director, officer, or employee"; and in subsec. (b) inserted "In the case of class A and B directors of Federal Reserve banks, the Board of Governors of the Federal Reserve System shall be the Government official responsible for appointment.".
1989. Act Nov. 30, 1989, in subsec. (a), inserted "or" following "United States Government," inserted "an officer or employee" and "general" in two places, and substituted "Shall be subject to the penalties set forth in section 216 of this title." for "Shall be fined not more than $ 10,000, or imprisoned not more than two years, or both."; substituted subsec. (b) for one which read: "Subsection (a) hereof shall not apply (1) if the officer or employee first advises the Government official responsible for appointment to his position of the nature and circumstances of the judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter and makes full disclosure of the financial interest and receives in advance a written determination made by such official that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from such officer or employee, or (2) if, by general rule or regulation published in the Federal Register, the financial interest has been exempted from the requirements of clause (1) hereof as being too remote or too inconsequential to affect the integrity of Government officers' or employees' services. In the case of class A and B directors of Federal Reserve banks, the Board of Governors of the Federal Reserve System shall be the Government official responsible for appointment."; and added subsecs. (c) and (d).
1990. Act May 4, 1990 (effective on enactment as provided by ∂ 11 of such Act, which appears as 5 USCS Appx. ∂ 101 note) amended the directory language

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of Act Nov. 30, 1989 so as to insert "general" in two places in subsec. (a) of this section; in subsec. (b)(2), substituted "subsection (a)" for "paragraph (1)" and, in para. (3), deleted "section 107 of" following "pursuant to"; and substituted subsec. (d)(1) for one which read:

"(d)(1) A copy of any determination by other than the Director of the Office of Government Ethics granting an exemption pursuant to subsection (b)(1) or (b)(3) shall be submitted to the Director, who shall make all determinations available to the public pursuant to section 105 of the Ethics in Government Act of 1978. For determinations pursuant to subsection (b)(3), the information from the financial disclosure report of the officer or employee involved describing the asset or assets that necessitated the waiver shall also be made available to the public. This subsection shall not apply, however, if the head of the agency or his or her designee determines that the determination under subsection (b)(1) or (b)(3), as the case may be, involves classified information.".

OTHER PROVISIONS:

Delegation of authority, Authority of the President under subsec. (b) of this section delegated to department or agency heads, see Part V of Ex. Or. No. 11222 of May 8, 1965, 30 Fed. Reg. 6469, set out as a 18 USCS ∂ 201 note.

Application of section to certain delegates to international telecommunications meetings and conferences. For provisions as to the application of this section to private sector representatives on the United States delegation to an international telecommunications meeting or conference, see Act Aug. 24, 1982, P.L. 97-241, Title I, ∂ 120, 96 Stat. 280, which appears as 18 USCS ∂ 203 note.

Repeal of Department of the Interior appropriations provisions. Act Sept. 27, 1988, P.L. 100-446, Title III, ∂ 319, 102 Stat. 1826, which formerly appeared as a note to this section, was repealed by Act Nov. 30, 1989, P.L. 101-194, Title V, ∂ 505(b), 103 Stat. 1756, as amended by Act May 4, 1990, P.L. 101-280, ∂ 6(c), 104 Stat. 160, effective on enactment as provided by ∂ 11 of such Act, which appears as 5 USCS Appx ∂ 101 note. This note related to the definition of "particular matter" as applied to the Department of the Interior and the Indian Health Service employees.

Provisions similar to this former note were contained in Act Dec. 22, 1987, P.L. 100-202, ∂ 101(g) {Title III, ∂ 318}, 101 Stat. 1329-255.

NOTES:

CODE OF FEDERAL REGULATIONS

Conduct of employees of U. S. Arms Control and Disarmament Agency, 22 CFR Part 606.

Responsibilities and conduct of employees of General Accounting Office and special government employees, 4 CFR Part 6.

Responsibilities and conduct of employees of Department of Agriculture, 7 CFR Part 0.

Actions and responsibilities of Federal Reserve Bank Directors, 12 CFR Part 264a.

Responsibilities and conduct of officers and employees of Federal Home Loan Bank Board and Federal Savings and Loan Insurance Corporation, 12 CFR Part 511.

Rules of conduct in proceedings of Civil Aeronautics Board, 14 CFR Parts 300, 302.

Procedures of Tennessee Valley Authority, 18 CFR Part 301.

Standards of conduct for Department of Housing and Urban Development employees, 24 CFR Part 0.

Standards of conduct for Department of Justice employees, 28 CFR Part 45.

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Ethics and conduct of Department of Labor employees, 29 CFR Part 0.
Rules of ethics and conduct of Review Commission employees, 29 CFR Part 2202.
Standards of conduct of employees of Department of Defense, 32 CFR Part 40.
Standards of conduct for Department of Army personnel, 32 CFR Part 579.
Restrictions on former employees of executive branch of United States government, of independent agencies of United States, or of District of Columbia to act as agent or attorney before Foreign Claims Settlement Commission, 45 CFR Part 500.
Standards of conduct for employees of Community Services Administration, 45 CFR Part 1015.
Responsibilities and conduct of employees of Federal Maritime Commission, 46 CFR Part 500.

Add:
16 CFR Part 5.
31 CFR Part 0.

This section is no longer cited as authority for:
32 CFR Part 579.

CROSS REFERENCES
Applicability to Canal Zone, 18 USCS ∂ 14.
Memorandum of Attorney General regarding conflict of interest provisions, 18 USCS ∂ 201 note.
Delegation of authority by Part V of Ex. Or. No. 11222, 18 USCS ∂ 201 note.
Definitions, 18 USCS ∂ 202.
Salary of government officials and employees payable only by the United States, 18 USCS ∂ 209.
Exemptions from provisions, 18 USCS ∂ 281.
Purchase of certain claims against United States forbidden, 18 USCS ∂ 291.
Conflict of interest in mail contracts, 18 USCS ∂ 440.
Applicability to State personnel assigned to Department of Health, Education and Welfare, 42 USCS ∂ 246.
Applicability to Federal cochairman and personnel Regional Action Planning Commissions, 42 USCS ∂ 3188.
USCS Administrative Rules, CAB, 14 CFR Parts 300 and 302.
This section is referred to in 5 USCS ∂ 3374; 12 USCS ∂ 1457; 15 USCS ∂ 763; 18 USCS ∂∂ 14, 202; 40 USCS Appx. ∂ 108; 42 USCS ∂∂ 246, 3188.
As to sentencing guidelines for this section, see the appendix entitled "Sentencing Guidelines for U.S. Courts" at the end of Title 18.

RESEARCH GUIDE

FEDERAL PROCEDURE L ED:
Foreign Relations, Fed Proc L Ed ∂ 36:451.
20 Fed Proc, L Ed ∂ 48:22.

AM JUR:
17 Am Jur 2d, Contracts ∂ 168.
63A Am Jur 2d, Public Officers and Employees ∂ 338, 342, 344, 346, 423.

AM JUR TRIALS:
Representing the Government Contractor, 14 Am Jur Trials 452--455.

FORMS:

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15A Am Jur Legal Forms 2d, Public Works and Contracts ∂ 216:2.

ANNOTATIONS:

Construction and application of statute (18 USCS ∂ 208) making interest in private business bar to acting for government. 5 L Ed 2d 268.

What constitutes acts affecting personal financial interest within meaning of 18 USCS ∂ 208 (a), penalizing participation by government employees in matters in which they have personal financial interest. 59 ALR Fed 872.

LAW REVIEW ARTICLES:

Kalo, Deterring Misuse of Confidential Government Information: A Proposed Citizens' Action. 72 Mich L Rev 1577.

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I. IN GENERAL

1. Generally

Public policy was not contravened where defendant was government's agent and his commission, although nominally paid by vendor, amounted to payment by government to him as agent. Muschany v United States (1945) 324 US 49, 89 L Ed 744, 65 S Ct 442.

Predecessor to 18 USCS ∂ 208 was not limited in its application to those in highest echelons of government service, or to those government agents who have only direct financial interest in business entities with which they negotiate on behalf of government, or to narrow class of business transactions. United States v Mississippi Valley Generating Co. (1961) 364 US 520, 5 L Ed 2d 268, 81 S Ct 294, reh den 365 US 855, 5 L Ed 2d 820, 81 S Ct 798.

No violation of predecessor to 18 USCS ∂ 208 occurred where government, in order to obtain maximum production of military materials during war time, advanced certain portion of purchase price which defendant collected and later

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reimbursed government for money advanced for its sales; testimony unquestionably disclosed that government was not actual purchaser. Atkinson v New Britain Mach. Co. (1946, CA7 Ill) 154 F2d 895.

Contracting agency did not act in arbitrary or irrational manner where it rejected bid from corporation, despite fact that corporation had best bid, because of appearance of impropriety caused by bidder's employment of individual from agency who had participated in bidding process and had insider information. NKF Engineering, Inc. v United States (1986, CA FC) 805 F2d 372, 33 CCF para. 74691.

18 USCS § 208 (a) does not require pleading of specific acts of negotiating or specific bilateral arrangements because terms "negotiating" and "arrangement" are common words of universal usage and person of ordinary intelligence has fair notice of conduct proscribed by statute. United States v Conlon (1980) 202 App DC 150, 628 F2d 150, later app 213 App DC 14, 661 F2d 235, cert den 454 US 1149, 71 L Ed 2d 304, 102 S Ct 1015.

Army officer should not have been assigned to maintain liaison with private corporation of which he was officer and stockholder; a person whose duty it was to serve public should not have been put into position where he could also serve his selfish interests. (1942) 40 Op Atty. Gen. 168.

18 USCS § 208 did not prohibit public officer from carrying on private business activity for compensation except when private activity touched upon some interest of government and fell within statutes aimed at improper conflicts of interest, or when officer was subject to one of several statutes forbidding specified officers to engage in private business activities. (1942) 40 Op Atty Gen 187.

1.5. Constitutionality

18 USCS § 208 may be interpreted in such a way as to save it from being impermissibly vague; thus, "arrangement" must require allegations of specific bilateral arrangements or acts of arranging and "negotiating" must require allegations of specific acts of negotiating by defendant in concert with prospective employer; similarly, statute must require specific intent in order to avoid impermissible vagueness. United States v Conlon (1979, DC Dist Col) 481 F Supp 654.

2. Purpose

Predecessor to 18 USCS § 208 is, like other conflict-of-interest statutes, designed to prohibit government officials from engaging in conduct that might be inimical to best interest of general public and its purpose is to insure honesty in government's business dealings by preventing federal agents with interests adverse to government from advancing own interest at expense of public welfare. United States v Mississippi Valley Generating Co. (1961) 364 US 520, 5 L Ed 2d 268, 81 S Ct 294, reh den 365 US 855, 5 L Ed 2d 820, 81 S Ct 798.

Purpose of 18 USCS §§ 201 and 208 is to protect government from corruption and self-interested financial dealing, and their function is to protect public from corrupting influences that might be brought to bear upon government agents who are financially interested in business transactions which they are conducting on behalf of government. San Francisco v United States (1977, DC Cal) 443 F Supp 1116.

3. Construction

Predecessor to 18 USCS § 208 laid down general rule for protection of United States in transactions between it and corporations and to prevent its action from being influenced by any one interested adversely to it; it was penal statute and was not to be extended to cases not clearly within its terms or to

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those exceptional to its spirit and purpose. United States v Chemical Foundation, Inc. (1926) 272 US 1, 71 L Ed 131, 47 S Ct 1.

Phrase "or otherwise" in 18 USCS ∂ 208 (a) must be construed to include causing delivery to be made of equipment and receiving payment of moneys for equipment under contract involving conflict of interest since legislative history of section demonstrates intention to proscribe broadly employee participation in business transactions involving conflicts of interest and to reach activities at various stages of these transactions including those activities specifically enumerated. United States v Irons (1981, CA7 Ill) 640 F2d 872, 59 ALR Fed 859.

18 USCS ∂ 208 does not allow multiple counts, where indictment charged separate violation of ∂ 208 for every invoice which defendant signed under single contract, since matter may form separate base for liability under ∂ 208 only if it is discrete transaction, not part of larger transaction, and not continuous or overlapping with another matter. United States v Jewell (1987, CA9 Nev) 827 F2d 586.

Former Air Force officer's conduct amounted to "negotiation" for employment in violation of 18 USCS ∂ 208, where, while representing Air Force on project, he applied for job and interviewed with firm which was negotiating with Air Force for contract project, although he was not offered job until months later when he was on inactive status, since to require that statute did not apply until formal offer of employment was made would be to read statute too narrowly, and statute is to be construed broadly. United States v Schaltenbrand (1991, CA11 Ga) 922 F2d 1565.

Air Force reserve officer "negotiated" with prospective corporate employer within meaning of 18 USCS ∂ 208 during period in which he had conflict of interest, where he approached prospective employer, filled out application, came for interview, discussed qualifications and indicated willingness to meet them, even though neither side had made formal offer until after he was finished with project which caused conflict of interest, since his purpose in applying and interviewing was in effect to offer himself to prospective employer. United States v Schaltenbrand (1991, CA11 Ga) 930 F2d 1554.

18 USCS ∂ 208 may be interpreted in such a way as to save it from being impermissibly vague; thus, "arrangement" must require allegations of specific bilateral arrangements or acts of arranging and "negotiating" must require allegations of specific acts of negotiating by defendant in concert with prospective employer; similarly, statute must require specific intent in order to avoid impermissible vagueness. United States v Conlon (1979, DC Dist Col) 481 F Supp 654.

In order for 18 USCS ∂ 203(a) to be valid, "arrangement" must be construed to require allegations of specific bilateral arrangements or acts of arranging; similarly, "negotiating" must require allegations of specific acts of negotiating by defendant in concert with prospective employer. United States v Conlon (1979, DC Dist Col) 481 F Supp 654.

3.5. Relationship with other statutes

Civil Service Reform Act (5 USCS ∂∂ 2302 and 3110) does not repeal by implication application of 18 USCS ∂ 208 to defendant who committed nepotism in federal personnel matters, since nothing in 18 USCS ∂ 208 or its legislative history suggests that Congress intended to limit government's choice of penalties. United States v Rogers (1988, CA4 NC) 853 F2d 249, 88-2 USTC para.9538, 62 AFTR 2d 88-5340, cert den (US) 57 USLW 3333.

4. Accounting and restitution of profits

No presumption arose that corporation's purpose in employing government

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employee at better salary was to reward him for contract negotiations where corporate profits were not excessive and unconscionable, and United States was not entitled to recover in action against corporation for accounting and restitution of allegedly exhorbitant profits realized under contract. United States v Goldfield (1967, CA10) 384 F2d 669.

Government was entitled to recover amount paid to contractor pursuant to contract which violated 18 USCS ∂ 208 (a). K & R Engineering Co. v United States (1980) 222 Ct Cl 340, 616 F2d 469, 27 CCF para. 80205.

5. Right to damages, recovery quantum valebat

Recovery quantum valebat is not appropriate in suit by private party to recover sums expended in connection with contract canceled for violation of predecessor to 18 USCS ∂ 208, since such remedy is appropriate only where one party to transaction has received and retained tangible benefits from other party. United States v Mississippi Valley Generating Co. (1961) 364 US 520, 5 L Ed 2d 268, 81 S Ct 294, reh den 365 US 855, 5 L Ed 2d 820, 81 S Ct 798.

Plaintiff contractor could not bring action seeking to recover damages for alleged breach of contract terminated by government for its convenience since agreement was prohibited by 18 USCS ∂ 208; neither could contractor recover under quantum valebat theory. K & R Engineering Co. v United States (1980) 222 Ct Cl 340, 616 F2d 469, 27 CCF para. 80205.

18 USCS ∂∂ 201 and 208 may not be construed to imply private right of damages against either federal employees allegedly acting improperly or against private defendants accused of acting in combination with such employees. San Francisco v United States (1977, DC Cal) 443 F Supp 1116.

6. Validity and enforcement of contract

Contracts made in violation of predecessor to 18 USCS ∂ 208 are not enforceable, even though party seeking enforcement ostensibly appears entirely innocent; in determining whether contract tainted by violation of predecessor to ∂ 208 renders contracts unenforceable, fact that ∂ 208 does not specifically provide for invalidation of contracts is not determinate since statute frequently implies that contract is not to be enforced when it arises out of circumstances that would lead enforcement to offend essential purpose. United States v Mississippi Valley Generating Co. (1961) 364 US 520, 5 L Ed 2d 268, 81 S Ct 294, reh den 365 US 855, 5 L Ed 2d 820, 81 S Ct 798.

Employment contract between plaintiff former government employee and defendant private corporation was not enforceable where arrangement was in clear violation of 18 USCS ∂∂ 208 and 209. Jordan v Axicom Systems, Inc. (1972, DC Dist Col) 351 F Supp 1134, affd without op 160 App DC 148, 489 F2d 1272.

Conflict-of-interest by officer of Corps of Engineers with financial interest in contract is grounds for terminating contract without damages against government, whether or not conviction is had or any financial loss to government is shown and government may recover amounts paid under contract. K & R Engineering Co., Inc. v The United States, Ct Cl No. 84-77, Feb. 20, 1980.

7. -Time of appointment

Appointment of physician as designated examiner for Public Health Service subsequent to his agreement with sanitorium under contract with United States Public Health Service did not invalidate pre-existing agreement under predecessor to 18 USCS ∂ 208. Ingalls v Perkins (1927) 33 NM 269, 263 P 761.

II. ELEMENTS OF OFFENSE

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8. Officer or agent

Person is "officer or agent of the United States for the transaction of business" within meaning of predecessor to 18 USCS ∂ 208 even though government consultant has taken no oath of office, has no tenure, receives no salary, and is permitted to continue in position as officer of corporation. United States v Mississippi Valley Generating Co. (1961) 364 US 520, 5 L Ed 2d 268, 81 S Ct 294, reh den 365 US 855, 5 L Ed 2d 820, 81 S Ct 798.

Officer or agent of United States who is administrative head of office which to his knowledge negotiates and enters into contracts with particular business entity, but who does not personally participate in such negotiations or execution of such contracts, and who does not give any particular instructions with regard to those dealings to his subordinates who carry on such dealings under blanket authority, may be found to have engaged in "transaction of business" with such entity within meaning of predecessor to 18 USCS ∂ 208. Smith v United States (1962, CA9 Or) 305 F2d 197, cert den 371 US 890, 9 L Ed 2d 124, 83 S Ct 189 and cert den 371 US 890, 9 L Ed 2d 124, 83 S Ct 190.

Person who as chief of Plant Branch of St. Louis District of Army Corps of Engineers had principal administrative authority over contracts in region was "employee of the executive branch" within meaning of 18 USCS ∂ 208. K & K Engineering Co., Inc. v United States (1980, Ct Cl) 616 F2d 469.

The predecessor to 18 USCS ∂ 208 did not prohibit awarding of contract to firm if member of firm, although officer of United States, did not act as such officer or agent with reference to contract in question. (1903) 24 Op Atty Gen 557.

Award by Air Force of domestic cargo airlift contract negotiated under 10 USCS ∂ 2304(a)(16) pursuant to Class Determinations and Findings to Government corporation that is to be transferred to individual to whom award is contemplated and who is currently operating activity pending Civil Aeronautics Board approval is not improper since services of intended buyer during Government control does not make him "officer or employee" within meaning of 18 USCS ∂∂ 205, 207, 208. (1973) 53 Op Comp Gen 86.

8.5. Agency of United States

Production credit associations are federally chartered instrumentalities and as such are not independent agencies of United States for purposes of 18 USCS ∂ 208. United States v Haynes (1985, MD Tenn) 620 F Supp 474.

9. Transaction of business

Phrase "transaction of business" within meaning of predecessor to 18 USCS ∂ 208 was intended to include any official role played by officer or agent of United States, in connection with dealings between government agency and business entity which reasonably could have been utilized to advance personal pecuniary interest to disadvantage of United States. Smith v United States (1962, CA9 Or) 305 F2d 197, cert den 371 US 890, 9 L Ed 2d 124, 83 S Ct 189 and cert den 371 US 890, 9 L Ed 2d 124, 83 S Ct 190.

10. -Power to bring about result

Fact that government agent had no authority to sign binding contract and that he did not participate in final negotiations resulting in contract does not support conclusion that his participation was too remote and tenuous to be considered "transaction of business" within meaning of predecessor to 18 USCS ∂ 208. United States v Mississippi Valley Generating Co. (1961) 364 US 520, 5 L Ed 2d 268, 81 S Ct 294, reh den 365 US 855, 5 L Ed 2d 820, 81 S Ct 798.

11. Personal interest or benefit

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No violation of predecessor to 18 USCS § 208 occurred where officers of corporation created by President to deal with enemy properties during wartime had no financial interest in corporation, its profits or its contracts, since all corporate shares were paid for by those interested in chemical industries. United States v Chemical Foundation, Inc. (1926) 272 US 1, 71 L Ed 131, 47 S Ct 1.

Government agent is "directly or indirectly interested in pecuniary profits or contracts" of corporation within meaning of predecessor to 18 USCS § 208 where it appears agent was officer and executive of corporation, that he not only shared in profits which corporation made during the year but also received bonus. United States v Mississippi Valley Generating Co. (1961) 364 US 520, 5 L Ed 2d 268, 81 S Ct 294, reh den 365 US 855, 5 L Ed 2d 820, 81 S Ct 798.

Participation of Department of Health, Education and Welfare officer in contracts for purchase of equipment from company with which officer was associated is violative of 18 USCS § 208 (a). United States v Irons (1981, CA7 Ill) 640 F2d 872, 59 ALR Fed 859.

"Financial interest" under 18 USCS § 208 existed on part of individual who allegedly stood to benefit from defendant's official action in conducting criminal bankruptcy investigation, where evidence showed that individual had 10 percent contingent fee arrangement with bankrupt's creditors, and expert testimony indicated that criminal investigation could prompt settlement favorable to individual; financial interest need not be probable so long as possibility of financial loss or gain as result of defendant's official action was real and not speculative. United States v Gorman (1986, CA6 Ohio) 807 F2d 1299, cert den (US) 98 L Ed 2d 32, 108 S Ct 68.

18 USCS § 208 applies to federal employee's participation, on behalf of government, in any application or contract in which he has conflict of interest, not just those involving "outside suppliers of goods and services to government", since that is plain and unambiguous meaning of statute. United States v Rogers (1988, CA4 NC) 853 F2d 249, 88-2 USTC para.9538, 62 AFTR 2d 88-5340, cert den (US) 57 USLW 3333.

Personal interest of prosecutor's husband, who was partner in law firm representing defendant's insurer which was suing defendant for declaratory judgment rescinding his insurance policy, was too remote and speculative to implicate 18 USCS § 208. United States v Tierney (1991, CA8 Mo) 947 F2d 854, 91-2 USTC para.50509, 68 AFTR 2d 91-5742, reh, en banc, den (CA8) 1991 US App LEXIS 29900.

18 USCS § 208 does not bar government employees from participating in contract discussions, negotiations, or evaluations merely because, at earlier time, they had some general discussions with some of bidders about possible employment. CACI, Inc.-Federal v United States (1983, CA FC) 719 F2d 1567, 31 CCF para. 71709, 71 ALR Fed 338.

Violation of 18 USCS § 208 occurs where person who is civil servant of long tenure, while officially engaged in his duties negotiates for and consumates agreement of employment with private firm, to become effective upon his government retirement. United States v Conlon (1981) 213 App DC 14, 661 F2d 235, cert den 454 US 1149, 71 L Ed 2d 304, 102 S Ct 1015.

It is improper for prosecutor to participate in case where he has pecuniary interest in outcome; threat posed to prosecutor's interest in his personal and professional reputation by bona fide civil action alleging bad faith in performance of his official duties should give rise to such concern. United States v Heldt (1981) 215 App DC 206, 668 F2d 1238, cert den 456 US 926, 72 L Ed 2d 440, 102 S Ct 1971.

Former Secretary of Department of Transportation did not violate 18 USCS § 208 by his involvement in proceeding in which he denied investigation of

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continuing fitness of airline, while negotiating for partnership with law firm which had represented airline in other matters, since link between official and projected beneficiary was too attenuated. Air Line Pilots Assn., Int'l v United States DOT (1990, App DC) 899 F2d 1230.

Defendant's holding of vested pension while serving as non-voting ex officio member of DOE board was financial interest too insubstantial to have constituted basis for violation of 18 USCS ∂ 208. TRW Environmental Safety Systems, Inc. v United States (1989) 18 Cl Ct 33, 35 CCF para. 75712.

Executive branch employee knowingly had "financial interest" in government contracts where construction company entered into agreement with him to pay him certain percentage of profits realized on all contracts which company would obtain from government. K & R Engineering Co. v United States (1980) 222 Ct Cl 340, 616 F2d 469, 27 CCF para. 80205.

Where plaintiff entity is deemed not to be within class designed to be protected by conflict of interest statute, 18 USCS ∂ 208 (a) is not applicable. Exchange Nat. Bank v Abramson (1969, DC Minn) 295 F Supp 87.

Plaintiff's claim that certain individuals connected with government's cancer research program had acted with conflict of interest in violation of 18 USCS ∂ 208 in denying him grant money was rejected by court; fact that these individuals or institutions with which they were associated were also recipients of grant funded by same institute did not create conflict of interest since individuals involved would in no way personally benefit financially by denying grant money to plaintiff. Grassetti v Weinberger (1976, DC Cal) 408 Supp 142.

Insubstantial financial interests are not prohibited by 18 USCS ∂ 208. United States v Conlon (1979, DC Dist Col) 481 F Supp 654.

Chairman of Federal Trade Commission is not required to recuse himself in defects case against car manufacturer, even though chairman before coming to FTC had been chairman of economic consulting firm whose largest client was car manufacturer, where refusal was sought for only appearance, not actual, conflict of interest. Center for Auto Safety v FTC (1984, DC Dist Col) 586 F Supp 1245, 1984-1 CCH Trade Cases para. 65954.

Federal employee's nepotism on behalf of wife, who works for same agency and whose relationship with husband was not disclosed to agency, does not violate 18 USCS ∂ 208 (a), because statute's meaning is unclear, statute apparently never before has been applied to intra-agency nepotism, and civil penalties for husband's alleged conduct can be sought under 5 USCS ∂ 2302(b)(7). United States v Lund (1987, ED Va) 670 F Supp 654.

12. Intent of official

Predecessor to 18 USCS ∂ 208 established objective standard of conduct, it being immaterial whether there is actual corruption on official's part. United States v Mississippi Valley Generating Co. (1961) 364 US 520, 5 L Ed 2d 268, 81 S Ct 294, reh den 365 US 855, 5 L Ed 2d 820, 81 S Ct 798.

18 USCS ∂ 208 is strict liability statute for which scienter is not element, since statute is not ambiguous. United States v Hedges (1990, CA11 Ala) 912 F2d 1397.

18 USCS ∂ 208 (a) must require specific intent for statute to be valid. United States v Conlon (1979, DC Dist Col) 481 F Supp 654.

Program manager, convicted of conflicts of interest and obstruction of justice, is not entitled to new trial, despite general intent instruction given jury with respect to conflict of interest laws, because legislative history, other cases, and related statutes indicate that specific intent is not requisite element of 18 USCS ∂ 208 (a). United States v Lord (1989, ED Va) 710 F Supp 615.

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13. Dealings by subordinates

No federal officer has power to exempt subordinate officer from prohibitions of predecessor to 18 USCS ∂ 208. United States v Mississippi Valley Generating Co. (1961) 364 US 520, 5 L Ed 2d 268, 81 S Ct 294, reh den 365 US 855, 5 L Ed 2d 820, 81 S Ct 798.

Administrative head of government office who knows that subordinates in office, subject to his control, are dealing with particular business entity is in position to benefit that company to detriment of government, by giving or withholding of general or specific instructions; whether he actually gives or withholds instructions for that purpose is immaterial. Smith v United States (1962, CA9 Or) 305 F2d 197, cert den 371 US 890, 9 L Ed 2d 124, 83 S Ct 189 and cert den 371 US 890, 9 L Ed 2d 124, 83 S Ct 190.

III. DEFENSES

14. Defenses, generally

In determining whether violation of predecessor to 18 USCS ∂ 208 occurred where agent was simultaneously government's key representative in preliminary negotiations between government and electric power project sponsors and profit-sharing officer of corporation likely to benefit from contract, following matters are immaterial (1) policy of administration concerning relative merits of public versus private power development, (2) desire of private party to contract and agent and corporate associates to advance administration policies, (3) fact that persons such as agent were retained on nominal basis to advise government in matters of business, industry, labor and sciences, and (4) reasonableness or unreasonableness of contract ultimately negotiated. United States v Mississippi Valley Generating Co. (1961) 364 US 520, 5 L Ed 2d 268, 81 S Ct 294, reh den 365 US 855, 5 L Ed 2d 820, 81 S Ct 798.

15. Failure to adversely affect government

"Fact that government agent's activities did not adversely affect government in any way is irrelevant to consideration of whether he violated predecessor to 18 USCS ∂ 208, since statute lays down absolute standard of conduct which is violated by entering into relationship which makes it difficult for agent to represent government with singleness of purpose required. United States v Mississippi Valley Generating Co. (1961) 364 US 520, 5 L Ed 2d 268, 81 S Ct 294, reh den 365 US 855, 5 L Ed 2d 820, 81 S Ct 798.

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3RD CASE of Level 3 printed in FULL format.

United States of America v. Manuel W. Vetti

Civil No. H-87-773 (PCD)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

681 F. Supp. 986; 1988 U.S. Dist. LEXIS 2420

March 22, 1988, Decided; March 23, 1988, Filed

COUNSEL: {**1}

W. Philip Jones, Assistant U.S. Attorney, Hartford, Connecticut, Attorney for Plaintiff.

Sally S. King, Esq., Robinson & Cole, Hartford, Connecticut, Attorney for Defendant

OPINIONBY: DORSEY

OPINION: {*987} RULING ON MOTION FOR SUMMARY JUDGMENT

Peter C. Dorsey, United States District Judge

I. Facts and Procedural History n1

n1 Except where noted, the facts and procedural history of this case are not disputed and are adopted in large part from plaintiff's statement of material facts not in dispute ("Statement"), Local Rule 9(c)

"On August 5, 1976, while an employee of the United States Postal Service, defendant filed a claim for benefits under the Federal Employees' Compensation Act ("FECA")," Statement, para. 1, for hypertension, cephalalgia, n2 sleeplessness, and high blood pressure, allegedly as a result of occupation related events.

n2 Cephalalgia is commonly defined as a headache. Webster's Third New International Dictionary at 364 (1981).

Apparently, in the early 1970s, defendant, along with a number of associates, owned several parcels of property in Stamford, Connecticut, which were offered for sale to the Postal Service. Defendant's involvement with these properties and his potential {**2} conflict of interest prompted investigations by his superiors and the United States Attorney. A subsequent indictment resulted in defendant's eventual conviction in 1979 on a charge that he participated, as a government employee, in a decision or recommendation which knew he had a financial interest, in violation of 18 U.S.C. @ 208 (a). See Employees' Compensation Appeals Board ("ECAB") Decision and Order (3/18/82).

Defendant claimed that the investigations, the suspension of further merit increases until the investigations were concluded, and the attack on his honor and integrity caused his medical problems. Id. {*988} "Compensation was awarded from September 30, 1976 through February 28, 1977 and April 1977 through February 5, 1981." Statement, para. 3. "On February 23, 1981 the Director of

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Office of Workers' 'Compensation Programs ("OWCP") issued an order rejecting defendant's claims." Id., para. 4. The Director found that defendant's medical problems were not the result "of his Federal employment as a Postmaster were not the result "of his Federal employment as a Postmaster, but related to his outside business activities." Compensation Order at 1 (2/23/81). Defendant's subsequent {**3} application for review was denied. Statement, paras. 6-7.

After the OWCPL's decision, defendant was informed that he had been overpaid in the amount of $ 102,329.32. Id., para. 9. Defendant sought review of both the denial of his benefits and a review of the overpayment order. Id., paras. 11-15. On March 18, 1982, the ECAB affirmed OWCP's decision denying defendant further benefits. Id., paras. 16-17. "On August 9, 1984 an OWCP hearing representative ("HR") conducted a hearing on the issues of: a. overpayment; b. amount of overpayment; c. existence of absence of fault by defendant." Id., para. 22. The HR found that the correct amount of overpayment was $ 102,329.32 and that defendant was not without fault in causing the overpayment. See Decision of HR (1/25/85). Specifically, the HR found that defendant should have known that he was not entitled to benefits because his problems related to his "outside business association and his financial interest in certain parcels of property. " Id. at 4. By representing that his medical problems were job related, defendant was found to have violated 5 U.S.C. @ 8129(a). n3 "On July 23, 1985 OWCP moved the ECAB to remand for {**4} a further hearing as there had been an incorrect finding as to {defendant's} fault." Statement, para. 26. the motion was subsequently granted. Id., para. 28.

n3 Section 8129 provides:

(a) When an overpayment has been made to an individual under this subchapter because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which the individual is entitled. If the individual dies before the adjustment is completed, adjustment shall be made by decreasing later benefits payable under this subchapter with respect to the individual's death.

(b) Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.

(c) A certifying or disbursing official is not liable for an amount certified or paid by him when --

(1) adjustment or recovery of the amount is waived under subsection (b) of this section; or

(2) adjustment under subsection (a) of this section is not completed before the death of all individuals against whose benefits deductions are authorized. {**5}

On remand, the HR issued a new decision on January 7, 1986, and found defendant without fault in creating the overpayment. Id., paras. 30-32. However, waiver of the overpayment was denied. Although defendant was found to be without fault in causing the payments, the HR concluded that recovery would not defeat the purpose of the FECA and would not be against equity and good conscience. This conclusion was based on the HR's finding that defendant had

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sufficient assets to afford repayment.

Defendant appealed the HR decision on April 9, 1986. On March 31, 1987, the ECAB affirmed the HR's decision denying a waiver based on defendant's estimated asset worth of $ 584,833.78. See ECAB Decision and Order (3/31/87). Several demand letters have subsequently been sent to defendant requesting overpayment. No payment has yet been mad.

On October 2, 1987, plaintiff instituted this action seeking recovery from defendant of the $ 102,329.32 in FECA overpayments made to him, plus interest to date of judgment. defendant denies plaintiff's entitlement to repayment on the basis that the procedures "followed by the U.S. Department of Labor, Office of Workers' Compensation Programs in purporting {**6} to determine and assess the amount of alleged overpayment to defendant violated the due process rights guaranteed to the defendant by the Fifth Amendment to the U.S. Constitution." Defendant's Answer {*989} at 1. Plaintiff has moved for summary judgment. For the reasons set forth herein, the motion is denied in part and granted in part.

II. Discussion

A. Summary Judgment

. . . Fed. R. Civ. P. 56(c) provides, in part, that summary judgment shall be rendered only when a review of the entire record demonstrates "that there is no genuine issue as to any material fact." The burden falls on the moving party to establish that no relevant facts are in dispute. Heyman v. Commerce & Indus. Ins. Co., 524 F.2d 1317, 1319-20 (2d Cir. 1975); accord Addickes v. S.H. Kress & Co., 398 U.S. 144, 157 . . . (1970). Moreover, in determining whether a genuine issue has been raised, a court must resolve all ambiguities and draw all reasonable inferences against the moving party. United States v. Diebold, Inc., 369 U.S. 654, 655 . . . (1962) (per curiam); Quinn v. Syracuse Model Neighborhood Corp., 613 F.2d 438, 445 (2d Cir. 1980).

Properly employed, summary judgment allows the court {**7} to dispose of meritless claims before becoming entrenched in a frivolous and costly trial. Knight v. U.S. Fire Inc. Co., 804 F.2d 9 (2d Cir. 1986), cert. denied, . . . 107 S. Ct. 1570 . . . (1987). It must, however, be used selectively to avoid trial by affidavit. Judge v. Buffalo, 524 F.2d 1321 (2d Cir. 1975). Hence, the fundamental maxim remains that on a motion for summary judgment a court "cannot try issue of fact; it can only determine whether there are issues to be tried." Heyman, 524 F.2d at 1319-20. As long as the plaintiff has adduced sufficient facts to substantiate the elements of his claim, summary judgment is inappropriate. Celotex Corp. v. Catrett, . . . 106 S. Ct. 2548, 2554 . . . (1986).

Donahue v. Windsor Locks Bd. of Fire Comm'rs, 834 F.2d 54, 57-58 (2d Cir. 1987).

B. Plaintiff's Argument

Relying principally on 5 U.S.C. @ 8128(b), plaintiff contends that the decision of March 31, 1987, is final and unreviewable. Section 8128(b) provides, in relevant part:

The action of the Secretary or his designee in allowing or denying a payment

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under this subchapter is --

(1) final and conclusive for all purposes and with respect to all questions {**8} of law of fact; and

(2) not subject to review by another official of the United States or by a court by mandamus or otherwise.

Under plaintiff's reading of the statute, the court only has the authority to hear constitutional challenges to the actions of the Secretary. It argues that defendant's fifth amendment challenge in this case is meritless as it is clear that the Secretary followed the regulations set out at 20 C.F.R. @ 10.321 and in so doing provided defendant the process to which he was due.

C. Defendant's Argument

Defendant argues that @ 8128(b) does not preclude judicial review in this instance as he is not seeking reconsideration of a decision "allowing or denying payment," but the decision on his obligation to reimburse the government for payments which were found in retrospect to have seen incorrectly made. His contention, therefore, is that denial of judicial review of the Secretary's decision in this regard would amount to a deprivation of property without due process of law. Defendant also argues that whether repayment would defeat the purpose of the FECA or "would be against equity and good conscience" are questions which are inappropriate for summary {**9} judgment.

III. Conclusion

A. Constitutional Challenge

Plaintiff concedes that the court is authorized to hear constitutional challenges to the Secretary's actions See Paluca v. Secretary, 813 F.2d 524, 526 (1st Cir.), cert. denied, 108 S. Ct. 328 (1987), citing Rodriquez v. Donovan, 769 F.2d 1344, 1347-48 (9th Cir. 1985) {*990} (@ 8128(b)'s language "under this subchapter" "refers to statutory, and not constitutional action"). One may not circumvent the statute by disguising a claim for benefits or an objection to the denial of benefits as a constitutional challenge. Traynor v. Walters, 791 F.2d 226, 228 (2d Cir. 1986), cert. granted, 107 S. Ct. 1368 (1987); Pappanikoloaou v. Administrator of the VA, 762 F.2d 8, 9 (2d Cir.), cert. denied, 474 U.S. 851 (1985). To be considered, the Secretary's actions must be challenged as constitutionally defective, viz, in this case, that the decision to recoup and determine the amount of the alleged overpayment constituted a deprivation of property without due process of law. In this light, defendant's argument that these questions are inappropriate for summary judgment is unsound. Whether the Secretary made {**10} the correct decision depends on the merits of the dispute and presents a statutory challenge; whether he afforded defendant the due process rights guaranteed to him by the fifth amendment is a constitutional question and does not involve the merits of the dispute. The correctness of the decision raises questions of material fact which preclude summary judgment. See infra. The due process issue poses no question of fact and warrants the entry of judgment for plaintiff.

Defendant had a property interest in the retention of the benefits paid to him. See Goldberg v. Kelly, 397 U.S. 254 (1970). Before he is deprived of that interest he must be afforded notice and opportunity for a hearing appropriate

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to the nature of the case. Bell v. Burson, 402 U.S. 535, 542 (1971). "Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property. " Carey v. Piphus, 435 U.S. 247, 259 (1978). In determining what process is due, "we must weigh the strength of the individual's interest, the risk of erroneous deprivation, the probable value, if any, of requested additional procedures, and {**11} the state's interest in providing (or not providing) those procedures." Baden v. Koch, 799 F.2d 825, 831 (2d Cir. 1986); accord Matthew v. Eldridge, 424 U.S. 319 (1976).

The record illustrates the procedures afforded defendant to ensure that his position was heard and considered. Those procedures, detailed at 20 C.F.R. ∂ 10.321, undeniably provide defendant with the notice and opportunity to be heard to which he is constitutionally entitled. The record also illustrates that defendant took advantage of each of these procedures. Indeed, he succeeded in obtaining a reversal of the HR's initial decision that he was at fault in causing the benefits to be paid. Defendant's only claim as to this procedure is that the court should be part of the process. But the fifth amendment does not require that the courts act as forums for final review on the merits of individual cases. Bishop v. Wood, 426 U.S. 341, 349-50 (1976). It only requires that the court ensure that the procedures afforded one whose life, liberty or property is subject to deprivation are adequate. The procedures set out at ∂ 10.321 are found to be adequate and have been provided to defendant. Accordingly, so much {**12} of the defense which is based on a constitutional challenge must be rejected and summary judgment entered for plaintiff in this regard.

B. Statutory Challenge

The heart of defendant's challenge is that he is entitled to review of the Secretary's decision that requiring him to return the payments would be consistent with the purposes of the FECA and not against equity or good conscience. As noted previously, this question and the question regarding how much money should be repaid are not constitutional challenges, but challenges to the application of the statute.

Section 8129 provides for the recovery of overpayments made to an individual because of an error of fact or law. Although the statute does not cover the situation when an overpayment or improper payment has been made and no future payments are available from which to recoup the past overpayment, Regulation ∂ 10.321(b) provides that the individual should make the {*991} appropriate refund. Unlike ∂ 8128, neither ∂ 8129 nor its implementing regulations contain a provision that the Secretary's decision is final and conclusive. Section 8128 provides the Secretary with unreviewable discretion in "allowing or denying a payment." {**13} It has nothing to do with the recoupment of payments which have already been allowed. See Paluca, 813 F.2d at 528 (distinguishing United States v. Lorenzetti, 467 U.S. 167 (1984), as holding that ∂ 8132 -- concerning the reimbursement to the Employees' Compensation Fund of compensation received from a tort judgment rendered under a state no-fault insurance statute -- did not preclude judicial review). In ∂ 8128(b), Congress chose language which was comprehensive and unambiguously precluded judicial review. Lindahl v. OPM, 470 U.S. 768, 780, n.13 (1985). Its failure to use the same language in ∂ 8129 strongly suggests that it did not intend to vest the Secretary with unreviewable discretion with regard to decisions made under that suggestion. Id.

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Accordingly, to the extent plaintiff's motion seeks to preclude defendant from challenging the Secretary's decision that it would not be inconsistent with the purpose of the FECA nor against equity or good conscience to order defendant to repay the benefits he received it is denied. Section 8129 does not provide plaintiff with final authority nor does it bar judicial review. The statute does not prevent defendant from contesting {**14} the amount of the overpayment. The motion is granted with respect to defendant's challenge of the Secretary's decision as a deprivation of property without due process of law.

Plaintiff's motion is, therefore, granted in part and denied in part. The parties shall report as to their time requirements for further pretrial processing of this matter, including motions, on or before April 5, 1988.

SO ORDERED.

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of slaves from United States

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73.)

al and Revision Notes

U.S.C., § 253, omitted and "within" substituted, in view of section 5 of this title defining "United States".

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78 USC

CHAPTER 79—PERJURY

Sec.
1621. Perjury generally.
1622. Subornation of perjury.
1623. False declarations before grand jury or court.

Historical Note

1970 Amendment. Pub.L. 91–452, Title IV, § 401(a), Oct. 15, 1970, 84 Stat. 933, added item 1623.

§ 1621. Perjury generally

Whoever—

(1) having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true; or

(2) in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code, willfully subscribes as true any material matter which he does not believe to be true;

is guilty of perjury and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States.

(June 25, 1948, c. 645, 62 Stat. 773; Oct. 3, 1964, Pub.L. 88–619, § 1, 78 Stat. 995; Oct. 18, 1976, Pub.L. 94–550, § 2, 90 Stat. 2534.)

Historical and Revision Notes

Reviser's Note. Based on Title 18, U.S.C., 1940 ed., §§ 231, 629 (Mar. 4, 1909, c. 321, § 125, 35 Stat. 1111; June 15, 1917, c. 30, Title XI, § 19, 40 Stat. 230).

Words "except as otherwise expressly provided by law" were inserted to avoid conflict with perjury provisions in other titles where the punishment and application vary.

More than 25 additional provisions are in the code. For construction and application of several such sections, see Behrle v. United States (App.D.C.1938, 100 F.2d 714), United States v. Hammer (D.C.N.Y.1924, 299 F. 1011, affirmed, 6 F.2d 786), Rosenthal v. United States (1918, 248 F. 684, 160 C.C.A. 584), cf. Epstein v. United States (1912, 196 F. 354, 116 C.C.A. 174, certiorari denied 32 S.Ct. 527, 223 U.S. 731, 56 L.Ed. 634).

Mandatory-punishment provisions were rephrased in the alternative.

Minor verbal changes were made.

1976 Amendment. Pub.L. 94–550 divided existing provisions into a single introductory word "Whoever", par. (1), and closing provisions following par. (2), and added par. (2).

1964 Amendment. Pub.L. 88–619 inserted "This section is applicable whether the statement or subscription is made within or without the United States."

thirty days during any period of three hundred and sixty-five consecutive days, temporary duties either on a full-time or intermittent basis, a part-time United States commissioner, a part-time United States magistrate, or, regardless of the number of days of appointment, an independent counsel appointed under chapter 40 of title 28 and any person appointed by that independent counsel under section 594(c) of title 28. Notwithstanding the next preceding sentence, every person serving as a part-time local representative of a Member of Congress in the Member's home district or State shall be classified as a special Government employee. Notwithstanding section 29(c) and (d) of the Act of August 10, 1956 (70A Stat. 632; 5 U.S.C. 30r(c) and (d)), a Reserve officer of the Armed Forces, or an officer of the National Guard of the United States, unless otherwise an officer or employee of the United States, shall be classified as a special Government employee while on active duty solely for training. A Reserve officer of the Armed Forces or an officer of the National Guard of the United States who is voluntarily serving a period of extended active duty in excess of one hundred and thirty days shall be classified as an officer of the United States within the meaning of section 203 and sections 205 through 209 and 218. A Reserve officer of the Armed Forces or an officer of the National Guard of the United States who is serving involuntarily shall be classified as a special Government employee. The terms "officer or employee" and "special Government employee" as used in sections 203, 205, 207 through 209, and 218, shall not include enlisted members of the Armed Forces.

[See main volume for text of (b)]

(c) Except as otherwise provided in such sections, the terms "officer" and "employee" in sections 203, 205, 207 through 209, and 218 of this title shall not include the President, the Vice President, a Member of Congress, or a Federal judge.

(d) The term "Member of Congress" in sections 204 and 207 means—

(1) a United States Senator; and

(2) a Representative in, or a Delegate or Resident Commissioner to, the House of Representatives.

(e) As used in this chapter, the term—

(1) "executive branch" includes each executive agency as defined in title 5, and any other entity or administrative unit in the executive branch;

(2) "judicial branch" means the Supreme Court of the United States; the United States courts of appeals; the United States district courts; the Court of International Trade; the United States bankruptcy courts; any court created pursuant to article I of the United States Constitution, including the Court of Military Appeals, the United States Claims Court, and the United States Tax Court, but not including a court of a territory or possession of the United States; the Federal Judicial Center; and any other agency, office, or entity in the judicial branch; and

(3) "legislative branch" means—

(A) the Congress; and

(B) the Office of the Architect of the Capitol, the United States Botanic Garden, the General Accounting Office, the Government Printing Office, the Library of Congress, the Office of Technology Assessment, the Congressional Budget Office, the United States Capitol Police, and any other agency, entity, office, or commission established in the legislative branch.

(As amended Pub.L. 100-191, § 3(a), Dec. 15, 1987, 101 Stat. 1306; Pub.L. 101-194, Title IV, § 401, Nov. 30, 1989, 103 Stat. 1747; Pub.L. 101-280, § 5(a), May 4, 1990, 104 Stat. 158.)

HISTORICAL AND STATUTORY NOTES

1990 Amendment

Subsec. (c). Pub.L. 101-280, § 5(a)(1), added provisions relating to section 218 of this title and struck out provisions referring to definitions of "officers" and "employees" found in sections 2104 and 2105, respectively, of Title 5, Government Organization and Employees.

Subsec. (d). Pub.L. 101-280, § 5(a)(2), substituted "means" for "shall include".

Subsec. (e)(1). Pub.L. 101-280, § 5(a)(3)(1), substituted "includes each" for "means any".

Subsec. (e)(3)(A). Pub.L. 101-280, § 5(a)(3)(2)(A), substituted provisions relating to the Congress for provisions relating to Members of Congress and any officers or employees of the Senate or of the House of Representatives.

Subsec. (e)(3)(B). Pub.L. 101-280, § 5(a)(3)(2)(B), substituted "the Office" for "an officer or employee".

1989 Amendment

Subsecs. (c) to (e). Pub.L. 101-194 added subsecs. (c) to (e).

1987 Amendment

Subsec. (a). Pub.L. 100-191 expanded the definition of "special Government employee" to include an independent counsel appointed under chapter 40 of title 28 and any person appointed by that independent counsel under section 594(c) of title 28, regardless of the number of days of appointment.

Change of Name

United States magistrate appointed under section 631 of Title 28, Judiciary and Judicial Procedure, to be known as United States magistrate judge after Dec. 1, 1990, with any reference to United States magistrate or magistrate in Title 28, in any other Federal statute, etc., deemed a reference to United States magistrate judge appointed under section 631 of Title 28, see section 321 of Pub.L. 101-650, set out as a note under section 631 of Title 28.

References to United States Claims Court deemed to refer to United States Court of Federal Claims and references to Claims Court deemed to refer to Court of Federal Claims, see section 902(b) of Pub.L. 102-572, set out as a note under section 171 of Title 28, Judiciary and Judicial Procedure.

Effective Date of 1990 Amendment

Amendment by Pub.L. 101-280 effective on May 4, 1990, see section 11 of Pub.L. 101-280, set out as a note under section 101 of Appendix 6 to Title 5, Government Organization and Employees.

Effective Date of 1987 Amendment

Amendment by Pub.L. 100-191 effective Dec. 15, 1987, applicable both to independent counsel proceedings initiated prior to, and still pending on, that date as well as to independent counsel proceedings initiated and independent counsels appointed on and after that date, see section 591 of Title 28, Judiciary and Judicial Procedure.

Legislative History

For legislative history and purpose of Pub.L. 100-191, see 1987 U.S. Code Cong. and Adm. News, p. 2150. See, also, Pub.L. 101-194, 1989 U.S.Code Cong. and Adm.News, p. 1225; Pub.L. 101-280, 1990 U.S. Code Cong. and Adm. News, p. 169.

FEDERAL PRACTICE AND PROCEDURE

Elements of offense to be alleged directly and with certainty, see Wright: Criminal 2d § 126.

CODE OF FEDERAL REGULATIONS

Officers and employees of U.S., claims against and matters affecting governmental activities of—

Practice of special government employee permitted, see 14 CFR 300.12.

Temporary disqualification of former Board Members and employees in matters formerly under their responsibility, see 14 CFR 300.14.

LAW REVIEW COMMENTARIES

And gifts and travel for all—A summary explanation of the Ethics Reform Act of 1989—The move toward greater parity. June E. Edmondson, 37 Fed.B.News & J. 402 (1990).

Mandatory summary jury trial in federal court: Foundationally flawed. 16 Pepperdine L.Rev. 251 (1989).

Proposed standards of conduct for presidential transition workers. Phillip J. Harter Esquire, 36 Fed.B.News & J. 130 (March/April 1989).

Section 205's restriction on pro bono representation by federal attorneys. Carolyn Elefant, 37 Fed.B.News & J. 407 (1990).

NOTES OF DECISIONS

Special government employees 1

1. Special government employees

Reserve officer who is in fact serving more than 130 days is not entitled to conflict of interest statute's exemption that Congress created for reserve officers who serve less than 130 days, whether or not orders changed at some point in the interim. U.S. v. Baird, D.D.C.1991, 778 F.Supp. 540.

So long as Board of Inquiry members, appointed under section 183 of Title 29, Labor, are appointed for terms of not more than 15 days and, whenever reappointed, would serve in total no more than 130 days in any period of 365 consecutive days, they would qualify as special Government employees under this section, and supplementation of their compensation would not be prohibited by section 209 of this title. 1978 (Counsel-Inf.Op.) 2 Op.O.L.C. 264.

Where an informal Presidential adviser has departed from his usual role in connection with his work on a social issue by calling and chairing a number of meetings that were attended by employees of various agencies, in relationship to this work, and assuming considerable responsibility for coordinating the administration's activities in that area, he is engaging in a governmental function when he performs these duties and should be designated as a special government employee for purposes of the Federal conflict-of-interest laws in connection with the work. 1977 (Counsel-Inf. Op.) 1 Op.O.L.C. 20.

§ 203. Compensation to Members of Congress, officers, and others in matters affecting the Government

(a) Whoever, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly—

tures and bribes made with criminal intent that the benefit be received by the official as a quid pro quo for some official act. U.S. v. Head, C.A.Va.1981, 641 F.2d 174.

In prosecution for accepting bribe, trial court's instructions, taken as whole, correctly and clearly charged jury that, in case before them, requisite corrupt intent consisted of defendant's knowing acceptance of money for financial gain, in return for violation of his official duty, with specific intent to violate law. U.S. v. Strand, C.A.Wash.1978, 574 F.2d 993.

In order to properly deny instruction on charge of giving a gratuity to a public official when defendant is charged with bribery, trial court must be able to say that a jury finding of no specific intent would be irrational. U.S. v. Crutchfield, C.A.Nev.1977, 547 F.2d 496.

152. —— Entrapment

Bribery defendant, a government contractor, was not entitled to entrapment instruction where evidence indicated that he had been paying bribes to government inspector overseeing his work for several months before another inspector, who was working undercover, began receiving bribes. U.S. v. Lee, C.A.9 (Cal.) 1988, 846 F.2d 531.

Where border patrolman told defendant that bribing him was illegal, and defendant stated that she knew her actions were unlawful, defendant was not entitled to jury instructions regarding entrapment by estoppel. U.S. v. Hsieh Hui Mei Chen, C.A.Ariz.1985, 754 F.2d 817, certiorari denied 105 S.Ct. 2684, 471 U.S. 1139, 86 L.Ed.2d 701.

In prosecution of United States senator and another on bribery and related charges arising out of Abscam undercover operation, district court did not err in instructing jury that they were not to be concerned with legality or propriety of Abscam investigation where district court properly instructed jury that their function was to decide each defendant's predisposition to commit crimes charged and to consider Abscam tactics only as they related to defense of entrapment. U.S. v. Williams, C.A.N.Y.1983, 705 F.2d 603, certiorari denied 104 S.Ct. 524, 525, 464 U.S. 1007, 78 L.Ed.2d 708.

In bribery prosecution in which person implanting illegal purpose in defendant's mind was "ignorant pawn of the government," trial court, which instructed jury that inducement to commit a crime from a private citizen cannot be deemed sufficient to support a claim of entrapment unless that private citizen was an "agent" of a government officer, committed reversible error in failing to explain the appropriate rules of agency. U.S. v. Anderton, C.A.Tex.1980, 629 F.2d 1044.

In view of want of any evidence whatever tending to show government inducement or defendant's lack of predisposition to commit offense charged, and in view of lack of any evidence of government involvement when defendant first sought out official of company which he had investigated, evidence was insufficient even to raise issue of entrapment to solicit value for work performed as public official, and thus giving instruction on entrapment was not reversible error even though it was assertedly confusing by reason of distinguishing between "legal" and "illegal" entrapment. U.S. v. Dobson, C.A.Tex.1980, 609 F.2d 840, certiorari denied 100 S.Ct. 2925, 446 U.S. 955, 64 L.Ed.2d 813.

In view of disclosures that internal revenue service agent insisted on meeting personally with accused in connection with audit despite accused's efforts to make available all necessary financial papers through his accountant, and in view of fact that accused and accountant both testified that agent repeatedly told accused he had problems with certain claimed expenses and deductions and asked accused what accused wanted agent to do about the problems, denial of accused's request to submit entrapment defense to jury on count two charging offense of gratuitous payment for an official act was erroneous. U.S. v. Cohen, C.A.N.Y.1970, 431 F.2d 830.

Where most defendant who was charged with payment of a bribe or gratuity to internal revenue agents could testify to was that an agent suggested a general financial need several days before $50 was given to the agent, and where there was no evidence given sufficient to warrant a jury finding that the agent induced or initiated the crime, refusal to charge as to entrapment was proper. U.S. v. Barash, C.A.N.Y. 1969, 412 F.2d 26, certiorari denied 90 S.Ct. 86, 396 U.S. 832, 24 L.Ed.2d 82.

153. —— Coercion of jury

Supplemental instruction in bribery prosecution that "you have an obligation to attempt to agree on a verdict" and "to see if you cannot agree without giving up what you believe to be a verdict based on the evidence" and not to "arbitrarily and capriciously give up what [you feel] to be a proper verdict based on the evidence for the sake of unanimity" represented proper attempt to avoid necessity for retrial and was not coercive, even if judge knew that jurors were split 11 to 1 in favor of conviction when instruction was given. U.S. v. Jennings, C.A.N.Y.1973, 471 F.2d 1310, certiorari denied 93 S.Ct. 1909, 411 U.S. 935, 36 L.Ed.2d 395.

154. Deliberations of jury

In prosecution for bribing Internal Revenue Service agent during criminal tax investigation, trial judge did not err in replaying at jury's request all three tape recordings containing defendants' incriminating conversations, even though jury requested that only two of those tapes be replayed, in view of fact that subject matter of tape which jury had not requested was closely related to that of the other two tapes and thus, jury could not have thought that additional playing of that tape indicated any prejudice by judge. U.S. v. Gentile, C.A.N.Y.1975, 525 F.2d 252, certiorari denied 96 S.Ct. 1493, 425 U.S. 903, 47 L.Ed.2d 753.

155. Verdict

Where, with regard to two of the three objects of the conspiracy, indictment rested in large part on acts occurring without limitations period, defendant was entitled to an instruction requiring jury to find an overt act committed within limitations period before it could find him guilty of conspiracy to achieve illegal objectives and trial court's failure to give such instruction as requested constituted reversible error where basis for jury's general verdict could not be perceived with reasonable certainty. U.S. v. Head, C.A.Va.1981, 641 F.2d 174.

Despite fact that defendant was found not guilty of accepting a bribe but was found guilty of lesser included offense of accepting a gratuity, defendant's conviction of engaging in interstate travel in aid of racketeering enterprises was neither logically nor legally inconsistent; even if logical inconsistency existed, there was no legal inconsistency where each verdict was independently supported by evidence. U.S. v. Evans, C.A.Tex.1978, 572 F.2d 455, rehearing denied 576 F.2d 931, certiorari denied 99 S.Ct. 200, 439 U.S. 870, 58 L.Ed.2d 182.

156. Sentence

Defendant was properly sentenced on both Hobbs Act and bribery convictions, even though convictions were based on the same acts, in absence of evidence of congressional intent to proscribe dual punishment under the two statutes. U.S. v. Stephenson, C.A.2 (N.Y.) 1990, 895 F.2d 867.

Where, in prosecution for soliciting money in exchange for promise not to testify at trial of another, each telephone call made by defendant required proof distinct from other, the two calls did not constitute single continuing violation or transaction, for sentencing purposes, though defendant's purpose of making calls, i.e., to market his testimony, was constant. U.S. v. Moore, C.A.Cal.1981, 653 F.2d 384, certiorari denied 102 S.Ct. 680, 454 U.S. 1102, 70 L.Ed.2d 646.

In prosecution wherein defendant was found guilty of asking for or receiving thing of value because of official act performed or to be performed, defendant was not shown to be innocent of bribery and thus no abuse of discretion was shown in imposition of sentence even if judge imposed maximum sentence only or largely because he thought defendant could have been convicted of bribery, but, in any event, defendant was not entitled to relief on appeal in view of his opportunity to seek reduction of sentence pursuant to rule 35, Federal Rules of Criminal Procedure, this title. U.S. v. Dobson, C.A.Tex. 1980, 609 F.2d 840, certiorari denied 100 S.Ct. 2925, 446 U.S. 955, 64 L.Ed.2d 813.

Where essentially the same evidence was relied on to prove both the substantive offenses, i.e., aiding and abetting in offering a bribe and accepting a bribe, and the conspiracy count, the defendant was doubly punished in violation of double jeopardy clause when he was sentenced on both the substantive and conspiracy counts; sentence on conspiracy count, being the longer sentence, would be vacated first so as to avoid any incentive for the government seeking similar multiple punishments in the future. U.S. v. Austin, C.A.Tenn.1976, 529 F.2d 559.

156a. Restitution

General rule, that seized property other than contraband should be returned to its rightful owner at conclusion of criminal proceedings, did not apply to money which was voluntarily given to public officials as gratuity in violation of criminal statute. U.S. v. Kim, E.D.Va.1990, 738 F.Supp. 1002.

158. Review

Where district court dismissed indictment against former senator for solicitation and acceptance of bribes, on ground that this section, as applied to the senator would violate speech or debate clause of Constitution, U.S.C.A. Const. art. 1, § 6, cl. 1, Supreme Court had jurisdiction of direct appeal by Government, despite district judge's statement "based on the facts of this case," which, in context, referred to facts alleged in the indictment. U.S. v. Brewster, Dist.Col. 1972, 92 S.Ct. 2531, 408 U.S. 501, 33 L.Ed.2d 507.

Admission of irrelevant evidence regarding defendant's flight was reversible error, in bribery case in which defendant admitted to willfully offering bribe and in which only remaining question was whether defendant had been entrapped into committing offense. U.S. v. Kang, C.A. 5 (Tex.) 1991, 934 F.2d 621.

Although defense counsel interposed general objection to admission of alleged hearsay testimony of an IRS agent that government's chief witness had admitted to him that he had paid a bribe to defendant in a tax case, objection was insufficient to preserve asserted hearsay claim for appeal, in absence of plain error, where defendant did not request instructions which he claimed should have been given and did not object to trial court's charge on subject. U.S. v. Lipton, C.A.N.Y.1972, 467 F.2d 1161, certiorari denied 93 S.Ct. 1358, 410 U.S. 927, 35 L.Ed.2d 587.

Contention that defendant had been entrapped into conspiring to bribe a government official, bribery of a government official and conspiring to smuggle marijuana into the country would not be considered by reviewing court where such defense was not presented in the court below. U.S. v. Cambre, C.A.Cal.1972, 467 F.2d 216.

Where flaw in bribery indictment under the D.C. Code was highly technical, government's decision to prosecute under such Code rather than under this section, and its decision to appeal dismissal of the original indictment rather than immediately seek a federal indictment did not, in relation to denial of claim of speedy trial, reflect arbitrary, negligent or purposefully oppressive behavior on the part of the Government. U.S. v. Bishton, 1972, 463 F.2d 887, 150 U.S.App.D.C. 51.

§ 202. Definitions

(a) For the purpose of sections 203, 205, 207, 208, and 209 of this title the term "special Government employee" shall mean an officer or employee of the executive or legislative branch of the United States Government, of any independent agency of the United States or of the District of Columbia, who is retained, designated, appointed, or employed to perform, with or without compensation, for not to exceed one hundred and

thirty days during any period of three hundred and sixty-five consecutive days, temporary duties either on a full-time or intermittent basis, a part-time United States commissioner, a part-time United States magistrate, or, regardless of the number of days of appointment, an independent counsel appointed under chapter 40 of title 28 and any person appointed by that independent counsel under section 594(c) of title 28. Notwithstanding the next preceding sentence, every person serving as a part-time local representative of a Member of Congress in the Member's home district or State shall be classified as a special Government employee. Notwithstanding section 29(c) and (d) of the Act of August 10, 1956 (70A Stat. 632; 5 U.S.C. 30r(c) and (d)), a Reserve officer of the Armed Forces, or an officer of the National Guard of the United States, unless otherwise an officer or employee of the United States, shall be classified as a special Government employee while on active duty solely for training. A Reserve officer of the Armed Forces or an officer of the National Guard of the United States who is voluntarily serving a period of extended active duty in excess of one hundred and thirty days shall be classified as an officer of the United States within the meaning of section 203 and sections 205 through 209 and 218. A Reserve officer of the Armed Forces or an officer of the National Guard of the United States who is serving involuntarily shall be classified as a special Government employee. The terms "officer or employee" and "special Government employee" as used in sections 203, 205, 207 through 209, and 218, shall not include enlisted members of the Armed Forces.

[See main volume for text of (b)]

(c) Except as otherwise provided in such sections, the terms "officer" and "employee" in sections 203, 205, 207 through 209, and 218 of this title shall not include the President, the Vice President, a Member of Congress, or a Federal judge.

(d) The term "Member of Congress" in sections 204 and 207 means—

(1) a United States Senator; and

(2) a Representative in, or a Delegate or Resident Commissioner to, the House of Representatives.

(e) As used in this chapter, the term—

(1) "executive branch" includes each executive agency as defined in title 5, and any other entity or administrative unit in the executive branch;

(2) "judicial branch" means the Supreme Court of the United States; the United States courts of appeals; the United States district courts; the Court of International Trade; the United States bankruptcy courts; any court created pursuant to article I of the United States Constitution, including the Court of Military Appeals, the United States Claims Court, and the United States Tax Court, but not including a court of a territory or possession of the United States; the Federal Judicial Center; and any other agency, office, or entity in the judicial branch; and

(3) "legislative branch" means—

(A) the Congress; and

(B) the Office of the Architect of the Capitol, the United States Botanic Garden, the General Accounting Office, the Government Printing Office, the Library of Congress, the Office of Technology Assessment, the Congressional Budget Office, the United States Capitol Police, and any other agency, entity, office, or commission established in the legislative branch.

(As amended Pub.L. 100-191, § 3(a), Dec. 15, 1987, 101 Stat. 1306; Pub.L. 101-194, Title IV, § 401, Nov. 30, 1989, 103 Stat. 1747; Pub.L. 101-280, § 5(a), May 4, 1990, 104 Stat. 158.)

HISTORICAL AND STATUTORY NOTES

1990 Amendment

Subsec. (c). Pub.L. 101-280, § 5(a)(1), added provisions relating to section 218 of this title and struck out provisions referring to definitions of "officers" and "employees" found in sections 2104 and 2105, respectively, of Title 5, Government Organization and Employees.

Subsec. (d). Pub.L. 101-280, § 5(a)(2), substituted "means" for "shall include".

Subsec. (e)(1). Pub.L. 101-280, § 5(a)(3)(1), substituted "includes each" for "means any".

Subsec. (e)(3)(A). Pub.L. 101-280, § 5(a)(3)(2)(A), substituted provisions relating to the Congress for provisions relating to Members of Congress and any officers or employees of the Senate or of the House of Representatives.

Subsec. (e)(3)(B). Pub.L. 101-280, § 5(a)(3)(2)(B), substituted "the Office" for "an officer or employee".

1989 Amendment

Subsecs. (c) to (e). Pub.L. 101-194 added subsecs. (c) to (e).

1987 Amendment

Subsec. (a). Pub.L. 100-191 expanded the definition of "special Government employee" to include an independent counsel appointed under chapter 40 of title 28 and any person appointed by that independent counsel under section 594(c) of title 28, regardless of the number of days of appointment.

Change of Name

United States magistrate appointed under section 631 of Title 28, Judiciary and Judicial Procedure, to be known as United States magistrate judge after Dec. 1, 1990, with any reference to United States magistrate or magistrate in Title 28, in any other Federal statute, etc., deemed a reference to United States magistrate judge appointed under section 631 of Title 28, see section 321 of Pub.L. 101-650, set out as a note under section 631 of Title 28.

References to United States Claims Court deemed to refer to United States Court of Federal Claims and references to Claims Court deemed to refer to Court of Federal Claims, see section 902(b) of Pub.L. 102-572, set out as a note under section 171 of Title 28, Judiciary and Judicial Procedure.

Effective Date of 1990 Amendment

Amendment by Pub.L. 101-280 effective on May 4, 1990, see section 11 of Pub.L. 101-280, set out as a note under section 101 of Appendix 6 to Title 5, Government Organization and Employees.

Effective Date of 1987 Amendment

Amendment by Pub.L. 100-191 effective Dec. 15, 1987, applicable both to independent counsel proceedings initiated prior to, and still pending on, that date as well as to independent counsel proceedings initiated and independent counsels appointed on and after that date, see section 591 of Title 28, Judiciary and Judicial Procedure.

Legislative History

For legislative history and purpose of Pub.L. 100-191, see 1987 U.S. Code Cong. and Adm. News, p. 2150. See, also, Pub.L. 101-194, 1989 U.S.Code Cong. and Adm.News, p. 1225; Pub.L. 101-280, 1990 U.S. Code Cong. and Adm. News, p. 169.

FEDERAL PRACTICE AND PROCEDURE

Elements of offense to be alleged directly and with certainty, see Wright: Criminal 2d § 126.

CODE OF FEDERAL REGULATIONS

Officers and employees of U.S., claims against and matters affecting governmental activities of—

Practice of special government employee permitted, see 14 CFR 300.12.

Temporary disqualification of former Board Members and employees in matters formerly under their responsibility, see 14 CFR 300.14.

LAW REVIEW COMMENTARIES

And gifts and travel for all—A summary explanation of the Ethics Reform Act of 1989—The move toward greater parity. June E. Edmondson, 37 Fed.B.News & J. 402 (1990).

Mandatory summary jury trial in federal court: Foundationally flawed. 16 Pepperdine L.Rev. 251 (1989).

Proposed standards of conduct for presidential transition workers. Phillip J. Harter Esquire, 36 Fed.B.News & J. 130 (March/April 1989).

Section 205's restriction on pro bono representation by federal attorneys. Carolyn Elefant, 37 Fed.B.News & J. 407 (1990).

NOTES OF DECISIONS

Special government employees 1

1. Special government employees

Reserve officer who is in fact serving more than 130 days is not entitled to conflict of interest statute's exemption that Congress created for reserve officers who serve less than 130 days, whether or not orders changed at some point in the interim. U.S. v. Baird, D.D.C.1991, 778 F.Supp. 540.

So long as Board of Inquiry members, appointed under section 183 of Title 29, Labor, are appointed for terms of not more than 15 days and, whenever reappointed, would serve in total no more than 130 days in any period of 365 consecutive days, they would qualify as special Government employees under this section, and supplementation of their compensation would not be prohibited by section 209 of this title. 1978 (Counsel-Inf.Op.) 2 Op.O.L.C. 264.

Where an informal Presidential adviser has departed from his usual role in connection with his work on a social issue by calling and chairing a number of meetings that were attended by employees of various agencies, in relationship to this work, and assuming considerable responsibility for coordinating the administration's activities in that area, he is engaging in a governmental function when he performs these duties and should be designated as a special government employee for purposes of the Federal conflict-of-interest laws in connection with the work. 1977 (Counsel-Inf. Op.) 1 Op.O.L.C. 20.

§ 203. Compensation to Members of Congress, officers, and others in matters affecting the Government

(a) Whoever, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly—

responsibilities where he does not intend to participate in the litigation on behalf of the United States or to act as agent or attorney on behalf of the corporation and the action is not being handled by his departmental section. 1977 (Counsel-Inf. Op.) 1 Op.O.L.C. 7.

5. Contracts

Generally, carriers' earnings in excess of authorized rate of return are not subject to refund orders by Federal Communications Commission (FCC), but rates carrier charges in future may be lowered if there is history of consistent overearnings. Ohio Bell Telephone Co. v. F.C.C., C.A.6 1991, 949 F.2d 864.

9. Assistance of counsel

In this section forbidding federal employee from representing anyone before agency or court, exclusion permitting one to act without compensation as agent or attorney for any person who is subject of disciplinary, loyalty or other personnel administration proceedings in connection with those proceedings is applicable only in "administration proceedings" and not in proceedings before courts. Bachman v. Pertschuk, D.C.D.C.1977, 437 F.Supp. 973.

Petitioner being investigated by Army to determine his suitability for retention in Army ROTC program and whether he should be ordered to active duty was not entitled to legally qualified counsel; in any event, petitioner knowingly and voluntarily waived any right that he had, if any such right existed, to legally qualified counsel. Scarth v. Geraci, D.C.Tex.1974, 382 F.Supp. 876, affirmed 510 F.2d 1363.

This section does not prohibit government attorneys from representing federal employees in personnel administration proceedings in court as well as before agencies, so long as the representation does not conflict with the attorney's official duties. 1982 (Counsel-Inf.Op.) 6 O.L.C. 461.

10. Representation of relatives

Attorneys employed by the federal government are barred by this section from participating in any case in which the District of Columbia is a party or has a direct and substantial interest. 1980 (Counsel-Inf.Op.) 4B Op.O.L.C. 800.

An employee in the office of a United States Attorney may appear on behalf of his daughter in an Internal Revenue Service office audit of her tax return. 1977 (Counsel-Inf. Op.) 1 Op. O.L.C. 148.

11. Prosecutor and defender exchange programs

This section is not a bar to having one or more Assistant United States Attorneys and assistant Federal Public Defenders temporarily exchange duties. 1977 (Counsel-Inf. Op.) 1 Op. O.L.C. 110.

12. Agency personnel exchanges

The detailing of Environmental Protection Agency employees to important positions in state agencies, the duties of which may require them to represent the state before the Environmental Protection Agency, is integral to the substantive environmental programs which the Agency administers, and is not prohibited by this section or section 203 of this title. 1980 (Counsel-Inf.Op.) 4B Op.O.L.C. 498.

13. Union activities

The representational bar of this section applies to union organizing activities of a federal employee in which he acts as "agent or attorney" for other federal employees before their agency. 1981 (Counsel-Inf.Op.) 5 Op.O.L.C. 194.

14. Class actions

This section does not bar Assistant United States Attorneys from participating as plaintiffs in a class action suit challenging the authority of the Office of Personnel Management to reduce the cost of living allowance paid to all federal employees in Alaska, though they may not accept any compensation for assisting in prosecuting the claims of the class or act as agents or attorneys for the class. 1981 (Counsel-Inf.Op.) 5 Op.O.L.C. 74.

§ 207. Restrictions on former officers, employees, and elected officials of the executive and legislative branches

(a) Restrictions on all officers and employees of the executive branch and certain other agencies.—

(1) Permanent restrictions on representation on particular matters.—Any person who is an officer or employee (including any special Government employee) of the executive branch of the United States (including any independent agency of the United States), or of the District of Columbia, and who, after the termination of his or her service or employment with the United States or the District of Columbia, knowingly makes, with the intent to influence, any communication to or appearance before any officer or employee of any department, agency, court, or court-martial of the United States or the District of Columbia, on behalf of any other person (except the United States or the District of Columbia) in connection with a particular matter—

(A) in which the United States or the District of Columbia is a party or has a direct and substantial interest,

(B) in which the person participated personally and substantially as such officer or employee, and

(C) which involved a specific party or specific parties at the time of such participation,

shall be punished as provided in section 216 of this title.

(2) Two-year restrictions concerning particular matters under official responsibility.—Any person subject to the restrictions contained in paragraph (1) who, within 2 years after the termination of his or her service or employment with the United States or the District of Columbia, knowingly makes, with the intent to influence, any communication to or appearance before any officer or employee of any department, agency, court, or court-martial of the United States or the District of Columbia, on behalf of any other person (except the United States or the District of Columbia), in connection with a particular matter—

(A) in which the United States or the District of Columbia is a party or has a direct and substantial interest,

(B) which such person knows or reasonably should know was actually pending under his or her official responsibility as such officer or employee within a period of 1 year before the termination of his or her service or employment with the United States or the District of Columbia, and

(C) which involved a specific party or specific parties at the time it was so pending,

shall be punished as provided in section 216 of this title.

(3) Clarification of restrictions.—The restrictions contained in paragraphs (1) and (2) shall apply—

(A) in the case of an officer or employee of the executive branch of the United States (including any independent agency), only with respect to communications to or appearances before any officer or employee of any department, agency, court, or court-martial of the United States on behalf of any other person (except the United States), and only with respect to a matter in which the United States is a party or has a direct and substantial interest; and

(B) in the case of an officer or employee of the District of Columbia, only with respect to communications to or appearances before any officer or employee of any department, agency, or court of the District of Columbia on behalf of any other person (except the District of Columbia), and only with respect to a matter in which the District of Columbia is a party or has a direct and substantial interest.

(b) One-year restrictions on aiding or advising.—

(1) In general.—Any person who is a former officer or employee of the executive branch of the United States (including any independent agency) and is subject to the restrictions contained in subsection (a)(1), or any person who is a former officer or employee of the legislative branch or a former Member of Congress, who personally and substantially participated in any ongoing trade or treaty negotiation on behalf of the United States within the 1-year period preceding the date on which his or her service or employment with the United States terminated, and who had access to information concerning such trade or treaty negotiation which is exempt from disclosure under section 552 of title 5, which is so designated by the appropriate department or agency, and which the person knew or should have known was so designated, shall not, on the basis of that information, knowingly represent, aid, or advise any other person (except the United States) concerning such ongoing trade or treaty negotiation for a period of 1 year after his or her service or employment with the United States terminates. Any person who violates this subsection shall be punished as provided in section 216 of this title.

(2) Definition.—For purposes of this paragraph—

(A) the term "trade negotiation" means negotiations which the President determines to undertake to enter into a trade agreement pursuant to section 1102 of the Omnibus Trade and Competitiveness Act of 1988, and does not include any action taken before that determination is made; and

(B) the term "treaty" means an international agreement made by the President that requires the advice and consent of the Senate.

(c) One-year restrictions on certain senior personnel of the executive branch and independent agencies.—

(1) Restrictions.—In addition to the restrictions set forth in subsections (a) and (b), any person who is an officer or employee (including any special Government employee) of the executive branch of the United States (including an independent agency), who is referred to in paragraph (2), and who, within 1 year after the termination of his or her service or employment as such officer or employee, knowingly makes, with the intent to influence, any communication to or appearance before any officer or employee of the department or agency in which such person served within 1 year before such termination, on behalf of any other person (except the United States), in connection with any matter on which such person seeks official action by any officer or employee of such department or agency, shall be punished as provided in section 216 of this title.

(2) Persons to whom restrictions apply.—(A) Paragraph (1) shall apply to a person (other than a person subject to the restrictions of subsection (d))—

(i) employed at a rate of pay specified in or fixed according to subchapter II of chapter 53 of title 5,

(ii) employed in a position which is not referred to in clause (i) and for which the basic rate of pay, exclusive of any locality-based pay adjustment under section 5302 of title 5 (or any comparable adjustment pursuant to interim authority of the President), is equal to or greater than the rate of basic pay payable for level V of the Executive Schedule;

(iii) appointed by the President to a position under section 105(a)(2)(B) of title 3 or by the Vice President to a position under section 106(a)(1)(B) of title 3, or

(iv) employed in a position which is held by an active duty commissioned officer of the uniformed services who is serving in a grade or rank for which the pay grade (as specified in section 201 of title 37) is pay grade O–7 or above.

(B) Paragraph (1) shall not apply to a special Government employee who serves less than 60 days in the 1-year period before his or her service or employment as such employee terminates.

(C) At the request of a department or agency, the Director of the Office of Government Ethics may waive the restrictions contained in paragraph (1) with respect to any position, or category of positions, referred to in clause (ii) or (iv) of subparagraph (A), in such department or agency if the Director determines that—

(i) the imposition of the restrictions with respect to such position or positions would create an undue hardship on the department or agency in obtaining qualified personnel to fill such position or positions, and

(ii) granting the waiver would not create the potential for use of undue influence or unfair advantage.

(d) Restrictions on very senior personnel of the executive branch and independent agencies.—

(1) Restrictions.—In addition to the restrictions set forth in subsections (a) and (b), any person who—

(A) serves in the position of Vice President of the United States,

(B) is employed in a position in the executive branch of the United States (including any independent agency) at a rate of pay payable for level I of the Executive Schedule or employed in a position in the Executive Office of the President at a rate of pay payable for level II of the Executive Schedule, or

(C) is appointed by the President to a position under section 105(a)(2)(A) of title 3 or by the Vice President to a position under section 106(a)(1)(A) of title 3,

and who, within 1 year after the termination of that person's service in that position, knowingly makes, with the intent to influence, any communication to or appearance before any person described in paragraph (2), on behalf of any other person (except the United States), in connection with any matter on which such person seeks official action by any officer or employee of the executive branch of the United States, shall be punished as provided in section 216 of this title.

(2) Persons who may not be contacted.—The persons referred to in paragraph (1) with respect to appearances or communications by a person in a position described in subparagraph (A), (B), or (C) of paragraph (1) are—

(A) any officer or employee of any department or agency in which such person served in such position within a period of 1 year before such person's service or employment with the United States Government terminated, and

(B) any person appointed to a position in the executive branch which is listed in sections 5312, 5313, 5314, 5315, or 5316 of title 5.

(e) Restrictions on members of Congress and officers and employees of the legislative branch.—

(1) Members of congress and elected officers.—(A) Any person who is a Member of Congress or an elected officer of either House of Congress and who, within 1 year after that person leaves office, knowingly makes, with the intent to influence, any communication to or appearance before any of the persons described in subparagraph (B) or (C), on behalf of any other person (except the United States) in connection with any matter on which such former Member of Congress or elected officer seeks action by a Member, officer, or employee of either House of Congress, in his or her official capacity, shall be punished as provided in section 216 of this title.

(B) The persons referred to in subparagraph (A) with respect to appearances or communications by a former Member of Congress are any Member, officer, or employee of either House of Congress, and any employee of any other legislative office of the Congress.

(C) The persons referred to in subparagraph (A) with respect to appearances or communications by a former elected officer are any Member, officer, or employee of the House of Congress in which the elected officer served.

(2) Personal staff.—(A) Any person who is an employee of a Senator or an employee of a Member of the House of Representatives and who, within 1 year after the termination of that employment, knowingly makes, with the intent to influence, any communication to or appearance before any of the persons described in subparagraph (B), on behalf of any other person (except the United States) in connection with any matter on which such former employee seeks action by a Member, officer, or employee of either House of Congress, in his or her official capacity, shall be punished as provided in section 216 of this title.

(B) The persons referred to in subparagraph (A) with respect to appearances or communications by a person who is a former employee are the following:

(i) the Senator or Member of the House of Representatives for whom that person was an employee; and

(ii) any employee of that Senator or Member of the House of Representatives.

(3) Committee staff.—Any person who is an employee of a committee of Congress and who, within 1 year after the termination of that person's employment on such committee, knowingly makes, with the intent to influence, any communication to or appearance before any person who is a Member or an employee of that committee or who was a Member of the committee in the year immediately prior to the termination of such person's employment by the committee, on behalf of any other person (except the United States) in connection with any matter on which such former employee seeks action by a Member, officer, or employee of either House of Congress, in his or her official capacity, shall be punished as provided in section 216 of this title.

(4) Leadership staff.—(A) Any person who is an employee on the leadership staff of the House of Representatives or an employee on the leadership staff of the Senate and who, within 1 year after the termination of that person's employment on such staff, knowingly makes, with the intent to influence, any communication to or appearance before any of the persons described in subparagraph (B), on behalf of any other person (except the United States) in connection with any matter on which such former employee seeks action by a Member, officer, or employee of either House of Congress, in his or her official capacity, shall be punished as provided in section 216 of this title.

(B) The persons referred to in subparagraph (A) with respect to appearances or communications by a former employee are the following:

(i) in the case of a former employee on the leadership staff of the House of Representatives, those persons are any Member of the leadership of the House

of Representatives and any employee on the leadership staff of the House of Representatives; and

(ii) in the case of a former employee on the leadership staff of the Senate, those persons are any Member of the leadership of the Senate and any employee on the leadership staff of the Senate.

(5) **Other legislative offices.**—(A) Any person who is an employee of any other legislative office of the Congress and who, within 1 year after the termination of that persons's employment in such office, knowingly makes, with the intent to influence, any communication to or appearance before any of the persons described in subparagraph (B), on behalf of any other person (except the United States) in connection with any matter on which such former employee seeks action by any officer or employee of such office, in his or her official capacity, shall be punished as provided in section 216 of this title.

(B) The persons referred to in subparagraph (A) with respect to appearances or communications by a former employee are the employees and officers of the former legislative office of the Congress of the former employee.

(6) **Limitation on restrictions.**—(A) The restrictions contained in paragraphs (2), (3), and (4) apply only to acts by a former employee who, for at least 60 days, in the aggregate, during the 1-year period before that former employee's service as such employee terminated, was paid a rate of basic pay equal to or greater than an amount which is 75 percent of the basic rate of pay payable for a Member of the House of Congress in which such employee was employed.

(B) The restrictions contained in paragraph (5) apply only to acts by a former employee who, for at least 60 days, in the aggregate, during the 1-year period before that former employee's service as such employee terminated, was employed in a position for which the rate of basic pay, exclusive of any locality-based pay adjustment under section 5302 of title 5 (or any comparable adjustment pursuant to interim authority of the President), is equal to or greater than the basic rate of pay payable for level V of the Executive Schedule.

(7) **Definitions.**—As used in this subsection—

(A) the term "committee of Congress" includes standing committees, joint committees, and select committees;

(B) a person is an employee of a House of Congress if that person is an employee of the Senate or an employee of the House of Representatives;

(C) the term "employee of the House of Representatives" means an employee of a Member of the House of Representatives, an employee of a committee of the House of Representatives, an employee of a joint committee of the Congress whose pay is disbursed by the Clerk of the House of Representatives, and an employee on the leadership staff of the House of Representatives;

(D) the term "employee of the Senate" means an employee of a Senator, an employee of a committee of the Senate, an employee of a joint committee of the Congress whose pay is disbursed by the Secretary of the Senate, an an employee on the leadership staff of the Senate;

(E) a person is an employee of a Member of the House of Representatives if that person is an employee of a Member of the House of Representatives under the clerk hire allowance;

(F) a person is an employee of a Senator if that person is an employee in a position in the office of a Senator;

(G) the term "employee of any other legislative office of the Congress" means an officer or employee of the Architect of the Capitol, the United States Botanic Garden, the General Accounting Office, the Government Printing Office, the Library of Congress, the Office of Technology Assessment, the Congressional Budget Office, the Copyright Royalty Tribunal, the United States Capitol Police, and any other agency, entity, or office in the legislative branch not covered by paragraph (1), (2), (3), or (4) of this subsection;

(H) the term "employee on the leadership staff of the House of Representatives" means an employee of the office of a Member of the leadership of the House of Representatives described in subparagraph (L), and any elected minority employee of the House of Representatives;

(I) the term "employee on the leadership staff of the Senate" means an employee of the office of a Member of the leadership of the Senate described in subparagraph (M);

(J) the term "Member of Congress" means a Senator or a Member of the House of Representatives;

(K) the term "Member of the House of Representatives" means a Representative in, or a Delegate or Resident Commissioner to, the Congress;

(L) the term "Member of the leadership of the House of Representatives" means the Speaker, majority leader, minority leader, majority whip, minority whip, chief deputy majority whip, chief deputy minority whip, chairman of the Democratic Steering Committee, chairman and vice chairman of the Democratic Caucus, chairman, vice chairman, and secretary of the Republican Conference, chairman of the Republican Research Committee, and chairman of the Republican Policy Committee, of the House of Representatives (or any similar position created on or after the effective date set forth in section 102(a) of the Ethics Reform Act of 1989);

(M) the term "Member of the leadership of the Senate" means the Vice President, and the President pro tempore, Deputy President pro tempore, majority leader, minority leader, majority whip, minority whip, chairman and secretary of the Conference of the Majority, chairman and secretary of the Conference of the Minority, chairman and co-chairman of the Majority Policy Committee, and chairman of the Minority Policy Committee, of the Senate (or any similar position created on or after the effective date set forth in section 102(a) of the Ethics Reform Act of 1989).

(f) **Restrictions relating to foreign entities.**—

(1) **Restrictions.**—Any person who is subject to the restrictions contained in subsection (c), (d), or (e) and who knowingly, within 1 year after leaving the position, office, or employment referred to in such subsection—

(A) represents a foreign entity before any officer or employee of any department or agency of the United States with the intent to influence a decision of such officer or employee in carrying out his or her official duties, or

(B) aids or advises a foreign entity with the intent to influence a decision of any officer or employee of any department or agency of the United States, in carrying out his or her official duties,

shall be punished as provided in section 216 of this title.

(2) **Special rule for trade representative.**—With respect to a person who is the United States Trade Representative, the restrictions described in paragraph (1) shall apply to representing, aiding, or advising foreign entities within 3 years after the termination of that person's service as the United States Trade Representative.

(3) **Definition.**—For purposes of this subsection, the term "foreign entity" means the government of a foreign country as defined in section 1(e) of the Foreign Agents Registration Act of 1938, as amended, or a foreign political party as defined in section 1(f) of that Act.

(g) **Special rules for detailees.**—For purposes of this section, a person who is detailed from one department, agency, or other entity to another department, agency, or other entity shall, during the period such person is detailed, be deemed to be an officer or employee of both departments, agencies, or such entities.

(h) **Designations of separate statutory agencies and bureaus.**—

(1) **Designations.**—For purposes of subsection (c) and except as provided in paragraph (2), whenever the Director of the Office of Government Ethics determines that an agency or bureau within a department or agency in the executive branch exercises functions which are distinct and separate from the remaining functions of the department or agency and that there exists no potential for use of undue influence or unfair advantage based on past Government service, the Director shall by rule designate such agency or bureau as a separate department or agency. On an annual basis the Director of the Office of Government Ethics shall review the designations and determinations made under this subparagraph and, in consultation with the department or agency concerned, make such additions and deletions as are necessary. Departments and agencies shall cooperate to the fullest extent with the Director of the Office of Government Ethics in the exercise of his or her responsibilities under this paragraph.

tures and bribes made with criminal intent that the benefit be received by the official as a quid pro quo for some official act. U.S. v. Head, C.A.Va.1981, 641 F.2d 174.

In prosecution for accepting bribe, trial court's instructions, taken as whole, correctly and clearly charged jury that, in case before them, requisite corrupt intent consisted of defendant's knowing acceptance of money for financial gain, in return for violation of his official duty, with specific intent to violate law. U.S. v. Strand, C.A.Wash.1978, 574 F.2d 993.

In order to properly deny instruction on charge of giving a gratuity to a public official when defendant is charged with bribery, trial court must be able to say that a jury finding of no specific intent would be irrational. U.S. v. Crutchfield, C.A.Nev.1977, 547 F.2d 496.

152. —— Entrapment

Bribery defendant, a government contractor, was not entitled to entrapment instruction where evidence indicated that he had been paying bribes to government inspector overseeing his work for several months before another inspector, who was working undercover, began receiving bribes. U.S. v. Lee, C.A.9 (Cal.) 1988, 846 F.2d 531.

Where border patrolman told defendant that bribing him was illegal, and defendant stated that she knew her actions were unlawful, defendant was not entitled to jury instructions regarding entrapment by estoppel. U.S. v. Hsieh Hui Mei Chen, C.A.Ariz.1985, 754 F.2d 817, certiorari denied 105 S.Ct. 2684, 471 U.S. 1139, 86 L.Ed.2d 701.

In prosecution of United States senator and another on bribery and related charges arising out of Abscam undercover operation, district court did not err in instructing jury that they were not to be concerned with legality or propriety of Abscam investigation where district court properly instructed jury that their function was to decide each defendant's predisposition to commit crimes charged and to consider Abscam tactics only as they related to defense of entrapment. U.S. v. Williams, C.A.N.Y.1983, 705 F.2d 603, certiorari denied 104 S.Ct. 524, 525, 464 U.S. 1007, 78 L.Ed.2d 708.

In bribery prosecution in which person implanting illegal purpose in defendant's mind was "ignorant pawn of the government," trial court, which instructed jury that inducement to commit a crime from a private citizen cannot be deemed sufficient to support a claim of entrapment unless that private citizen was an "agent" of a government officer, committed reversible error in failing to explain the appropriate rules of agency. U.S. v. Anderton, C.A.Tex.1980, 629 F.2d 1044.

In view of want of any evidence whatever tending to show government inducement or defendant's lack of predisposition to commit offense charged, and in view of lack of any evidence of government involvement when defendant first sought out official of company which he had investigated, evidence was insufficient even to raise issue of entrapment to solicit value for work performed as public official, and thus giving instruction on entrapment was not reversible error even though it was assertedly confusing by reason of distinguishing between "legal" and "illegal" entrapment. U.S. v. Dobson, C.A.Tex.1980, 609 F.2d 840, certiorari denied 100 S.Ct. 2925, 446 U.S. 955, 64 L.Ed.2d 813.

In view of disclosures that internal revenue service agent insisted on meeting personally with accused in connection with audit despite accused's efforts to make available all necessary financial papers through his accountant, and in view of fact that accused and accountant both testified that agent repeatedly told accused he had problems with certain claimed expenses and deductions and asked accused what accused wanted agent to do about the problems, denial of accused's request to submit entrapment defense to jury on count two charging offense of gratuitous payment for an official act was erroneous. U.S. v. Cohen, C.A.N.Y.1970, 431 F.2d 830.

Where most defendant who was charged with payment of a bribe or gratuity to internal revenue agents could testify to was that an agent suggested a general financial need several days before $50 was given to the agent, and where there was no evidence given sufficient to warrant a jury finding that the agent induced or initiated the crime, refusal to charge as to entrapment was proper. U.S. v. Barash, C.A.N.Y. 1969, 412 F.2d 26, certiorari denied 90 S.Ct. 86, 396 U.S. 832, 24 L.Ed.2d 82.

153. —— Coercion of jury

Supplemental instruction in bribery prosecution that "you have an obligation to attempt to agree on a verdict" and "to see if you cannot agree without giving up what you believe to be a verdict based on the evidence" and not to "arbitrarily and capriciously give up what [you feel] to be a proper verdict based on the evidence for the sake of unanimity" represented proper attempt to avoid necessity for retrial and was not coercive, even if judge knew that jurors were split 11 to 1 in favor of conviction when instruction was given. U.S. v. Jennings, C.A.N.Y.1973, 471 F.2d 1310, certiorari denied 93 S.Ct. 1909, 411 U.S. 935, 36 L.Ed.2d 395.

154. Deliberations of jury

In prosecution for bribing Internal Revenue Service agent during criminal tax investigation, trial judge did not err in replaying at jury's request all three tape recordings containing defendants' incriminating conversations, even though jury requested that only two of those tapes be replayed, in view of fact that subject matter of tape which jury had not requested was closely related to that of the other two tapes and thus, jury could not have thought that additional playing of that tape indicated any prejudice by judge. U.S. v. Gentile, C.A.N.Y.1975, 525 F.2d 252, certiorari denied 96 S.Ct. 1493, 425 U.S. 903, 47 L.Ed.2d 753.

155. Verdict

Where, with regard to two of the three objects of the conspiracy, indictment rested in large part on acts occurring without limitations period, defendant was entitled to an instruction requiring jury to find an overt act committed within limitations period before it could find him guilty of conspiracy to achieve illegal objectives and trial court's failure to give such instruction

as requested constituted reversible error where basis for jury's general verdict could not be perceived with reasonable certainty. U.S. v. Head, C.A.Va.1981, 641 F.2d 174.

Despite fact that defendant was found not guilty of accepting a bribe but was found guilty of lesser included offense of accepting a gratuity, defendant's conviction of engaging in interstate travel in aid of racketeering enterprises was neither logically nor legally inconsistent; even if logical inconsistency existed, there was no legal inconsistency where each verdict was independently supported by evidence. U.S. v. Evans, C.A.Tex.1978, 572 F.2d 455, rehearing denied 576 F.2d 931, certiorari denied 99 S.Ct. 200, 439 U.S. 870, 58 L.Ed.2d 182.

156. Sentence

Defendant was properly sentenced on both Hobbs Act and bribery convictions, even though convictions were based on the same acts, in absence of evidence of congressional intent to proscribe dual punishment under the two statutes. U.S. v. Stephenson, C.A.2 (N.Y.) 1990, 895 F.2d 867.

Where, in prosecution for soliciting money in exchange for promise not to testify at trial of another, each telephone call made by defendant required proof distinct from other, the two calls did not constitute single continuing violation or transaction, for sentencing purposes, though defendant's purpose of making calls, i.e., to market his testimony, was constant. U.S. v. Moore, C.A.Cal.1981, 653 F.2d 384, certiorari denied 102 S.Ct. 680, 454 U.S. 1102, 70 L.Ed.2d 646.

In prosecution wherein defendant was found guilty of asking for or receiving thing of value because of official act performed or to be performed, defendant was not shown to be innocent of bribery and thus no abuse of discretion was shown in imposition of sentence even if judge imposed maximum sentence only or largely because he thought defendant could have been convicted of bribery, but, in any event, defendant was not entitled to relief on appeal in view of his opportunity to seek reduction of sentence pursuant to rule 35, Federal Rules of Criminal Procedure, this title. U.S. v. Dobson, C.A.Tex. 1980, 609 F.2d 840, certiorari denied 100 S.Ct. 2925, 446 U.S. 955, 64 L.Ed.2d 813.

Where essentially the same evidence was relied on to prove both the substantive offenses, i.e., aiding and abetting in offering a bribe and accepting a bribe, and the conspiracy count, the defendant was doubly punished in violation of double jeopardy clause when he was sentenced on both the substantive and conspiracy counts; sentence on conspiracy count, being the longer sentence, would be vacated first so as to avoid any incentive for the government seeking similar multiple punishments in the future. U.S. v. Austin, C.A.Tenn.1976, 529 F.2d 559.

156a. Restitution

General rule, that seized property other than contraband should be returned to its rightful owner at conclusion of criminal proceedings, did not apply to money which was voluntarily given to public officials as gratuity in violation of criminal statute. U.S. v. Kim, E.D.Va.1990, 738 F.Supp. 1002.

158. Review

Where district court dismissed indictment against former senator for solicitation and acceptance of bribes, on ground that this section, as applied to the senator would violate speech or debate clause of Constitution, U.S.C.A. Const. art. 1, § 6, cl. 1, Supreme Court had jurisdiction of direct appeal by Government, despite district judge's statement "based on the facts of this case," which, in context, referred to facts alleged in the indictment. U.S. v. Brewster, Dist.Col. 1972, 92 S.Ct. 2531, 408 U.S. 501, 33 L.Ed.2d 507.

Admission of irrelevant evidence regarding defendant's flight was reversible error, in bribery case in which defendant admitted to willfully offering bribe and in which only remaining question was whether defendant had been entrapped into committing offense. U.S. v. Kang, C.A. 5 (Tex.) 1991, 934 F.2d 621.

Although defense counsel interposed general objection to admission of alleged hearsay testimony of an IRS agent that government's chief witness had admitted to him that he had paid a bribe to defendant in a tax case, objection was insufficient to preserve asserted hearsay claim for appeal, in absence of plain error, where defendant did not request instructions which he claimed should have been given and did not object to trial court's charge on subject. U.S. v. Lipton, C.A.N.Y.1972, 467 F.2d 1161, certiorari denied 93 S.Ct. 1358, 410 U.S. 927, 35 L.Ed.2d 587.

Contention that defendant had been entrapped into conspiring to bribe a government official, bribery of a government official and conspiring to smuggle marijuana into the country would not be considered by reviewing court where such defense was not presented in the court below. U.S. v. Cambre, C.A.Cal.1972, 467 F.2d 216.

Where flaw in bribery indictment under the D.C. Code was highly technical, government's decision to prosecute under such Code rather than under this section, and its decision to appeal dismissal of the original indictment rather than immediately seek a federal indictment did not, in relation to denial of claim of speedy trial, reflect arbitrary, negligent or purposefully oppressive behavior on the part of the Government. U.S. v. Bishton, 1972, 463 F.2d 887, 150 U.S.App.D.C. 51.

§ 202. Definitions

(a) For the purpose of sections 203, 205, 207, 208, and 209 of this title the term "special Government employee" shall mean an officer or employee of the executive or legislative branch of the United States Government, of any independent agency of the United States or of the District of Columbia, who is retained, designated, appointed, or employed to perform, with or without compensation, for not to exceed one hundred and

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set out in subsec. (b) of this section. 1985, 65 Op.Comp.Gen. 9.

Where guards at Rocky Mountain Arsenal claimed overtime compensation for time spent in drawing out weapons and equipment, but record did not establish that duties required more than ten minutes to perform, claim was not allowed under this section, since preshift duties that require ten minutes or less may be disregarded as de minimis. 1981, 60 Comp.Gen. 523.

11. Hours of employment—Generally

Entitlement to overtime compensation is determined by distinct criteria in subsec. (b)(2) of this section, as construed by interpretive decisions. 1981, 60 Comp.Gen. 681.

14. —— Eating and sleeping periods

Lunch breaks provided officers of Library of Congress Special Police Force may properly be offset against preshift and postshift hours compensable under this section; although officers are restricted to Library premises, and are subject to call, they are relieved from duty posts during lunch breaks. 1983, 62 Op.Comp.Gen. 447.

Civilian nurses at military hospital were entitled to overtime compensation under this section on occasions when they reported fifteen minutes early and worked through lunch without receiving appropriate remuneration. 1981, 61 Comp.Gen. 174.

15. —— Standby duty

Federal firefighters who work irregular or occasional overtime shift of twelve hours cannot be paid for less than twelve hours of overtime, regardless of rule that substantial time in standby status is presumed to be for sleep and meals. 1984, 64 Op.Comp.Gen. 1.

16. —— Time spent in travel status

Barth v. U.S., 568 F.2d 1329 [main volume] 215 Ct.Cl. 383.

Federal penitentiary employees who could show that they performed some significant work while traveling on prison boat from mainland to prison island, that work was officially ordered or approved, and that time involved was sufficient to clear de minimis standard, could be entitled to overtime compensation under this section. Abrahams v. U.S., 1982, 1 Cl.Ct. 305.

Air safety investigators, who travel to and from accident sites on aircraft or by automobile, and who perform investigative functions while traveling under emergent conditions, are performing compensable overtime work under this section. 1982, 61 Comp.Gen. 626.

Air safety investigator who is ordered to transport documents, equipment, and exhibits, and who is required to personally travel with the items in order to protect their integrity or to insure that they are not damaged, lost, or tampered with, may have such travel time considered work for the purpose of overtime under this section. Id.

Federal Aviation Administration employees assigned to remote radar site were entitled to compensation for travel time to and from place where they obtained and returned special purpose vehicles necessary for trip to work site. 1981, 61 Comp.Gen. 27.

Entitlement to overtime compensation while in travel status under subsec. (b)(2)(B)(iv) of this section requires at least (1) that travel result from event which could not be scheduled or controlled administratively; and (2) immediate official necessity in connection with event requiring travel to be performed outside employee's regular duty hours. 1981, 60 Comp.Gen. 681.

17. Rules and regulations

Even if Army's work schedule were found to be in violation of regulation stating that head of each agency shall establish by regulation a basic workweek of 40 hours which does not extend over more than six of any seven consecutive days, security guards at Army's arsenal had no basis upon which to recover overtime pay they sought, in that neither the Federal Employees Pay Act nor regulations promulgated thereunder prescribes any penalty for failure by government to comply with scheduling requirements governing number of consecutive days worked and, moreover, the Fair Labor Standards Act, which does have a penalty provision, does not proscribe the scheduling of any number of consecutive workdays. Sanford v. Weinberger, C.A.Fed.1985, 752 F.2d 636.

20. Jurisdiction

Statute under which civilian employee at missile test center claimed to be entitled to additional overtime compensation did not confer any entitlement to annual leave or to restoration of forfeited annual leave which would bring leave claim within jurisdiction of Claims Court. Manning v. U.S., 1984, 7 Cl.Ct. 128.

27. Duty to bargain

Federal Grain Inspection Service of the United States Department of Agriculture had no duty to bargain over union's proposal that all work in excess of 40 hours per week performed on Sunday be paid at twice basic rate of pay, since proposal concerned matter exclusively provided for by this section which required that such work "shall be paid for" at statutorily specified rate: one and one-half times employee's basic rate, or one and one-half times minimum GS-10 rate, whichever is lower. American Federation of Government Emp., AFL-CIO v. Federal Labor Relations Authority, 1981, 653 F.2d 669, 209 U.S.App.D.C. 414.

§ 5543. Compensatory time off

(a) The head of an agency may—

(1) on request of an employee, grant the employee compensatory time off from his scheduled tour of duty instead of payment under section 5542 or section 7 of the Fair Labor Standards Act of 1938 for an equal amount of time spent in irregular or occasional overtime work; and

(2) provide that an employee whose rate of basic pay is in excess of the maximum rate of basic pay for GS-10 (including any applicable locality-based comparability payment under section 5304 or similar provision of law and any applicable special rate of pay under section 5305 or similar provision of law) shall be granted compensatory time off from his scheduled tour of duty equal to the amount of time spent in irregular or occasional overtime work instead of being paid for that work under section 5542 of this title.

[See main volume for text of (b)]

(As amended Pub.L. 101-509, Title I, § 101(b)(3)(E), Title II, § 210(2), Nov. 5, 1990, 104 Stat. 1439, 1460.)

Historical and Statutory Notes

References in Text. Section 7 of the Fair Labor Standards Act of 1938, referred to in subsec. (a)(1), is classified to section 207 of Title 29, Labor.

Effective Date of 1990 Amendment. Amendment by Pub.L. 101-509 effective on such date as the President shall determine, but not earlier than 90 days, and not later than 180 days, after Nov. 5, 1990, see section 305 of Pub.L. 101-509, set out as a note under section 5301 of this title.

Notes of Decisions

Official order or approval 2
Part-time employees 1

1. Part-time employees

Except where prohibited for nonexempt employees, part-time employees may be granted compensatory time off in lieu of overtime compensation for irregular or occasional overtime work performed in excess of forty hours in an administrative workweek and eight hours in a workday but such employees may not be granted such compensatory time off simply because he works hours in excess of his regular part-time tour of duty. 1980, 59 Comp.Gen. 237.

2. Official order or approval

Where supervisor of government employee lacked the authority to order or approve overtime compensation, employee would not be entitled to such compensation and since compensatory time could be granted under this section only when the employee would be entitled to such compensation, such employee would also be ineligible to receive compensatory time. 1980, 59 Comp.Gen. 246.

§ 5544. Wage-board overtime and Sunday rates; computation

(a) An employee whose pay is fixed and adjusted from time to time in accordance with prevailing rates under section 5343 or 5349 of this title, or by a wage board or

similar administrative authority serving the same purpose, is entitled to overtime pay for overtime work in excess of 8 hours a day or 40 hours a week. However, an employee subject to this subsection who regularly is required to remain at or within the confines of his post of duty in excess of 8 hours a day in a standby or on-call status is entitled to overtime pay only for hours of duty, exclusive of eating and sleeping time, in excess of 40 a week. The overtime hourly rate of pay is computed as follows:

(1) If the basic rate of pay of the employee is fixed on a basis other than an annual or monthly basis, multiply the basic hourly rate of pay by not less than one and one-half.

(2) If the basic rate of pay of the employee is fixed on an annual basis, divide the basic annual rate of pay by 2,080 and multiply the quotient by one and one-half.

(3) If the basic rate of pay of the employee is fixed on a monthly basis, multiply the basic monthly rate of pay by 12 to derive a basic annual rate of pay, divide the basic annual rate of pay by 2,080, and multiply the quotient by one and one-half.

An employee subject to this subsection whose regular work schedule includes an 8-hour period of service a part of which is on Sunday is entitled to additional pay at the rate of 25 percent of his hourly rate of basic pay for each hour of work performed during that 8-hour period of service. Time spent in a travel status away from the official duty station of an employee subject to this subsection is not hours of work unless the travel (i) involves the performance of work while traveling, (ii) is incident to travel that involves the performance of work while traveling (iii) is carried out under arduous conditions, or (iv) results from an event which could not be scheduled or controlled administratively.

This section, other than the sixth sentence, shall not be applicable to an employee who is subject to the overtime pay provisions of section 7 of the Fair Labor Standards Act of 1938. In the case of an employee who would, were it not for the preceding sentence, be subject to this section, hours of work in excess of 8 hours in a day shall be deemed to be overtime hours for the purposes of such section 7 and hours in a paid nonwork status shall be deemed to be hours of work.

[See main volume for text of (b)]

(As amended Pub.L. 101–509, Title II, § 210(3), Nov. 5, 1990, 104 Stat. 1460.)

Historical and Statutory Notes

References in Text. Section 7 of the Fair Labor Standards Act of 1938, referred to in subsec. (a), is classified to section 207 of Title 29, Labor.

Effective Date of 1990 Amendment. Amendment by Pub.L. 101–509 effective on such date as the President shall determine, but not earlier than 90 days, and not later than 180 days, after Nov. 5, 1990, see section 305 of Pub.L. 101–509, set out as a note under section 5301 of this title.

Notes of Decisions

5. —— Employees whose pay is fixed according to prevailing rates

Foremen may continue to receive double overtime in accordance with Congressional purpose of preserving prevailing rate practices. 1980, 60 Comp.Gen. 58.

7. Computation of overtime pay—Generally

Government Printing Office security police employees' time spent in acquiring uniforms does not constitute "overtime work" for purposes of this section. 1981, 60 Comp.Gen. 431.

Where three Navy employees who performed temporary duty in Scotland returned to United States on Saturday (which was a non-workday), their travel time was not compensable as overtime under subsec. (a) of this section. 1980, 60 Comp. Gen. 90.

10. —— Per diem and hourly employees

Since premium pay was "determined as an appropriate percentage," within certain parameters, of minimum basic annual salary, employees could not claim under this section and simultaneously request their relief in terms of hours. Ater v. U.S., 1984, 6 Cl.Ct. 344, affirmed 770 F.2d 182.

12. Eating periods

Cook foremen at federal correctional institutions were not entitled to overtime pay under Federal Employees Pay Act for overtime worked during lunch breaks, where they were instructed to take break of 30 minutes each day and their duties did not entail constant or continuous work. Amos v. U.S., 1987, 13 Cl.Ct. 442.

Where the government stood ready and willing to pay overtime compensation to any crew member who performed substantial official duties during his lunch period while on board the patrol boat if the overtime work was properly documented and approved in accordance with prevailing regulations, the crew members were not entitled to overtime compensation for those lunch periods while on station when they were not required to

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Where the government stood ready and willing to pay overtime compensation to any crew member who performed substantial official duties during his lunch period while on board the patrol boat if the overtime work was properly documented and approved in accordance with prevailing regulations, the crew members were not entitled to overtime compensation for those lunch periods while on station when they were not required to

observe the area or perform any other job-related duties, since time available for, or spent, in eating is generally noncompensable, even where the employee is required to be on the employer's premises, except where substantial labor is performed in the time regularly set aside for eating. Baker v. U.S., 1978, 218 Ct.Cl. 602.

13. Standby or on-call status

Civilian employees working on government vessels were not induced to remain on board during their off-duty hours to degree necessary to find equivalent of statutory "requirement" that they remain on vessel, and therefore they were not entitled, on that basis, to additional overtime for off-duty periods. Bowman v. U.S., 1985, 7 Cl.Ct. 302.

Civilian employee of Army Corps of Engineers was not entitled to overtime compensation simply because he was required to live in government housing near the dam at which he was employed, where employee was not required to be at jobsite outside his normal tour of duty, and where his presence on the jobsite due to location of his residence merely served to discourage vandalism, and to make him more available for call-back duty. McConnell v. U.S., 1984, 5 Cl.Ct. 785, affirmed 770 F.2d 176, affirmed 763 F.2d 414.

Employee required to live at dam reservation was not entitled to overtime compensation under subsec. (a) of this section during period he was restricted to the site, since he was not, in effect, required to be on "ready alert," and there was no indication that his activities were often interrupted by emergency or other work situation requiring prompt attention. 1982, 61 Comp.Gen. 301.

14. Waiting periods

That civilian employees were working aboard government vessels for six-hour on and six-hour off shifts did not compel conclusion that they were thereby "required" to remain on board during off-duty periods so as to be entitled to additional compensation for those periods, where facts indicated that crew members left vessels during off-duty times or remained on the vessels and watched television, fished, slept, ate and generally did as they wished. Bowman v. U.S., 1985, 7 Cl.Ct. 302.

§ 5545. Night, standby, irregular, and hazardous duty differential

(a) Except as provided by subsection (b) of this section, nightwork is regularly scheduled work between the hours of 6:00 p.m. and 6:00 a.m., and includes—

[See main volume for text of (1) and (2)]

Except as otherwise provided by subsection (c) of this section, an employee is entitled to pay for nightwork at his rate of basic pay plus premium pay amounting to 10 percent of that basic rate. This subsection and subsection (b) of this section do not modify section 5141 of title 31, or other statute authorizing additional pay for nightwork.

[See main volume for text of (b)]

(c) The head of an agency, with the approval of the Office of Personnel Management may provide that—

(1) an employee in a position requiring him regularly to remain at, or within the confines of, his station during longer than ordinary periods of duty, a substantial part of which consists of remaining in a standby status rather than performing work, shall receive premium pay for this duty on an annual basis instead of premium pay provided by other provisions of this subchapter, except for irregular, unscheduled overtime duty in excess of his regularly scheduled weekly tour. Premium pay under this paragraph is determined as an appropriate percentage, not in excess of 25 percent, of such part of the rate of basic pay for the position as does not exceed the minimum rate of basic pay for GS–10 (including any applicable locality-based comparability payment under section 5304 or similar provision of law and any applicable special rate of pay under section 5305 or similar provision of law), (or, for a position described in section 5542(a)(3) of this title, of the basic pay of the position), by taking into consideration the number of hours of actual work required in the position, the number of hours required in a standby status at or within the confines of the station, the extent to which the duties of the position are made more onerous by night, Sunday, or holiday work, or by being extended over periods of more than 40 hours a week, and other relevant factors; or

(2) an employee in a position in which the hours of duty cannot be controlled administratively, and which requires substantial amounts of irregular, unsche-

21. Abandonment of claims

Where no proof was adduced in support of claims of retired federal civil service employees for overtime compensation for work allegedly performed during civil defense test exercises, that aspect of their claims would be treated as having been abandoned. Rapp v. U. S., 1964, 340 F.2d 635, 167 Ct.Cl. 852.

22. Laches

Laches is an equitable defense and its application in each case must be considered in the light of the particular facts of the case and the relief being sought, and where a suit for overtime pay under this section is commenced some 10 years after the failure to pay for ordered and approved overtime began, the government can show no prejudice in the delay. Albright v. U. S., 1963, 161 Ct.Cl. 356.

23. Evidence

Evidence supported conclusion that overtime work of investigators of Alcohol and Tobacco Tax Division, Internal Revenue Service, was performed with full knowledge and inducement of regional and national officials within this section providing for overtime for employment "officially ordered or approved". Byrnes v. U. S., 1964, 330 F.2d 986, 163 Ct.Cl. 167.

24. Amendment of judgment

Court of Claims' amendment of judgment to declare in effect that premium compensation of investigators in two regions of Alcohol and Tobacco Tax Division should be computed after July 1, 1955 under same regulations of Civil Service Commission [now Office of Personnel Management] and Division as were applicable to same class of investigators in other regions during same period of litigation manifested intention that only lawful regulations be applied. Fix v. U. S., 1966, 368 F.2d 609, 177 Ct.Cl. 369.

25. Scope and extent of recovery

Retired federal civil service employees, who sought overtime compensation for periods during which they acted as duty officers outside their regular work week during employment for Civil Defense Administration [now Federal Emergency Management Agency] were not entitled to recover for any services performed more than six years preceding dates of filing of petitions, where employees limited their proof and requested findings solely to services allegedly rendered during six-year period immediately preceding filing of respective petitions. Rapp v. U. S., 1964, 340 F.2d 635, 167 Ct.Cl. 852.

26. Reopening of case

In view of reaffirmation in another case of Court of Claims' general interpretation of this section and of fact that factual record remained the same as when the general interpretation was made, Court of Claims would not reopen to see the record and law differently and hold that much so-called travel by investigators of Alcohol and Tobacco Tax Division was compensable work includable as basis of granting extra pay beyond per diem allowed while away from official station. Fix v. U. S., 1966, 368 F.2d 609, 177 Ct.Cl. 369.

Absent alteration in governing legal rules or change in the record, holding that retail liquor duty consisting of investigation as to whether retail liquor establishments had proper federal stamps, had paid federal tax, and were complying with federal regulations was compensable to extent that the work was performed during overtime would not be reexamined. Id.

§ 5543. Compensatory time off

(a) The head of an agency may—

(1) on request of an employee, grant the employee compensatory time off from his scheduled tour of duty instead of payment for an equal amount of time spent in irregular or occasional overtime work; and

(2) provide that an employee whose rate of basic pay is in excess of the maximum rate of basic pay for GS–10 shall be granted compensatory time off from his scheduled tour of duty equal to the amount of time spent in irregular or occasional overtime work instead of being paid for that work under section 5542 of this title.

(b) The Architect of the Capitol ma
an annual basis compensatory time of
time pay for overtime work.

Pub.L. 89–554, Sept. 6, 1966, 80 Stat.
Sept. 11, 1967, 81 Stat. 200.

Historical and Revi

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Derivation:	United States Code	R
	5 U.S.C. 912	Ju M Se

Explanatory N

In subsection (a), the words "head of an agency" are substituted for "head of any department, independent establishment, or agency, including Government-owned or controlled corporations, or of the municipal government of the District of Columbia, or the head of any legislative or judicial agency to which this subchapter applies" because of the definition of "agency" and the application stated in section 5541.

In subsection (a) (1), the word "officer" is omitted as included in "employee".

In subsection (a) (2), the words "at his own discretion" are omitted as unnecessary in view of the permissive nature of the authority. The word "officer" is omitted as included in "employee". The word "scheduled" is omitted since section

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5543(a)(2)	5 App.:912	

Legislative History. For legislative history and purpose of Pub.L. 90–83, see 1967 1538.

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United States ⟹39(4, 5). C.J

§ 5544. Wage-board overtime a tion

(a) An employee whose pay is fixe time in accordance with prevailing rat

(b) The Architect of the Capitol may grant an employee paid on an annual basis compensatory time off from duty instead of overtime pay for overtime work.

Pub.L. 89–554, Sept. 6, 1966, 80 Stat. 486; Pub.L. 90–83, § 1(25), Sept. 11, 1967, 81 Stat. 200.

Historical and Revision Notes

1966 Act

Derivation:	United States Code	Revised Statutes and Statutes at Large
	5 U.S.C. 912	June 30, 1945, ch. 212, § 202, 59 Stat. 297. May 24, 1946, ch. 270, § 9, 60 Stat. 218. Sept. 1, 1954, ch. 1208, § 204, 68 Stat. 1109.

Explanatory Notes

In subsection (a), the words "head of an agency" are substituted for "head of any department, independent establishment, or agency, including Government-owned or controlled corporations, or of the municipal government of the District of Columbia, or the head of any legislative or judicial agency to which this subchapter applies" because of the definition of "agency" and the application stated in section 5541.

In subsection (a) (1), the word "officer" is omitted as included in "employee".

In subsection (a) (2), the words "at his own discretion" are omitted as unnecessary in view of the permissive nature of the authority. The word "officer" is omitted as included in "employee". The word "scheduled" is omitted since section 603 of the Act of Oct. 11, 1962, Pub.L. 87–793, 76 Stat. 847, eliminated the necessity of referring to rates as scheduled or longevity. Reference to the "Classification Act of 1949, as amended" is omitted as unnecessary.

In subsection (b), the words "in his discretion" are omitted as unnecessary in view of the permissive nature of the authority. The words "overtime work" are substituted for "any work in excess of forty hours in any regularly scheduled administrative workweek" because of the definition of "overtime work" in section 5542(a).

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

1967 Act

Section of title 5	Source (U.S. Code)	Source (Statutes at Large)
5543(a)(2)	5 App.:912	July 18, 1966, Pub.L. 89–504, § 404(b), 80 Stat. 297.

Legislative History. For legislative history and purpose of Pub.L. 90–83, see 1967 U.S. Code Cong. and Adm. News, p. 1538.

Library References

United States ⟹39(4, 5). C.J.S. United States §§ 17, 46.

§ 5544. Wage-board overtime and Sunday rates; computation

(a) An employee whose pay is fixed and adjusted from time to time in accordance with prevailing rates under section 5343 or 5349

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ments" each time it is used in this title. See section 101(7) of title 10.

References

military departments, see section 513 of title.

Title 10, Armed Forces.

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" means a corporation owned or of the United States; and

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corporation" each time it is used in this title.

References

section 1501 et seq. of Title 7, Agriculture.
section 841 et seq. of Title 31, Money and

in United States, see section 468 et seq. of

poration, see section 981 et seq. of Title 33,

31 et seq. of Title 16, Conservation.

References

C.J.S. United States § 65.

§ 104. Independent establishment

For the purpose of this title, "independent establishment" means—

(1) an establishment in the executive branch (other than the United States Postal Service or the Postal Rate Commission) which is not an Executive department, military department, Government corporation, or part thereof, or part of an independent establishment; and

(2) the General Accounting Office.

Pub.L. 89–554, Sept. 6, 1966, 80 Stat. 379; Pub.L. 91–375, § 6(c)(2), Aug. 12, 1970, 84 Stat. 775.

Historical and Revision Notes

The section is supplied to avoid the necessity for defining "independent establishment" each time it is used in this title.

Certain agencies are not independent establishments under the definition since they are constituent agencies or parts of an independent establishment. However, these agencies would continue to be subject to the provisions of this title applicable to the independent establishment of which they are a constituent or part. Also, the definition does not expand or abridge any rights or authority possessed by these agencies as no substantive changes are intended, see section 7(a) of the bill.

1970 Amendment. Par. (1). Pub.L. 91–375 inserted "(other than the United States Postal Service or the Postal Rate Commission)" following "executive branch".

Effective Date of 1970 Amendment. Amendment by Pub.L. 91–375 effective within 1 year after Aug. 2, 1970, on date established therefor by the Board of Governors of the United States Postal Service and published by it in the Federal Register, see section 15(a) of Pub.L. 91–735, set out as a note preceding section 101 of Title 39, Postal Service.

Legislative History. For legislative history and purpose of Pub.L. 91–375, see 1970 U.S.Code Cong. and Adm.News, p. 3649.

Cross References

Board of Veterans' Appeals, see section 4001 et seq. of Title 38, Veterans' Benefits.
Department of Medicine and Surgery, see section 4101 et seq. of Title 38.
General Accounting Office, see section 41 et seq. of Title 31, Money and Finance.
Veterans' Administration, see section 201 et seq. of Title 38, Veterans' Benefits.
Veterans' Canteen Service, see section 4201 et seq. of Title 38.

Library References

United States ⚷31.

C.J.S. United States § 31.

§ 105. Executive agency

For the purpose of this title, "Executive agency" means an Executive department, a Government corporation, and an independent establishment.

Pub.L. 89–554, Sept. 6, 1966, 80 Stat. 379.

Historical and Revision Notes

Reviser's Note. The section is supplied to avoid the necessity for defining "Executive agency" each time it is used in this title.

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Code — Revised Statutes and Statutes at Large
R.S. § 161.
Aug. 12, 1958, Pub.L. 85-619, 72 Stat. 547.

Explanatory Notes

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"All laws, orders, regulations, and other actions relating to the National Military Establishment, the Departments of the Army, the Navy, or the Air Force, or to any officer or activity of such establishment or such departments, shall, except to the extent inconsistent with the provisions of this Act, have the same effect as if this Act had not been enacted; but, after the effective date of this Act, any such law, order, regulation, or other action which vested functions in or otherwise related to any officer, department, or establishment, shall be deemed to have vested such function in or relate to the officer or department, executive or military, succeeding the officer, department, or establishment in which such function was vested. For purposes of this subsection the Department of Defense shall be deemed the department succeeding the National Military Establishment, and the military departments of Army, Navy, and Air Force shall be deemed the departments succeeding the Executive Departments of Army, Navy, and Air Force."

This section was part of title IV of the Revised Statutes. The Act of July 26, 1947, ch. 343, § 201(d), as added Aug. 10,

1949, ch. 412, § 4, 63 Stat. 579 (former 5 U.S.C. 171-1), which provides "Except to the extent inconsistent with the provisions of this Act [National Security Act of 1947], the provisions of title IV of the Revised Statutes as now or hereafter amended shall be applicable to the Department of Defense" is omitted from this title but is not repealed.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

Equal Opportunity in Federal Employment. Establishment of equal employment opportunity programs by heads of Executive departments and agencies, see Ex.Ord.No.11246, Sept. 24, 1965, 30 F.R. 12319, set out as a note under section 2000e of Title 42, The Public Health and Welfare.

Cross References

Confidential records—
Tax returns and lists, publicity, see section 6103 et seq. of Title 26, Internal Revenue Code.
Visas or permits to enter United States, records of Department of State and of diplomatic and consular offices respecting issuance or refusal, see section 1202 of Title 8, Aliens and Nationality.

Library References

Armed Services ⚷1.
United States ⚷40.

C.J.S. Armed Services §§ 2 to 4, 11, 12.
C.J.S. United States §§ 38 to 40.

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CHAPTER 3—POWERS

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§ 301. Departmental regulations

The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public.

Pub.L. 89–554, Sept. 6, 1966, 80 Stat. 379.

Historical and Revision Notes

Derivation:	United States Code	Revised Statutes and Statutes at Large
	5 U.S.C. 22	R.S. § 161. Aug. 12, 1958, Pub.L. 85–619, 72 Stat. 547.

Explanatory Notes

The words "Executive department" are substituted for "department" as the definition of "department" applicable to this section is coextensive with the definition of "Executive department" in section 101. The words "not inconsistent with law" are omitted as surplusage as a regulation which is inconsistent with law is invalid.

The words "or military department" are inserted to preserve the application of the source law. Before enactment of the National Security Act Amendments of 1949 (63 Stat. 578), the Department of the Army, the Department of the Navy, and the Department of the Air Force were Executive departments. The National Security Act Amendments of 1949 established the Department of Defense as an Executive Department including the Department of the Army, the Department of the Navy, and the Department of the Air Force as military departments, not as Executive departments. However, the source law for this section, which was in effect in 1949, remained applicable to the Secretaries of the military departments by virtue of section 12(g) of the National Security Act Amendments of 1949 (63 Stat. 591), which provided:

"All laws, orders, regulations, and other actions relating to the National Military Establishment, the Departments of the Army, the Navy, or the Air Force, or to any officer or activity of such establishment or such departments, shall, except to the extent inconsistent with the provisions of this Act, have the same effect as if this Act had not been enacted; but, after the effective date of this Act, any such law, order, regulation, or other action which vested functions in or otherwise related to any officer, department, or establishment, shall be deemed to have vested such function in or relate to the officer or department, executive or military, succeeding the officer, department, or establishment in which such function was vested. For purposes of this subsection the Department of Defense shall be deemed the department succeeding the National Military Establishment, and the military departments of Army, Navy, and Air Force shall be deemed the departments succeeding the Executive Departments of Army, Navy, and Air Force."

This section was part of title IV of the Revised Statutes. The Act of July 26, 1947, ch. 343, § 201(d), as added Aug. 10,

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SOURCE: 33 FR 12458, Sept. 4, 1968, unless otherwise noted.

Subpart A—Premium Pay

AUTHORITY: 5 U.S.C. 5548 and 6101(c).

GENERAL PROVISIONS

§ 550.101 Coverage and exemptions.

(a) *Employees to whom this subpart applies.* (1) This subpart applies to each employee in or under an Executive agency as defined by section 105 of title 5, United States Code, except those named in paragraph (b) of this section.

(2) The sections in this subpart incorporating special provisions for certain types of work (§§ 550.141 to 550.164, inclusive) apply also to each employee of the judicial branch, legislative branch, and the government of the District of Columbia who is subject to subchapter V of chapter 55 of title 5, United States Code.

(b) *Employees to whom this subpart does not apply.* This subpart does not apply to:

(1) An elected official;

(2) The head of a department;

(3) [Reserved]

(4) An employee whose pay is fixed and adjusted from time to time in accordance with prevailing rates under subchapter IV of chapter 53 of title 5, United States Code, or by a wage board or similar administrative authority serving the same purpose, except that § 550.113(d) is applicable to such an employee whose rate of basic pay is fixed on an annual or monthly basis;

(5) An employee outside the continental United States or in Alaska who is paid in accordance with local prevailing wage rates for the area in which employed;

(6) An employee of the Tennessee Valley Authority;

(7) An employee of the Central Intelligence Agency (sec. 10, 63 Stat. 212, as amended; 50 U.S.C. 403j);

(8) A seaman to whom section 1(a) of the act of March 24, 1943 (57 Stat. 45; 50 U.S.C. App. 1291(a)) applies;

(9) A member of the United States Park Police or the United States Secret Service Uniformed Division;

(10) An officer or member of the crew of a vessel, whose pay is fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates and practices in the maritime industry (30 Comp. Gen. 158);

(11) A civilian keeper of a lighthouse, or a civilian employed on a lightship or another vessel of the Coast Guard (14 U.S.C. 432(f));

(12) A physician, dentist, nurse, or any other employee in the Department of Medicine and Surgery, Veterans Administration, whose pay is fixed under chapter 73 of title 38, United States Code;

(13) A student-employee as defined by section 5351 of title 5, United States Code;

(14) An employee of the Environmental Science Services Administration engaged in the conduct of meteorological investigations in the Arctic region (62 Stat. 286; 15 U.S.C. 327);

(15) An employee of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives;

(16) A "teacher" or an individual holding a "teaching position" as defined by section 901 of title 20, United States Code;

(17) A Foreign Service officer or a member of the Senior Foreign Service; or

(18) A member of the Senior Executive Service.

(c) *Services to which this subpart does not apply.* This subpart does not apply to overtime, night, or holiday services for which additional pay is provided by the act of:

(1) February 13, 1911, as amended (36 Stat. 899, as amended; 19 U.S.C. 261, 267), involving inspectors, storekeepers, weighers, and other customs officers and employees;

(2) July 24, 1919 (41 Stat. 241; 7 U.S.C. 394), involving employees engaged in enforcement of the Meat Inspection Act;

(3) June 17, 1930, as amended (46 Stat. 715, as amended; 19 U.S.C. 1450, 1451, 1452), involving customs officers and employees;

(4) March 2, 1931 (46 Stat. 1467; 8 U.S.C. 1353*a*), involving inspectors and employees, Immigration and Naturalization Service;

(5) May 27, 1936, as amended (49 Stat. 1380, as amended; 46 U.S.C. 382b), involving local inspectors of steam vessels and assistants, U.S. shipping commissioners, deputies, and assistants, and customs officers and employees;

(6) March 23, 1941 (55 Stat. 46; 47 U.S.C. 154(f)(3)), involving certain engineers of the Federal Communications OPM;

(7) June 3, 1944 (58 Stat. 269; 19 U.S.C. 1451a), involving customs officers and employees;

(8) August 4, 1949 (63 Stat. 495; 7 U.S.C. 349a), involving employees of the Bureau of Animal Industry who work at establishments which prepare virus, serum, toxin, and analogous products for use in the treatment of domestic animals; or

(9) August 28, 1950 (64 Stat. 561; 7 U.S.C. 2260), involving employees of the Department of Agriculture performing inspection or quarantine services relating to imports into and exports from the United States.

[33 FR 12458, Sept. 4, 1968, as amended at 48 FR 3933, Jan. 28, 1983]

§ 550.102 Entitlement.

A department (and for the purpose of §§ 550.141 to 550.164, inclusive, a legislative or judicial agency and the government of the District of Columbia) shall determine an employee's entitlement to premium pay in accordance with subchapter V of chapter 55 of title 5, United States Code, and this subpart.

§ 550.103 Definitions.

In this subpart:

(a) "Department" means an executive agency and a military department as defined by sections 105 and 102 of title 5, United States Code.

(b) "Agency" means (1) a department as defined in paragraph (a) of this section, (2) the government of the District of Columbia, and (3) a legislative or judicial agency which has positions that are subject to subchapter V of chapter 55 of title 5, United States Code.

(c) "Employee" means an employee to whom this subpart applies.

(d) "Head of a department" means the head of a department and, except for the purpose of § 550.101(b)(2), an official who has been delegated authority to act for the head of a department in the matter concerned.

(e) "Nightwork" has the meaning given that term in § 550.121, and includes any nightwork preformed by an employee as part of his or her regularly scheduled administrative workweek.

(f) "Irregular or occasional overtime work" means overtime work that is not part of an employee's regularly scheduled administrative workweek.

(g) "Regular overtime work" means overtime work that is part of an employee's regularly scheduled administrative workweek.

(h) "Overtime work" has the meaning given that term by paragraphs (a) and (d) of § 550.111, and includes irregular or occasional overtime work and regular overtime work.

(i) "Premium pay" means additional pay authorized by subchapter V of chapter 55 of title 5, United States Code, and this subpart for overtime, night, holiday, or Sunday work, and for standby duty or administratively uncontrollable work.

(j) "Rate of basic pay" means the rate of pay fixed by law or administrative action for the position held by an employee, before any deductions and exclusive of additional pay of any kind.

(k) "Tour of duty" means the hours of a day (a daily tour of duty) and the days of an administrative workweek (a weekly tour of duty) that constitute an employee's regularly scheduled administrative workweek.

§ 550.103 Definitions.

In this subpart:

(a) "Department" means an executive agency and a military department as defined by sections 105 and 102 of title 5, United States Code.

(b) "Agency" means (1) a department as defined in paragraph (a) of this section, (2) the government of the District of Columbia, and (3) a legislative or judicial agency which has positions that are subject to subchapter V of chapter 55 of title 5, United States Code.

(c) "Employee" means an employee to whom this subpart applies.

(d) "Head of a department" means the head of a department and, except for the purpose of § 550.101(b)(2), an official who has been delegated authority to act for the head of a department in the matter concerned.

(e) "Nightwork" has the meaning given that term in § 550.121, and includes any nightwork preformed by an employee as part of his or her regularly scheduled administrative workweek.

(f) "Irregular or occasional overtime work" means overtime work that is not part of an employee's regularly scheduled administrative workweek.

(g) "Regular overtime work" means overtime work that is part of an employee's regularly scheduled administrative workweek.

(h) "Overtime work" has the meaning given that term by paragraphs (a) and (d) of § 550.111, and includes irregular or occasional overtime work and regular overtime work.

(i) "Premium pay" means additional pay authorized by subchapter V of chapter 55 of title 5, United States Code, and this subpart for overtime, night, holiday, or Sunday work, and for standby duty or administratively uncontrollable work.

(j) "Rate of basic pay" means the rate of pay fixed by law or administrative action for the position held by an employee before any deductions and exclusive of additional pay of any kind.

(k) "Tour of duty" means the hours of a day (a daily tour of duty) and the days of an administrative workweek (a weekly tour of duty) that constitute an employee's regularly scheduled administrative workweek.

(l) "Administrative workweek" means a period of 7 consecutive calendar days designated in advance by the head of a department under section 6101(a) of title 5, United States Code.

(m) "Basic workweek," for full-time employees, means the 40-hour workweek established in accordance with § 610.111 of this chapter.

(n) "Regularly scheduled administrative workweek," for a full-time employee, means the period within an administrative workweek, established in accordance with § 610.111 of this chapter, within which the employee is regularly scheduled to work. For a part-time employee, it means the officially prescribed days and hours within an administrative workweek during which the employee is regularly scheduled to work.

(o) "Sunday work" means nonovertime work performed by an employee during a regularly scheduled daily tour of duty when any part of that daily tour of duty is on a Sunday.

(p) "Regularly scheduled" work means work that is scheduled in advance of an administrative workweek under an agency's procedures for establishing workweeks in accordance with § 610.111 of this chapter.

(q) "Holiday work" means nonovertime work performed by an employee during a regularly scheduled daily tour of duty on a holiday designated in accordance with § 610.202 of this chapter.

[33 FR 12458, Sept. 4, 1968, as amended at 48 FR 3933, Jan. 28, 1983]

§ 550.105 Maximum limitation.

An employee may be paid premium pay under this subpart only to the extent that the payment does not cause his aggregate rate of pay for any pay period to exceed the maximum rate for GS-15.

OVERTIME PAY

§ 550.111 Authorization of overtime pay.

(a) Except as provided by paragraph (d) of this section, overtime work means work in excess of 8 hours in a day or in excess of 40 hours in an administrative workweek that is:

(1) Officially ordered or approved: and

(2) Performed by an employee. Hours of work in excess of eight in a day are not included in computing hours of work in excess of 40 hours in an administrative workweek.

(b) Except as otherwise provided in this subpart, a department shall pay for overtime work at the rates provided in § 550.113.

(c) Overtime work in excess of any included in a regularly scheduled administrative workweek may be ordered or approved only in writing by an officer or employee to whom this authority has been specifically delegated.

(d) For an employee for whom the first 40 hours of duty in an administrative workweek is his basic workweek under § 610.111(b) of this chapter, overtime work means work in excess of 40 hours in an administrative workweek that is:

(1) Officially ordered or approved, and

(2) Performed by an employee, when the employee's basic pay exceeds the minimum rate for GS-10 or when the employee is engaged in professional or technical engineering or scientific activities. For purposes of this section and section 5542(a) of title 5, United States Code, an employee is engaged in professional or technical engineering or scientific activities when he is assigned to perform the duties of a professional or support technician position in the physical, mathematical, natural, medical, or social sciences or engineering or architecture.

(e) Notwithstanding paragraphs (a) and (d) of this section, when an employee's basic workweek includes a daily tour of duty of more than 8 hours and his hourly rate of basic pay exceeds the hourly rate of overtime pay provided by § 550.113, the department shall pay him at his basic rate of pay for each hour of his daily tour of duty within his basic workweek.

[33 FR 12458, Sept. 4, 1968, as amended at 34 FR 19495, Dec. 10, 1969; 48 FR 36805, Aug. 15, 1983]

§ 550.112 Computation of overtime work.

The computation of the amount of overtime work of an employee is subject to the following conditions:

(a) *Time spent in principal activities.* Principal activities are the activities that an employee is employed to perform. They are the activities that an employee performs during his or her regularly scheduled administrative workweek (including regular overtime work) and activities performed by an employee during periods of irregular or occasional overtime work authorized under § 550.111. Overtime work in principal activities shall be credited as follows:

(1) An employee shall be compensated for every minute of regular overtime work.

(2) A quarter of an hour shall be the largest fraction of an hour used for crediting irregular or occasional overtime work under this subpart. When irregular or occasional overtime work is performed in other than the full fraction, odd minutes shall be rounded up or rounded down to the nearest full fraction of an hour used to credit overtime work.

(b) *Time spent in preshift or postshift activities.* A preshift activity is a preparatory activity that an employee performs prior to the commencement of his or her principal activities, and a postshift activity is a concluding activity that an employee performs after the completion of his or her principal activities. Such activities are not principal activities as defined in paragraph (a) of this section.

(1) (i) If the head of a department reasonably determines that a preshift or postshift activity is closely related to an employee's principal activities, and is indispensable to the performance of the principal activities, and that the total time spent in that activity is more than 10 minutes per daily tour of duty, he or she shall credit all of the time spent in that activity, including the 10 minutes, as hours of work.

(ii) If the time spent in a preshift or postshift activity is compensable as hours of work, the head of the department shall schedule the time period for the employee to perform that activity. An employee shall be credited with the actual time spent in that activity during the time period scheduled by the head of the department. In no case shall the time credited for

(a) *Time spent in principal activities.* Principal activities are the activities that an employee is employed to perform. They are the activities an employee performs during his or her regularly scheduled administrative workweek (including regular overtime work) and activities performed by an employee during periods of irregular or occasional overtime work authorized under § 550.111. Overtime principal activities shall be credited as follows:

(1) An employee shall be compensated for every minute of regular overtime work.

(2) A quarter of an hour shall be the largest fraction of an hour used in crediting irregular or occasional overtime work under this subpart. If an irregular or occasional overtime work is performed in other than the full fraction, odd minutes shall be rounded up or rounded down to the nearest full fraction of an hour used to credit overtime work.

(b) *Time spent in preshift or postshift activities.* A preshift activity is a preparatory activity that an employee performs prior to the commencement of his or her principal activities, and a postshift activity is a concluding activity that an employee performs after the completion of his or her principal activities. Such activities are not principal activities as defined in paragraph (a) of this section.

(1) (i) If the head of a department reasonably determines that a preshift or postshift activity is closely related to an employee's principal activities and is indispensable to the performance of the principal activities, and that the total time spent in that activity is more than 10 minutes per daily tour of duty, he or she shall credit all of the time spent in that activity, including the 10 minutes, as hours of work.

(ii) If the time spent in a preshift or postshift activity is compensable hours of work, the head of the department shall schedule the time period for the employee to perform that activity. An employee shall be credited with the actual time spent in that activity during the time period scheduled by the head of the department. In no case shall the time credited for

performance of an activity exceed the scheduled by the head of the department. If the time period scheduled by the head of the department for performance of a pereshift or postshift activity is outside the employee's daily tour of duty, the employee shall be credited with the time spent performing that activity in accordance with paragraph (a)(2) of this section.

(2) A preshift or postshift activity that is not closely related to the performance of the principal activities is considered a preliminary or postliminary activity. Time spent in preliminary or postliminary activities is excluded from hours of work and is not compensable even if it occurs between periods of activity that are compensable as hours of work.

(c) *Leave with pay.* An employee's absence from duty on authorized leave with pay under subchapter I of chapter 61 of title 5, United States Code, during the time when he would otherwise have been required to be on duty during a basic workweek (including authorized absence on a legal holiday, on a nonworkday established by Executive order or administrative order, and on compensatory time off as provided in § 550.114) is deemed employment and does not reduce the amount of overtime pay to which the employee is entitled during an administrative workweek. Leave of absence with pay under subchapter I of chapter 61 of title 5, United States Code, is charged only for an absence that occurs during a basic workweek.

(d) *Leave without pay.* (1) For a period of leave without pay in an employee's basic workweek, an equal period of service performed outside the basic workweek, but in the same administrative workweek, shall be substituted and paid for at the rate applicable to his basic workweek before any remaining period of service may be paid for at the overtime rate on the basis of exceeding 40 hours in a workweek.

(2) For a period of leave without pay in an employee's daily tour of duty, an equal period of service performed outside the daily tour, but in the same workday, shall be substituted and paid at the rate applicable to his daily tour of duty before any remaining period of service may be paid for at the overtime rate on the basis of exceeding 8 hours in a workday.

(e) *Absence during overtime periods.* Except as provided by paragraph (a) of this section, as expressly authorized by statute, or to the extent authorized while the employee is in a travel status, a period is counted as overtime work only when the employee actually performs work during the period or is taking compensatory time off as provided in § 550.114.

(f) *Night, Sunday, or holiday work.* Hours of night, Sunday, or holiday work are included in determining for overtime pay purposes the total number of hours of work in an administrative workweek.

(g) *Time in travel status.* Time in travel status away from the official duty-station of an employee is deemed employment only when:

(1) It is within his regularly scheduled administrative workweek, including regular overtime work; or

(2) The travel (i) involves the performance of actual work while traveling, (ii) is incident to travel that involves the performance of work while traveling, (iii) is carried out under such arduous and unusual conditions that the travel is inseparable from work, or (iv) results from an event which could not be scheduled or controlled administratively.

(h) *Call-back overtime work.* Irregular or occasional overtime work performed by an employee on a day when work was not scheduled for him, or for which he is required to return to his place of employment, is deemed at least 2 hours in duration for the purpose of premium pay, either in money or compensatory time off.

[33 FR 12458, Sept. 4, 1968, as amended at 33 FR 18669, Dec. 18, 1968; 48 FR 3934, Jan. 28, 1983; 48 FR 36805, Aug. 15, 1983]

§ 550.113 Computation of overtime pay.

(a) For each employee whose rate of basic pay does not exceed the minimum rate for GS-10 the overtime hourly rate is 1½ times his hourly rate of basic pay.

(b) For each employee whose rate of basic pay exceeds the minimum rate for GS-10 the overtime hourly rate is 1½ times the hourly rate of basic pay at the minimum rate for GS-10.

(c) An employee is paid for overtime work performed on a Sunday or a holiday at the same rate as for overtime work performed on another day.

(d) An employee whose rate of basic pay is fixed on an annual or monthly basis and adjusted from time to time in accordance with prevailing rates by a wage board or similar administrative authority serving the same purpose is entitled to overtime pay in accordance with the provisions of section 5544 of title 5, United States Code. The rate of pay for each hour of overtime work of such an employee is computed as follows:

(1) If the rate of basic pay of the employee is fixed on an annual basis, divide the rate of basic pay by 2,080 and multiply the quotient by one and one-half; and

(2) If the rate of basic pay of the employee is fixed on a monthly basis, multiply the rate of basic pay by 12 to derive an annual rate of basic pay, divide the annual rate of basic pay by 2,080 and multiply the quotient by one and one-half.

Rates are computed in full cents, counting a fraction of a cent as the next higher cent.

§ 550.114 Compensatory time off for irregular or occasional overtime work.

(a) At the request of an employee, the head of a department may grant him compensatory time off from his tour of duty instead of payment under § 550.113 for an equal amount of irregular or occasional overtime work.

(b) The head of a department may provide that an employee whose rate of basic pay exceeds the maximum rate for GS-10 shall be paid for irregular or occasional overtime work with an equivalent amount of compensatory time off from his tour of duty instead of payment under § 550.113.

(c) The head of a department may fix a time limit for an employee to request or take compensatory time off and may provide that an employee who fails to take compensatory time off to which he is entitled under paragraph (a) or (b) of this section before the time limit fixed, shall lose his right both to compensatory time off and to overtime pay unless his failure is due to an exigency of the service beyond his control.

NIGHT PAY

§ 550.121 Authorization of night pay differential.

(a) Except as provided by paragraph (b) of this section, nightwork is regularly scheduled work performed by an employee between the hours of 6 p.m. and 6 a.m. Subject to § 550.122, and except as otherwise provided in this subpart, an employee who performs nightwork is entitled to pay for that work at his or her rate of basic pay plus a night pay differential amounting to 10 percent of his or her rate of basic pay.

(b) The head of a department may designate a time after 6 p.m. and a time before 6 a.m. as the beginning and end, respectively, of nightwork for the purpose of paragraph (a) of this section, at a post outside the United States where the customary hours of business extend into the hours of nightwork provided by paragraph (a) of this section. Times so designated as the beginning or end of nightwork shall correspond reasonably with the end or beginning, respectively, of the customary hours of business in the locality.

[33 FR 12458, Sept. 4, 1968, as amended at 48 FR 3934, Jan. 28, 1983]

§ 550.122 Computation of night pay differential.

(a) *Absence on holidays or in travel status.* An employee is entitled to a night pay differential for a period when he is excused from nightwork on a holiday or other nonworkday and for night hours of his tour of duty while he is in an official travel status, whether performing actual duty or not.

(b) *Absence on leave.* An employee is entitled to a night pay differential for a period of paid leave only when the total amount of that leave in a pay

the information specified in paragraphs (a) (1) through (3) of this section and an installment agreement (or other instruction on the payment schedule), if applicable, to the employee's paying agency.

(5) If the employee is in the process of separating, the creditor agency must submit its debt claim to the employee's paying agency for collection as provided in § 550.1104(1). The paying agency must certify the total amount of its collection and notify the creditor agency and the employee as provided in paragraph (c)(1) of this section. If the paying agency is aware that the employee is entitled to payments from the Civil Service Retirement and Disability Fund, or other similar payments, it must provide written notification to the agency responsible for making such payments that the debtor owes a debt (including the amount) and that the provisions of this section have been fully complied with. However, the creditor agency must submit a properly certified claim to the agency responsible for making such payments before the collection can be made.

(6) If the employee is already separated and all payments due from his or her former paying agency have been paid, the creditor agency may request, unless otherwise prohibited, that money due and payable to the employee from the Civil Service Retirement and Disability Fund (5 CFR 831.1801 *et seq.*), or other similar funds, be administratively offset to collect the debt. (See 31 U.S.C. 3716 and the FCCS.)

(b) *Responsibilities of paying agency*—(1) *Complete claim.* When the paying agency receives a properly certified debt claim from a creditor agency, deductions should be scheduled to begin prospectively at the next officially established pay interval. The employee must receive written notice that the paying agency has received a certified debt claim from the creditor agency (including the amount) and written notice of the date deductions from salary will commence and of the amount of such deductions.

(2) *Incomplete claim.* When the paying agency receives an incomplete debt from a creditor agency, the paying agency must return the debt claim with a notice that procedures under 5 U.S.C. 5514 and this subpart must be provided and a properly certified debt claim received before action will be taken to collect from the employee's current pay account.

(3) *Review.* The paying agency is not required or authorized to review the merits of the creditor agency's determination with respect to the amount or validity of the debt certified by the creditor agency.

(c) *Employees who transfer from one paying agency to another.* (1) If, after the creditor agency has submitted the debt claim to the employee's paying agency, the employee transfers to a position served by a different paying agency before the debt is collected in full, the paying agency from which the employee separates must certify the total amount of the collection made on the debt. One copy of the certification must be furnished to the employee, another to the creditor agency along with notice of the employee's transfer. However, the creditor agency must submit a properly certified claim to the new paying agency before collection can be resumed.

(2) When an employee transfers to another paying agency, the creditor agency need not repeat the due process procedures described by 5 U.S.C. 5514 and this subpart to resume the collection. However, the creditor agency is responsible for reviewing the debt upon receiving the former paying agency's notice of the employee's transfer to make sure the collection is resumed by the new paying agency.

[51 FR 21325, June 12, 1986]

PART 551—PAY ADMINISTRATION UNDER THE FAIR LABOR STANDARDS ACT

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paying agency must return the debt claim with a notice that procedures under 5 U.S.C. 5514 and this subpart must be provided and a properly certified debt claim received before action will be taken to collect from the employee's current pay account.

(3) *Review.* The paying agency is not required or authorized to review the merits of the creditor agency's determination with respect to the amount or validity of the debt certified by the creditor agency.

(c) *Employees who transfer from one paying agency to another.* (1) If, after the creditor agency has submitted the debt claim to the employee's paying agency, the employee transfers to a position served by a different paying agency before the debt is collected in full, the paying agency from which the employee separates must certify the total amount of the collection made on the debt. One copy of the certification must be furnished to the employee, another to the creditor agency along with notice of the employee's transfer. However, the creditor agency must submit a properly certified claim to the new paying agency before collection can be resumed.

(2) When an employee transfers to another paying agency, the creditor agency need not repeat the due process procedures described by 5 U.S.C. 5514 and this subpart to resume the collection. However, the creditor agency is responsible for reviewing the debt upon receiving the former paying agency's notice of the employee's transfer to make sure the collection is resumed by the new paying agency.

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PART 551—PAY ADMINISTRATION UNDER THE FAIR LABOR STANDARDS ACT

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551.521 Fractional hours of work.

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551.531 Compensatory time off.

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551.541 Employees engaged in fire protection activities or law enforcement activities.

AUTHORITY: Sec. 4(f) of the Fair Labor Standards Act as amended by Pub. L. 93-259 enacted April 8, 1974, 88 Stat. 55; 29 USC 204f.

Subpart A—General Provisions

SOURCE: 45 FR 85663, Dec. 30, 1980, unless otherwise noted.

§ 551.101 General.

(a) Section 3(e)(2) of the Fair Labor Standards Act of 1938, as amended, authorizes the application of the provisions of the Act to any person employed by the Government of the United States, as specified in that section. Section 4(f) of the Act authorizes the Office of Personnel Management to administer the provisions of the Act for all such employees, except for those who are employed by the Library of Congress, United States Postal Service, Postal Rate Commission, or the Tennessee Valley Authority; the named groups of employees are specifically excluded from the Office of Personnel Management's administration.

(b) The Act provides for minimum standards for both wages and overtime entitlements, and delineates administrative procedures by which covered worktime must be compensated. Included in the Act are provisions related to child labor, equal pay, and portal-to-portal activities. In addition, the Act exempts specified employees or groups of employees from the application of certain of its provisions. It prescribes penalties for the commission of specifically prohibited acts.

(c) This part contains the regulations, criteria, and conditions that the Office of Personnel Management has prescribed for the administration of the Act. This part supplements and

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implements the Act, and must be read in conjunction with it.

§ 551.102 Definitions.

In this part:

(a) "Act" means the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 201 et seq.);

(b) "Agency", for purposes of the Office of Personnel Management's administration of the Act, means any instrumentality of the United States Government, or any constituent element thereof acting directly or indirectly as an employer, as this term is defined in section 3(d) of the Act; but does not include:

(1) The Library of Congress;

(2) The United States Postal Service;

(3) The Postal Rate Commission; or

(4) The Tennessee Valley Authority;

all of which are subject to the administration of the Act by the Department of Labor, under Title 29, Code of Federal Regulations.

(c) "Employ" means to engage a person in an activity that is for the benefit of an agency, as defined for this part, and includes any hours of work that are suffered or permitted.

(d) "Employee" means a person who is employed:

(1) In an executive agency;

(2) As a civilian in a military department;

(3) In a nonappropriated fund instrumentality of an executive agency or a military department; or

(4) In a unit of the legislative or judicial branch of the Government that has positions in the competitive service.

(e) "Suffered or permitted" work means any work performed by an employee for the benefit of an agency, whether requested or not, provided the employee's supervisor knows or has reason to believe that the work is being performed and has an opportunity to prevent the work from being performed.

(f) "Trainee" means a person who does not meet the definition of "employee" in paragraph (d) of this section, and who is assigned or attached to a Federal activity primarily for training. A person who attends a training program under the following conditions is considered a "trainee" and, therefore, is not an "employee" of t Government of the United States f purposes of the Act:

(1) The training, even though it i cludes actual operation of the faciliti of the Federal activity, is similar that given in a vocational school other institution of learning;

(2) The training is for the benefit the individual;

(3) The trainee does not displace re ular employees, but, rather, is supe vised by them;

(4) The Federal activity which pr vides the training derives no immed ate advantage from the activities the trainee; on occasion its operatio may actually be impeded;

(5) The trainee is not necessarily e titled to a job with the Federal acti ty at the completion of the trainir period; and

(6) The agency and the trainee u derstand that the trainee is not ent tled to the payment of wages from t agency for the time spent in trainin

(g) "Volunteer" means a person wh does not meet the definition of "en ployee" in paragraph (d) of this se tion, and who volunteers or donat his or her service the primary benef of which accrues to the performer the service or to someone other tha the agency. Under such circumstanc there is neither an expressed nor a implied compensation agreemen Services performed by such a volu teer include personal services that, left unperformed, would not necess tate the assignment of an employee perform them.

(h) "Exempt area" means any fo eign country, or any territory withi the jurisdiction of the United Stat other than the following locations:

(1) A State of the United States;

(2) The District of Columbia;

(3) Puerto Rico;

(4) The Virgin Islands;

(5) Outer Continental Shelf Lan as defined in the Outer Continent Shelf Lands Act (67 Stat. 462);

(6) American Samoa;

(7) Guam;

(8) Wake Island;

(9) Eniwetok Atoll;

(10) Kwajalein Atoll; and

(11) Johnston Island.

the employee spends more than 80 percent of a given workweek performing exempt duties, in which case the employee is exempt for that workweek.

(f) Notwithstanding any other provision of this section, and regardless of an employee's grade level, the agency may determine that an emergency situation exists which threatens the life or safety of people, or serious damage to property, or serious disruption to the operations of an activity, and there is no recourse other than to assign qualified employees to perform emergency duties. In such a designated emergency the exemption status of an employee shall be determined on a workweek basis and the employee shall be nonexempt for any workweek in which the employee performs more than 20 percent nonexempt work.

[51 FR 7426, Mar. 4, 1986. Redesignated and amended at 53 FR 1740, Jan. 22, 1988]

Subpart C—Minimum Wage Provisions

Basic Provision

§ 551.301 Minimum wage.

(a) Except as provided in § 551.311, an agency shall pay each of its employees wages at rates not less than the minimum wage specified in section 6(a)(1) of the Act for all hours of work as defined in Subpart D of this part.

(b) An employee has been paid in compliance with the minimum wage provisions of this subpart if the employee's hourly regular rate of pay, as defined in § 551.511(a) of this part, for the workweek is equal to or in excess of the rate specified in section 6(a)(1) of the Act.

[45 FR 85664, Dec. 30, 1980]

Subminimum Wage

§ 551.311 Subminimum wage.

An agency may, if it meets certain criteria published by the Office of Personnel Management, employ certain groups of less than fully productive employees (e.g., handicapped patient workers) at rates less than the minimum wage specified in section 6(a)(1) of the Act.

[45 FR 85664, Dec. 30, 1980]

Subpart D—Hours of Work

SOURCE: 45 FR 85664, Dec. 30, 1980, unless otherwise noted.

General Provisions

§ 551.401 Basic principles.

(a) All time spent by an employee performing an activity for the benefit of an agency and under the control or direction of the agency is "hours of work." Such time includes:

(1) Time during which an employee is required to be on duty;

(2) Time during which an employee is suffered or permitted to work; and

(3) Waiting time or idle time which is under the control of an agency and which is for the benefit of an agency.

(b) Except as provided in paragraph (c) of this section, paid periods of nonwork (e.g., leave, holidays, or excused absences) are not hours of work for the purpose of this part.

(c) Paid periods of nonwork (e.g., leave, holidays, or excused absences) are counted as hours of work for the purpose of this part for an employee who receives:

(1) Annual premium pay for standby duty under 5 CFR 550.141;

(2) Annual premium pay for administratively uncontrollable overtime work under 5 CFR 550.151; or

(3) Overtime pay for regularly scheduled overtime work, as defined in 5 CFR 550.103(p) and 610.102(g).

(d) Time that is considered hours of work under this part shall be used only to determine an employee's entitlement to minimum wages or overtime pay under the Act, and shall not be used to determine hours of work for pay administration under title 5, United States Code, or any other authority.

[45 FR 85664, Dec. 30, 1980, as amended at 52 FR 47687, Dec. 16, 1987, and 53 FR 27147, July 19, 1988]

§ 551.402 Agency responsibility.

(a) An agency is responsible for exercising appropriate controls to assure that only that work for which it intends to make payment is performed.

[45 FR 85664, Dec. 30, 1980]

Subpart D—Hours of Work

SOURCE: 45 FR 85664, Dec. 30, 1980, unless otherwise noted.

GENERAL PROVISIONS

§ 551.401 Basic principles.

(a) All time spent by an employee performing an activity for the benefit of an agency and under the control or direction of the agency is "hours of work." Such time includes:

(1) Time during which an employee is required to be on duty;

(2) Time during which an employee is suffered or permitted to work; and

(3) Waiting time or idle time which is under the control of an agency and which is for the benefit of an agency.

(b) Except as provided in paragraph (c) of this section, paid periods of nonwork (e.g., leave, holidays, or excused absences) are not hours of work for the purpose of this part.

(c) Paid periods of nonwork (e.g., leave, holidays, or excused absences) are counted as hours of work for the purpose of this part for an employee who receives:

(1) Annual premium pay for standby duty under 5 CFR 550.141;

(2) Annual premium pay for administratively uncontrollable overtime work under 5 CFR 550.151; or

(3) Overtime pay for regularly scheduled overtime work, as defined in 5 CFR 550.103(p) and 610.102(g).

(d) Time that is considered hours of work under this part shall be used only to determine an employee's entitlement to minimum wages or overtime pay under the Act, and shall not be used to determine hours of work for pay administration under title 5, United States Code, or any other authority.

[45 FR 85664, Dec. 30, 1980, as amended at 52 FR 47687, Dec. 16, 1987, and 53 FR 27147, July 19, 1988]

§ 551.402 Agency responsibility.

(a) An agency is responsible for exercising appropriate controls to assure that only that work for which it intends to make payment is performed.

(b) An agency shall keep complete and accurate records of all hours worked by its employees.

APPLICATION OF PRINCIPLES IN RELATION TO NORMAL WORKDAY

§ 551.411 Workday.

(a) For the purposes of this part, "workday" means the period between the commencement of the principal activities that an employee is engaged to perform on a given day, and the cessation of the principal activities for that day. All time spent by an employee in the performance of such activities is hours of work. The workday is not limited to a calendar day or any other 24-hour period.

(b) Any rest period authorized by an agency that does not exeed 20 minutes and that is within the workday shall be considered hours of work.

(c) *Bona fide* meal periods shall not be considered hours of work.

[45 FR 85664, Dec. 30, 1980, as amended at 48 FR 36805, Aug. 15, 1983]

§ 551.412 Preparatory or concluding activities.

(a) (1) If an agency reasonably determines that a preparatory or concluding activity is closely related to an employee's principal activities, and is indispensable to the performance of the principal activities, and that the total time spent in that activity is more than 10 minutes per workday, the agency shall credit all of the time spent in that activity, including the 10 minutes, as hours of work.

(2) If the time spent in a preparatory or concluding activity is compensable as hours of work, the agency shall schedule the time period for the employee to perform that activity. An employee shall be credited with the actual time spent in that activity during the time period scheduled by the agency. In no case shall the time credited for the performance of an activity exceed the time scheduled by the agency. The employee shall be credited for the time spent performing preparatory or concluding activities in accordance with paragraph (b) of §551.521 of this part.

(b) A preparatory or concluding activity that is not closely related to the performance of the principal activities is considered a preliminary or postliminary activity. Time spent in preliminary or postliminary activities is excluded from hours of work and is not compensable, even if it occurs between periods of activity that are compensable as hours of work.

[48 FR 36805, Aug. 15, 1983]

APPLICATION OF PRINCIPLES IN RELATION TO OTHER ACTIVITIES

§ 551.421 Regular working hours.

(a) Under the Act there is no requirement that a Federal employee have a regularly scheduled administrative workweek. However, under title 5 United States Code, and Part 610 of this chapter, the head of an agency is required to establish work schedules for his or her employees. In determining what activities constitute hours of work under the Act, there is generally a distinction based on whether the activity is performed by an employee during regular working hours or outside regular working hours. For purposes of this part, "regular working hours" means the days and hours of an employee's regularly scheduled administrative workweek established under part 610 of this chapter.

[45 FR 85664, Dec. 30, 1980, as amended at 48 FR 36806, Aug. 15, 1983]

§ 551.422 Time spent traveling.

(a) Time spent traveling shall be considered hours of work if:

(1) An employee is required to travel during regular working hours;

(2) An employee is required to drive a vehicle or perform other work while traveling;

(3) An employee is required to travel as a passenger on a one-day assignment away from the official duty station; or

(4) An employee is required to travel as a passenger on an overnight assignment away from the official duty station during hours on nonworkdays that correspond to the employee's regular working hours.

(b) An employee who travels from home before the regular workday begins and returns home at the end of the workday is engaged in normal

"home to work" travel; such travel is not hours of work. When an employee travels directly from home to a temporary duty location outside the limits of his or her official duty station, the time the employee would have spent in normal home to work travel shall be deducted from hours of work as specified in paragraphs (a)(2) and (a)(3) of this section.

(c) An employee who is offered one mode of transportation, and who is permitted to use an alternative mode of transportation, or an employee who travels at a time other than that selected by the agency, shall be credited with the lesser of:

(1) The actual travel time which is hours of work under this section; or

(2) The estimated travel time which would have been considered hours of work under this section had the employee used the mode of transportation offered by the agency, or traveled at the time selected by the agency.

§ 551.423 Time spent on training or attending a lecture, meeting, or conference.

(a) Time spent in training, whether or not it is under the purview of Part 410 of this chapter, shall be administered as follows:

(1) Time spent in training during regular working hours shall be considered hours of work.

(2) Time spent in training outside regular working hours shall be considered hours of work if:

(i) The employee is directed to participate in the training by his or her employing agency; and

(ii) The purpose of the training is to improve the employee's performance of the duties and responsibilities of his or her current position.

(3) Time spent in apprenticeship or other entry level training, or internship or other career related work study training, or training under the Veterans Readjustment Act (5 CFR Part 307) outside regular working hours shall not be considered hours of work, provided no productive work is performed during such periods.

(4) Time spent by an employee performing work for the agency during a period of training shall be considered hours of work.

(b) The following phrases contained in paragraph (a) of this section, are further clarified:

(1) "Directed to participate" means that the training is required by the agency and the employee's performance or continued retention in his or her current position will be adversely affected by nonenrollment in such training.

(2) Training "to improve the employee's performance * * * of his or her current position" is distinguished from upward mobility training or developmental training to provide an employee the knowledge or skills needed for a subsequent position in the same career field.

(c) Time spent by an employee within an agency's allowance of preparatory time for attendance at training shall be considered hours of work if such preparatory time is:

(1) During an employee's regular working hours; or

(2) Outside the employee's regular working hours, and the purpose of the training meets the requirements of paragraph (a)(2) of this section.

(d) Time spent attending a lecture, meeting, or conference shall be considered hours of work if attendance is:

(1) During an employee's regular working hours; or

(2) Outside an employee's regular working hours, and

(i) The employee is directed by an agency to attend such an event; or

(ii) The employee performs work for the benefit of the agency during such attendance.

§ 551.424 Time spent adjusting grievances or performing representational functions.

(a) Time spent by an employee adjusting his or her grievance (or any appealable action) with an agency during the time the employee is required to be on the agency's premises shall be considered hours of work.

(b) "Official time" granted an employee by an agency to perform representational functions during those hours when the employee is otherwise in a duty status shall be considered hours of work. This includes time spent by an employee performing such

(b) The following phrases contained in paragraph (a) of this section, are further clarified:

(1) "Directed to participate" means that the training is required by the agency and the employee's performance or continued retention in his or her current position will be adversely affected by nonenrollment in such training.

(2) Training "to improve the employee's performance * * * of his or her current position" is distinguished from upward mobility training or developmental training to provide an employee the knowledge or skills needed for a subsequent position in the same career field.

(c) Time spent by an employee within an agency's allowance of preparatory time for attendance at training shall be considered hours of work if such preparatory time is:

(1) During an employee's regular working hours; or

(2) Outside the employee's regular working hours, and the purpose of the training meets the requirements of paragraph (a)(2) of this section.

(d) Time spent attending a lecture, meeting, or conference shall be considered hours of work if attendance is:

(1) During an employee's regular working hours; or

(2) Outside an employee's regular working hours, and

(i) The employee is directed by an agency to attend such an event; or

(ii) The employee performs work for the benefit of the agency during such attendance.

§ 551.424 Time spent adjusting grievances or performing representational functions.

(a) Time spent by an employee adjusting his or her grievance (or any appealable action) with an agency during the time the employee is required to be on the agency's premises shall be considered hours of work.

(b) "Official time" granted an employee by an agency to perform representational functions during those hours when the employee is otherwise in a duty status shall be considered hours of work. This includes time spent by an employee performing such

ctions during regular working rs (including regularly scheduled time hours), or during a period of gular, unscheduled overtime work, ided an event arises incident to esentational functions that must ealt with during the irregular, unduled overtime period.

1.425 Time spent receiving medical attention.

) Time spent waiting for and reing medical attention for illness or ry shall be considered hours of k if:

1) The medical attention is required a workday an employee reported duty and subsequently became ill as injured;

2) The time spent receiving medical ention occurs during the employee's ular working hours; and

3) The employee receives the medi attention on the agency's premises, at the direction of the agency at a dical facility away from the agen's premises.

b) Time spent taking a physical exination that is required for the emoyee's continued employment with e agency shall be considered hours work.

551.426 Time spent in charitable activities.

Time spent working for public or haritable purposes at an agency's reuest, or under an agency's direction r control, shall be considered hours f work. However, time spent voluntarily in such activities outside an employee's regular working hours is not ours of work.

Special Situations

551.431 Time spent on standby duty or in an on-call status.

(a) An employee will be considered n duty and time spent on standby uty shall be considered hours of work

(1) The employee is restricted to an ency's premises, or so close thereto hat the employee cannot use the time ffectively for his or her own purposes; or

(2) The employee, although not restricted to the agency's premises:

(i) Is restricted to his or her living quarters or designated post of duty;

(ii) Has his or her activities substantially limited; and

(iii) Is required to remain in a state of readiness to perform work.

(b) An employee will be considered off duty and time spent in an on-call status shall not be considered hours of work if:

(1) The employee is allowed to leave a telephone number or to carry an electronic device for the purpose of being contacted, even though the employee is required to remain within a reasonable call-back radius; or

(2) The employee is allowed to make arrangements such that any work which may arise during the on-call period will be performed by another person.

§ 551.432 Sleep time.

(a) Except as provided in paragraph (b) of this section, *bona fide* sleep time that fulfills the following conditions shall not be considered hours of work if:

(1) The tour of duty is *24 hours or more;*

(2) During such time there are adequate facilities such that an employee may usually enjoy an uninterrupted period of sleep; and

(3) There are at least 5 hours available for such time during the sleep period.

(b) For employees engaged in fire protection activities or law enforcement activities, the exclusion of sleep time is appropriate for tours of duty *of more than 24 hours* only. However, paragraphs (a)(2) and (a)(3) of this section still apply to employees in these activities.

(c) Not more than 8 hours in a 24-hour period shall be considered sleep time.

(d) If sleep time is interrupted by a call to duty, the time spent on duty is considered hours of work.

Subpart E—Overtime Pay Provisions

Source: 45 FR 85665, Dec. 30, 1980, unless otherwise noted.

BASIC PROVISIONS

§ 551.501 Overtime pay.

(a) Except as otherwise provided in this subpart, an agency shall compensate an employee who is not exempt under Subpart B of this part for all hours of work in excess of 40 in a workweek at a rate equal to one and one-half times the employee's hourly regular rate of pay.

(b) An employee's "workweek" is a fixed and recurring period of 168 hours—seven consecutive 24-hour periods. It need not coincide with the calendar week but may begin on any day and at any hour of a day. For employees subject to Part 610 of this chapter, the workweek shall be the same as the administrative workweek defined in § 610.102 of this chapter.

(c) The maximum limitation on an employee's aggregate rate of pay under § 550.105 of this chapter does not apply to overtime pay due the employee under this subpart.

OVERTIME PAY COMPUTATIONS

§ 551.511 Hourly regular rate of pay.

(a) An employee's "hourly regular rate" is computed by dividing the total remuneration paid to an employee in the workweek by the total number of hours of work in the workweek for which such compensation was paid.

(b) "Total remuneration" includes all remuneration for employment paid to, or on behalf of, an employee except:

(1) Payments as rewards for service the amount of which is not measured by or dependent on hours of work, production, or efficiency (e.g., a cash award for a suggestion made by an employee and adopted by an agency);

(2) Payments for periods during which no work is performed (e.g., leave, holidays, or excused absences) for all employees except those in receipt of—

(i) Annual premium pay for standby duty under 5 CFR 550.141;

(ii) Annual premium pay for administratively uncontrollable overtime work under 5 CFR 550.151; or

(iii) Overtime pay for regularly scheduled overtime work, as defined in 5 CFR 550.103(p) and 610.102(g);

(3) Reimbursements for travel expenses, or other similar expenses, incurred by an employee in furtherance of an agency's interest, which are not related to hours of work;

(4) Payments made in recognition of services performed during a given period, if both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the agency (e.g., incentive awards for outstandingly high-quality work);

(5) Contributions by an agency to a fund for retirement, insurance, or similar benefits;

(6) Extra compensation provided by a premium rate paid for hours of work performed by an employee in excess of eight in a day, or in excess of the normal workweek applicable to the employee;

(7) Extra compensation provided by a premium rate paid for hours of work performed by an employee on a Sunday or a holiday where such premium rate is at least one and one-half times the employee's rate of pay for work performed in nonovertime hours on other days; or

(8) Extra compensation provided by a premium rate paid for hours of work performed by an employee outside his or her regular working hours, where such premium rate is at least one and one-half times the employee's rate of pay for work performed in nonovertime hours.

[45 FR 85665, Dec. 30, 1980, as amended at 52 FR 47688, Dec. 16, 1987, and 53 FR 27160, July 19, 1988]

§ 551.512 Overtime pay entitlement.

(a) An employee's overtime entitlement under this subpart includes:

(1) The straight time rate of pay times all overtime hours worked; plus

(2) One-half times the employee's hourly regular rate of pay times overtime hours worked.

(b) An employee's "straight time rate of pay" is equal to the employee's rate of pay for his or her position (exclusive of any premiums or differentials) except for an employee who is authorized annual premium pay under § 550.141 or § 550.151 of this chapter. For an employee who is authorized annual premium pay, straight time rate of pay is equal to basic pay plus annual premium pay divided by the hours for which the basic pay plus annual premium pay are intended.

(c) An employee has been paid in compliance with the overtime pay provisions of this subpart only if the employee has received pay at a rate at least equal to the employee's straight time rate of pay for all nonovertime hours of work in the workweek.

§ 551.513 Payment of greater overtime pay entitlement.

An employee entitled to overtime pay under this subpart and overtime pay under § 550.113 of this chapter, or under any other authority, shall be paid under whichever authority provides the greater overtime entitlement in the workweek. This overtime pay shall be paid in addition to all pay, other than overtime pay, to which the employee is entitled under title 5, United States Code, or any other authority.

FRACTIONAL HOURS OF WORK

§ 551.521 Fractional hours of work.

(a) An employee shall be compensated for every minute of regular overtime work.

(b) A quarter of an hour shall be the largest fraction of an hour used for crediting irregular or occasional overtime work under this subpart. When irregular or occasional overtime work is performed in other than the full fraction, odd minutes shall be rounded up or rounded down to the nearest full fraction of an hour used to credit overtime work.

[48 FR 36806, Aug. 15, 1983]

COMPENSATORY TIME OFF

§ 551.531 Compensatory time off.

(a) An agency may grant an employee compensatory time off in lieu of overtime pay under appropriate statutory authority, to be taken during the same workweek in which the overtime work was performed.

(b) An employee who earns an overtime pay entitlement under this subpart may be granted compensatory

annual premium pay, straight time rate of pay is equal to basic pay plus annual premium pay divided by the hours for which the basic pay plus annual premium pay are intended.

(c) An employee has been paid in compliance with the overtime pay provisions of this subpart only if the employee has received pay at a rate at least equal to the employee's straight time rate of pay for all nonovertime hours of work in the workweek.

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[48 FR 36806, Aug. 15, 1983]

COMPENSATORY TIME OFF

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(a) An agency may grant an employee compensatory time off in lieu of overtime pay under appropriate statutory authority, to be taken during the same workweek in which the overtime work was performed.

(b) An employee who earns an overtime pay entitlement under this subpart may be granted compensatory time off in a subsequent workweek provided:

(1) The employee earns overtime entitlement under § 550.113 of this chapter that is equal to or greater than the employee's overtime entitlement under this subpart; and

(2) The employee makes a written request to substitute compensatory time off for overtime payment.

SPECIAL OVERTIME PAY PROVISIONS

§ 551.541 Employees engaged in fire protection activities or law enforcement activities.

(a) An employee engaged in fire protection activities or law enforcement activities shall be paid at a rate equal to one and one-half times the employee's hourly regular rate of pay for those hours in a tour of duty which exceed the overtime standard for a work period specified in section 7(k) of the Act.

(b) The "tour of duty" of an employee engaged in these activities shall include all time the employee is on duty. Meal periods and sleep periods are included in the tour of duty except as otherwise provided in § 551.432 of this part.

(c) Each agency shall establish the "work period" to be used for application of section 7(k) of the Act. The work period shall be at least seven days and not more than 28 days.

PART 572—TRAVEL AND TRANSPORTATION EXPENSES; NEW APPOINTEES

Subpart A—General Provisions

Sec.
572.101 Agency authority.
572.102 Agencies' discretion in paying travel and transportation expenses.

Subpart B—Shortage Determinations for Positions above Grade GS-15 (or Equivalent)

572.201 Determination of manpower shortage for positions at level GS-16 and above (or equivalents).
572.202 Senior Executive Service: New appointees.

therefore, is not an "employee" of the Government of the United States for purposes of the Act:

(1) The training, even though it includes actual operation of the facilities of the Federal activity, is similar to that given in a vocational school or other institution of learning;

(2) The training is for the benefit of the individual;

(3) The trainee does not displace regular employees, but, rather, is supervised by them;

(4) The Federal activity which provides the training derives no immediate advantage from the activities of the trainee; on occasion its operations may actually be impeded;

(5) The trainee is not necessarily entitled to a job with the Federal activity at the completion of the training period; and

(6) The agency and the trainee understand that the trainee is not entitled to the payment of wages from the agency for the time spent in training.

(g) "Volunteer" means a person who does not meet the definition of "employee" in paragraph (d) of this section, and who volunteers or donates his or her service the primary benefit of which accrues to the performer of the service or to someone other than the agency. Under such circumstances there is neither an expressed nor an implied compensation agreement. Services performed by such a volunteer include personal services that, if left unperformed, would not necessitate the assignment of an employee to perform them.

(h) "Exempt area" means any foreign country, or any territory within the jurisdiction of the United States other than the following locations:

(1) A State of the United States;

(2) The District of Columbia;

(3) Puerto Rico;

(4) The Virgin Islands;

(5) Outer Continental Shelf Lands as defined in the Outer Continental Shelf Lands Act (67 Stat. 462);

(6) American Samoa;

(7) Guam;

(8) Wake Island;

(9) Eniwetok Atoll;

(10) Kwajalein Atoll; and

(11) Johnston Island.

[45 FR 85663, Dec. 30, 1980, as amended at 51 FR 7426, Mar. 4, 1986]

§ 551.103 Coverage.

(a) Any employee of an agency who is not specifically excluded by another statute is covered by the Act. This includes any person who is:

(1) Defined as an employee under section 2105 of title 5, United States Code;

(2) Appointed under other appropriate authority; or

(3) Suffered or permitted to work by an agency whether or not formally appointed.

(b) The following persons are not covered under the Act:

(1) A person appointed under appropriate authority without compensation;

(2) A trainee as defined in § 551.102(f); or

(3) A volunteer as defined in § 551.102(g).

§ 551.104 Administrative authority.

The Office of Personnel Management is the administrator of the provisions of the Act with respect to any person employed by an agency, except for the equal pay provisions contained in section 6(d) of the Act, which are administered by the Equal Employment Opportunity Commission.

Subpart B—Exemptions

SOURCE: 51 FR 7426, Mar. 4, 1986, unless otherwise noted.

§ 551.201 Agency authority.

The employing agency shall exempt from the overtime provisions of the Act any employee who meets the exemption criteria of this subpart and such supplemental interpretations or instructions as shall be issued by the Office of Personnel Management.

§ 551.202 General principles governing exemptions.

In all exemption determinations, the agency shall observe the principles that—

(a) Exemption criteria shall be narrowly construed to apply only to those employees who are clearly within the terms and spirit of the exemption.

(b) The burden of proof rests with the agency that asserts the exemption.

(c) All employees who clearly meet the criteria for exemption must be exempted.

§ 551.203 Exemption of General Schedule employees.

(a) Any employee properly classified at GS-4 or below (or the equivalent level in other white collar pay systems) shall be nonexempt;

(b) Any employee properly classified at GS-5 through GS-10 (or the equivalent level in other white collar pay systems) shall be exempt only if the employee is an executive, administrative, or professional employee as defined in §§ 551.204, 551.205, and 551.206 of this subpart.

[51 FR 7426, Mar. 4, 1986, as amended at 53 FR 1740, Jan. 22, 1988]

§ 551.204 Executive exemption criteria.

An "executive" employee is a supervisor, foreman, or manager who manages a Federal agency or any subdivision thereof (including the lowest recognized organizational unit with a continuing function) and regularly and customarily directs the work of at least three subordinate employees (excluding support employees) and meets all the following criteria:

(a) The employee's primary duty consists of management or supervision. The primary duty requirement is met if the employee—

(1) Has authority to select or remove, and advance in pay and promote, or make any other status changes of subordinate employees, or has authority to suggest and recommend such actions with particular consideration given to these suggestions and recommendations; and

(2) Customarily and regularly exercises discretion and independent judgment in such activities as work planning and organization; work assignment, direction, review, and evaluation; and other aspects of management of subordinates, including personnel administration.

(b) In addition to the primary duty criterion that applies to all employees, foreman level supervisors in the Federal Wage System (or the equivalent

in other wage systems), employees at the GS-7 through GS-9 level subject to section 207(k) of Title 29, United States Code, and employees classified at the GS-5 or GS-6 level (or equivalent in other white collar pay systems) must spend 80 percent or more of the worktime in a representative workweek on supervisory and closely related work.

[53 FR 1332, Jan. 19, 1988, and 53 FR 1740, Jan. 22, 1988]

§ 551.205 Administrative exemption criteria.

An administrative employee is an advisor, assistance, or representative of management, or a specialist in a management or general business function or supporting service who meets all of the following criteria:

(a) The employee's primary duty consists of work that—

(1) Significantly affects the formulation or execution of management policies or programs; or

(2) Involves general management or business functions or supporting services of substantial importance to the organization serviced; or

(3) Involves substantial participation in the executive or administrative functions of a mangement official.

(b) The employee performs office or other predominantly nonmanual work which is—

(1) Intellectual and varied in nature; or

(2) Of a specialized or technical nature that requires considerable special training, experience, and knowledge.

(c) The employee must frequently exercise discretion and independent judgment, under only general supervision, in performing the normal day-to-day work.

(d) In addition to the primary duty criterion that applies to all employees, General Schedule employees classified at GS-5 or GS-6 (or the equivalent in other white collar systems) must spend 80 percent or more of the worktime in a representative workweek on administrative functions and work that is an essential part of those functions.

§ 551.206 Professional exemption criteria.

A professional employee is an employee who meets all of the following criteria, or any teacher who is engaged in the imparting of knowledge or in the administration of an academic program in a school system or educational establishment.

(a) The employee's primary duty consists of—

(1) Work that requires knowledge in a field of science or learning customarily and characteristically acquired through education or training that meets the requirements for a bachelor's or higher degree, with major study in or pertinent to the specialized field as distinguished from general education; or is performing work, comparable to that performed by professional employees, on the basis of specialized education or training and experience which has provided both theoretical and practical knowledge of the specialty, including knowledge of related disciplines and of new developments in the field; or

(2) Work in a recognized field of artistic endeavor that is original or creative in nature (as distinguished from work which can be produced by a person endowed with general manual or intellectual ability and training) and the result of which depends on the invention, imagination, or talent of the employee.

(b) The employee's work is predominantly intellectual and varied in nature, requiring creative, analytical, evaluative, or interpretative thought process for satisfactory performance.

(c) The employee frequently exercises discretion and independent judgment, under only general supervision, in performing the normal day-to-day work.

(d) In addition to the primary duty criterion that applies to all employees, General Schedule exployees classified at GS-5 or GS-6 (or the equivalent in other systems), must spend 80 percent or more of the worktime in a representative workweek in professional functions and work that is an essential part of those functions.

§ 551.206 Professional exemption criteria.

A professional employee is an employee who meets all of the following criteria, or any teacher who is engaged in the imparting of knowledge or in the administration of an academic program in a school system or educational establishment.

(a) The employee's primary duty consists of—

(1) Work that requires knowledge in a field of science or learning customarily and characteristically acquired through education or training that meets the requirements for a bachelor's or higher degree, with major study in or pertinent to the specialized field as distinguished from general education; or is performing work, comparable to that performed by professional employees, on the basis of specialized education or training and experience which has provided both theoretical and practical knowledge of the specialty, including knowledge of related disciplines and of new developments in the field; or

(2) Work in a recognized field of artistic endeavor that is original or creative in nature (as distinguished from work which can be produced by a person endowed with general manual or intellectual ability and training) and the result of which depends on the invention, imagination, or talent of the employee.

(b) The employee's work is predominantly intellectual and varied in nature, requiring creative, analytical, evaluative, or interpretative thought process for satisfactory performance.

(c) The employee frequently exercises discretion and independent judgment, under only general supervision, in performing the normal day-to-day work.

(d) In addition to the primary duty criterion that applies to all employees, General Schedule exployees classified at GS-5 or GS-6 (or the equivalent in other systems), must spend 80 percent or more of the worktime in a representative workweek in professional functions and work that is an essential part of those functions.

§ 551.207 Foreign exemption.

(a) This section provides criteria for applying the "foreign exemption" contained in section 13(f) of the Act. An employee who is exempt under the foreign exemption is not subject to the minimum wage and overtime provisions of the Act. The exemption status of an employee to whom the foreign exemption is not applicable shall be determined under the general criteria contained in this subpart.

(b) Except as provided in § 551.208(d), an agency shall apply the foreign exemption to any employee who is permanently stationed in an "exempt area" as defined in § 551.102(h).

(c) An agency shall also apply the foreign exemption on a workweek basis to an employee on temporary duty who is not permanently stationed in an exempt area, but who performs *all* hours of work in a given workweek in an exempt area.

(d) The foreign exemption is not applicable to an employee permanently stationed in an exempt area for any given workweek in which the employee performs *any* hours of work in the United States or in a terrritory under the jurisdiction of the United States.

[51 FR 7426, Mar. 4, 1986. Redesignated at 53 FR 1740, Jan. 22, 1988]

§ 551.208 Application of the executive, administrative, and professional exemption criteria for periods of temporary duty.

(a) This section is not applicable when an employee is detailed to an identical additional position or to a position of the same grade, series code, and basic duties as the employee is regularly assigned to. This section applies only when an employee is assigned to perform duties which are not included in the employee's representative workweek. For the period of any such temporary duty, the exemption criteria contained in §§ 551.202 through 551.206 of this subpart shall be applied using the procedures specified in this section.

(b) A nonexempt employee who is assigned to perform duties which are not included in the employee's permanent position shall remain nonexempt for the entire period of the termporary duty unless the following three conditions apply:

(1) The temporary duty exceeds 30 days;

(2) The employee occupies a permanent position, or is temporarily promoted to a position which is either—

(i) Classified at GS-7 or above (or the equivalent level in other white collar pay systems); or

(ii) Classified as a General Foreman (or the equivalent level in other age systems);

(3) The employee's primary duty for the period of temporary duty is exempt duty as defined in this subpart.

(c) Except as provided in § 551.208(e), an exempt employee who is assigned to perform duties which are not included in the employee's permanent position shall remain exempt for the entire period of the temporary duty unless the following three conditions apply:

(1) The temporary duty exceeds 30 days;

(2) The employee occupies a permanent position, or is temporarily promoted to a position which is either—

(i) Classified at GS-7 or above (or the equivalent level in other white collar pay systems); or

(ii) Classified as a General Foreman (or the equivalent level in other wage systems);

(3) The employee's primary duty for the period of temporary duty is *not* exempt duty as defined in this subpart.

(d) An employee who becomes exempt under the criteria contained in § 551.208(b) shall be considered exempt for the entire period of temporary duty. An employee who becomes nonexempt under the criteria contained in § 551.208(c) shall be considered nonexempt for the entire period of temporary duty.

(e) An exempt employee who is classified at GS-5 or GS-6 (or the equivalent level in other white collar pay systems), or who is classified below General Foreman (or the equivalent level in other wage systems) who is assigned to perform duties which are not included in the employee's permanent position shall remain exempt *only* if

Asst Div
Barbara FSO
Compensation
606-2880
O. Personal Management

(395-6933)

Ray Kogut →

→ OMB ←

Fed employees - potentially
- Premium Pay
- NFLA -

- FLSA - profess - supervisors - managem are exempt -

exempt NFLA

secretarial staff -

exec. level SES - /
any GS 15 + step 10 → no additional compensate
aggregate paid unless → premium pay → 86,589.00

① FLSA - trainees -
secretarials -

1) for those covered - their choice if comp by time - ff
rather time ff -

Both FLSA + Title 5 - must approve overtime -

Professional - Title 5 -
Agency make determination comp time ff
and can set rules when ~~[illegible]~~ time/used
could write a rule - yes - here's how
5550 CFR → 1 hr off - 1 hr →
must be used w/in 2 time periods
must be used by year →
→ practically set that way but legally
can't -
→ need record keeping →

accrual & usage

12 or above - supervisor - can arrive late →

→ reasonable / workout -

→ Detailes - are we reimbursing them (?) →

→ hourly of 10th step of 10 - $23.67 per hour -
a little more -

↔ may be differences of agency ?

- no military → comp/time → military personnel.

(703) Mr. Brig
"Brierton"
"Frank" -
697-5272

Jerry Sanders

detailees—

(1)

(2) AF Manual 177-372 pay

overtime/request →

428 AF - approval

compensation -

if overtime less 10 step of GS10

if have GS15 most get

must get paid per hour -

no overall earnings can exceed 10th step of 15th

- over a 15th equivalent → 4

Fair Labor Stand Acts -

- exempt from ACT - "non-exempt"

up to them → do we want

pay -

or comptime - its their discretion

comp time approved hour / hours -

5 hours of 6 later - pay can't exceed 10th step of GS6

Document Separator

15 February 1995

MEMORANDUM FOR All Commission Staff

SUBJECT: Attendance at the South Texas Military Facilities Task Force Reception

1. Many of you have been invited to attend the above-referenced reception this Thursday, 16 February 1995. The Standards of Conduct for Employees of the Executive Branch, 5 C.F.R. §2635, prohibits participation in events that give the appearance of impropriety and thus undermines the integrity of the government, or in this case, the Commission. Therefore, although the hospitality of the South Texas Task Force is appreciated, Commission staff should decline the invitation to this reception.

2. Questions or comments should be addressed to Ralph Kaiser, Counsel, at extension 196.

MADELYN CREEDON
General Counsel

Interoffice Memo

Date: 02/14/95

To: Madelyn Creedon, General Counsel

From: Ralph Kaiser

Subject: Attendance at the South Texas Military Facilities Task Force Reception

1. References.
   a. Standards of Conduct for Employees of the Executive Branch, 5 C.F.R. §2635, Chapter 2.
   b. DOD 5500.7-R, Joint Ethics Regulation (JER), Chapter 2.
2. Background.

   Members of the BRAC staff on board as of 1 February 1995 have been invited to attend a reception/barbecue hosted by the above-referenced group and the south Texas Congressional delegation including Senators Gramm and Hutchison.
3. As you know, the general standard is that no employee shall solicit or accept a gift from a prohibited source or given because of the employee's official position, unless it falls into one of the exceptions listed in §2635.204. 5 C.F.R. §2635.202. Prohibited Source being any person who, among other things: is seeking official action by the employee's agency and/or has interests that may be substantially affected by performance or nonperformance of the employee's official duties. 5 C.F.R. §2635.203.
4. In this case, it appears that the "Gifts of $20 or less" exception would apply. However, the key question is whether using any exception would undermine government integrity or give the appearance of impropriety. Clearly, based upon the language quoted above in paragraph 3., attendance by BRAC personnel would both undermine the Commission's integrity and give the appearance of impropriety. Thus, the limitations on use of exceptions section, §2635.201(c) [the exception to the exceptions], applies. Therefore, I recommend that all personnel be advised that they may not attend the event in question. Attached is a draft memo for your signature.

April 23, 1995

MEMORANDUM TO COMMISSION STAFF

From: Madelyn Creedon

Subject: Guidelines when seeking other employment.

As all of you are aware, the Commission, by law, will go out of business on December 31, 1995. Understandably, each of you is concerned about future employment and may be actively looking, or preparing to look for your next job. While job hunting is not prohibited, there are certain guidelines which you must follow as a federal employee. Failure to follow these guidelines may be a violation of criminal law. Below are a series of questions and answers which may assist you in complying with ethics regulations as you seek future employment. If you have any questions about the regulations in general or your job search in particular, please contact Elizabeth King at extension 127.

GENERAL RULE:

18 U.S.C. § 208 and 5 C.F.R. § 2637 require that employees disqualify themselves from participating in any particular matter that will have a direct and predictable effect on the financial interest of a person with whom he or she is negotiating or has any arrangement concerning prospective employment. Not all "job hunting" efforts require special disclosure or disqualification.

Q: WHAT IS THE PURPOSE OF RESTRICTIONS ON "SEEKING EMPLOYMENT"?

A: The purpose of these restrictions is to eliminate situations that could put a DBCRC employee in a position where performance or non-performance of his or her official duties with DBCRC could have any affect, either positive or negative, on a prospective employer. Generally, this problem is eliminated by requiring a DBCRC employee to disqualify himself or herself from taking any official action which would involve such a prospective employer.

Q: ARE RESTRICTIONS ON SEEKING EMPLOYMENT JUST INTERNAL ADMINISTRATIVE REGULATIONS?

A: No. These regulations are based on 18 U.S.C. § 208 which apply to all employees of the federal government.

Q: ARE ALL DBCRC EMPLOYEES COVERED BY THE ETHICS REGULATIONS ON "JOB HUNTING"?

A: Yes, with one or two exceptions. If you completed either a public or confidential financial disclosure form (SF 278 or SF 450), then you must observe certain "job hunting" restrictions.

Q: AS A "COVERED EMPLOYEE" MUST I REPORT EVERY ATTEMPT TO SEEK OTHER EMPLOYMENT?

A: No. You must only report attempts to seek employment with firms or individuals which are affected by the performance or non-performance of your official duties at DBCRC. However, you would not need to report attempts to gain employment with any organization which has no interest in your duties as a DBCRC employee.

Usually a federal employee does not have to report an attempt to seek employment with another federal agency. However, in the case of the Commission, DOD and Congress are government entities that may be affected by the performance or non-performance of the official duties of a DBCRC employee. Although it is not required by federal regulations, in order preserve the integrity of the Commission and avoid the appearance of the loss of impartiality, we ask you to contact an ethics official if you begin to seek employment with DOD or Congress prior to the time when the President submits the Commission's report to Congress.

Q: AM I PROHIBITED FROM SEEKING ANY TYPE OF EMPLOYMENT?

A: No. DBCRC employees, regardless of their position or duties, may seek future employment <u>with anyone they choose</u> (including DOD and those doing business with DOD or DBCRC). However, if the employee has official responsibilities which may affect the possible employer, he or she must recuse himself or herself from any further dealing on behalf of DBCRC which involve the prospective employer until the negotiations have ended. Recusals will be honored by DBCRC, provided they are consistent with the needs of the agency.

Q: WHAT ACTUALLY CONSTITUTES "SEEKING EMPLOYMENT"?

A: This is a rather broad term, and may be defined in terms of "beginning" and "ending".

A DBCRC employee <u>begins</u> seeking employment when the employee:

1) makes unsolicited communications to a prospective employer regarding possible employment (such as mailing a resume);

2) engages in discussions for employment with any person; or

3) makes a response other than rejection to an unsolicited communication from a prospective employer regarding possible employment with that person.

A DBCRC employee is no longer seeking employment when:

1) the employee does not hear from the prospective employer for two months from the date a resume was sent (any indication of interest from the prospective employer means the employee is still seeking employment);

2) when they have withdrawn their resume or application;

3) the employee or prospective employer rejects the possibility of employment and all discussions have terminated (a response that simply defers discussions does not constitute a rejection).

Q: ARE THERE ANY OTHER CONCERNS IF I PLACE MY NAME WITH EMPLOYMENT AGENCIES OR WITH "HEAD HUNTERS"?

A: Yes. When an employment agency or head hunter notifies you of the names of prospective employers which they have contacted on your behalf, then you are considered to be seeking employment with those organizations. You have a positive duty to ask that you be so notified so that you can make appropriate recusals.

Q: IF I CALL A FIRM AND ASK THEM FOR A JOB APPLICATION, IS THAT CONSIDERED "SEEKING EMPLOYMENT"?

A: No. You are not considered to be "seeking employment" until you complete and submit the employment application. You may prepare and update your SF 171 or your resume, but once you submit it in response to a job advertisement, you are seeking employment.

Q: HOW IS "DISQUALIFICATION" OR "RECUSAL" ACCOMPLISHED?

A: Recusal may be in writing and given to the agency ethics officials and your supervisor or you can inform them orally. If recusal is appropriate, you must not participate in a matter that to your knowledge would have a direct and predictable effect on the financial interests of a prospective employer with whom you are seeking employment.

Q: WILL THE DBCRC GIVE TIME OFF/ADMINISTRATIVE LEAVE FOR PREPARATION OF RESUME, COMPLETION OF EMPLOYMENT APPLICATIONS AND JOB INTERVIEWS?

A: Yes, but not until after the President has submitted the Commission's report to Congress.

Q: I HAVE RECEIVED A RESPONSE TO A RESUME, AND A POTENTIAL EMPLOYER WANTS TO FLY ME TO THEIR HOME OFFICE FOR A JOB INTERVIEW. CAN I ACCEPT ROUND-TRIP TRAVEL AND LODGING TO INTERVIEW FOR EMPLOYMENT?

A: You may accept round-trip travel and lodging from a prospective employer as follows:

1) If the prospective employer has a business relationship with DBCRC, then you must obtain prior written approval from an agency ethics official before accepting the travel. The ethics official will review the matter based upon any appearance of conflict of interest, and will issue any disqualifcations if deemed appropriate.

2) If the prospective employer has no business relationship with DBCRC, then you may accept the travel, but you must report the travel to an agency ethics official no later than two weeks after completion of the travel.

3) In all cases, travel must be completed on your own time during weekends, annual leave, or special leave scheduled with your supervisor.

Q: IN CLOSING, COULD YOU SUMMARIZE DBCRC'S POLICY ON "SEEKING EMPLOYMENT"?

A: Yes. The prior questions and answers should be used in conjunction with the Standards of Ethical Conduct, a synopsis of which you received during your ethics training. In summary, DBCRC employees may seek employment with anyone, and are under **no obligation** to disclose employment negotiations with any person whose financial interests would **not** be affected by the performance or nonperformance of the employee's official duties. DBCRC employees are also free to seek employment with persons whose financial interests **could be** affected by the performance or non-performance of the employee's official duties; **however, in these instances DBCRC employees, prior to seeking employment, must disqualify themselves from taking official actions which could affect the financial interests of the targeted prospective employer.**

Generally speaking, one must keep their official responsibilities separate from their private interest. If there is no official involvement, there won't be a conflict. If there is official involvement, then the employee must recuse himself or herself from that involvement before he or she pursues employment opportunities.

21 March 1995

MEMORANDUM FOR Division Heads

SUBJECT: E-Mail Use and Record Keeping

1. After reviewing the use of e-mail by the Commission staff, we in legal have determined that the information processed in our e-mail system does not rise to the level of a "record" as defined in the Federal Records Act (44 U.S.C. 3301). This is chiefly because we do not conduct "official business" on the e-mail system, i.e., no final actions are constructed either on, or through the use of, e-mail. Consequently, we have no requirement either to implement a recordkeeping system (as outlined in 36 C.F.R. 1228.188 and 1234.28(a), or an e-mail back-up system (as described in 36 C.F.R. 1234.30).

2. So, your asking what this has to do with you. Well, in order for our opinion to remain valid, we must continue our current practice of using e-mail only for administrative correspondence and in the place of the intra-office intercom/phone (it is OK, however, to download a file from *MS Word* and send it via e-mail). Thus , please monitor the use of e-mail in your area of responsibility to insure that the current practice remains constant. Don't worry, there are currently no problems - this is just a bit of preventive law.

Ralph A. Kaiser

RALPH A. KAISER
Counsel

MEMORANDUM FOR: All Staff
FROM: Madelyn Creedon
SUBJECT: Travel
DATE: March 20, 1995

As travel season is upon us, it is time to review the ethics rules as they apply to official travel.

1. General Provision: Anything a Commission employee receives as a result of official travel belongs to the Federal Government.

2. Frequent Flyer Miles: If earned on official travel, they belong to the government and may be used only on subsequent official travel. If you commingle official and personal frequent flyer miles in the same account, then the entire account becomes property of the Federal Government and may be used only for subsequent official travel. Frequent flyer miles remain the property of the government even after you have left the government.

3. Getting "Bumped": Benefits, such as free tickets, as a result of being *involuntarily* bumped from an overbooked flight on official travel belong to the Federal Government as the traveler remains on government time. However, benefits as a result of *voluntarily* relinquishing a seat on an overbooked flight belong to the traveler and can be used on personal travel. The traveler may not give up the seat if it would interfere with the accomplishment of the government's mission for which the official travel was undertaken or add to the government's costs for the trip. If this would significantly delay your trip, you may be required to take the additional time as annual leave.

4. First-Class Travel: First-class travel is prohibited except in rare circumstances; please see one of the Commission's attorneys for further guidance.

5. Other Travel-Related Benefits: Benefits that cannot be used for official purposes *may* be accepted *if* they fall into an exception to the receipt of gifts by government employees. Examples include on-the-spot upgrades and rebates on personal credit cards (Discover). However, the system should not be manipulated in order to maximize upgrades.

6. Government American Express Card Please remember that the Government American Express Card should be used for official travel purposes.

7. Meals Meals are generally considered gifts when they come from prohibited sources, including communities. When you are visiting communities you must make arrangements to pay for all meals. This includes those situations where the community is holding a dinner, lunch etc. for the Commission. The one exception is miscellaneous food not intended as a meal. A good example of this would be coffee and doughnuts made available during a meeting.

If you have any questions, please ask one of the legal staff for guidance.

Document Separator

King, Liz

From: King, Liz
To: Creedon, Madelyn
Cc: King, Liz
Subject: Mandatory Drug Testing
Date: Tuesday, January 17, 1995 4:40PM

This afternoon I spoke with Caroline Yeary, Drug Program Coordinator at OSD. She told me that the Commission is not part of mandatory drug testing. Apparently, the 1991 Commissioner did want us to be part of drug testing. However, we are not officially part of DOD even though they do our paperwork. Ms. Yeary found that the big obstacle was the number of detailees working on the commission who would be twice subject to drug testing and could sue. She and others at DOD decided it would be too complicated and by the time they finished the paperwork the commission would be out of business and it thus was not worth it. She said we should find a note to file saying that the commission declines to be part of the program. I haven't found one yet and if I don't I will write one.

CAROLINE YEARY

DRUG Program Coordinator
for OSD

☎ 703-607-3454 or 3455

MEMORANDUM FOR EMPLOYEE ASSIGNED TO A TESTING DESIGNATED POSITION

SUBJECT: Notice of Applicability of the Random Drug Testing Component of the Base Closure and Realignment Commission Drug-Free Workplace Plan

In compliance with the Base Closure and Realignment Commission Drug-Free Workplace Plan, which is being operated in conjunction with the OSD/OJCS Drug-Free Workplace Plan, you are hereby informed that you have been assigned to a Testing Designated Position (TDP) and therefore you will be subject to random urinalysis screening beginning no sooner than 30 days from the date of this memorandum.

Our intent is to provide an opportunity for our employees to obtain assistance if it is needed, while sending a clear message that illegal drug use is incompatible with employment with the Base Closing and Realignment Commission. Refusal to submit to testing will result in disciplinary action, up to and including dismissal.

The Plan provides for an opportunity for an employee to voluntarily identify himself or herself as a user of illegal drugs prior to being identified through other means. If the employee obtains counseling or rehabilitation through an Employee Assistance Program, and thereafter refrains from illegal drug use, the employee will not be subject to disciplinary action. If you believe you may have a drug problem, you are encouraged to voluntarily seek counseling and/or referral services by contacting the Pentagon Employee Referral Service, (PERS), telephone (703) 697-6830.

If you believe that your position has been incorrectly determined to be a Testing Designated Position, you may seek administrative relief by filing your appeal within fifteen (15) days of the date of this notice through your immediate supervisor to the Executive Director, Base Closing and Realignment Commission. The Executive Director's decision is final and is not subject to further review.

Please sign and date the acknowledgement on page 2 and return it to Caroline Cimons. Your signature merely indicates that you have received and read this notice which states that your position has been designated for random drug testing, and that refusal to submit to testing will result in initiation of disciplinary action, up to and including dismissal.

MATT BEHRMANN
Executive Director

Alonzo - I spoke with Joan Hicks and if you are interested in summer interning at the DOD Gen. Counsel office you need to get her your 171 by Nov. 14. Her # is 703-697-4211

TO: ALONZO
FR: CAROLINE
RE: TESTING DESIGNATED POSITIONS (TDPs)

After reviewing the Drug-Free Workplace Plan regarding TDPs, I suggested, and Bob Moore agreed, that all members of the Commission who will be employed after December 31st should be TDPs. The overriding factor leading to this decision was the language in the plan which states that among the factors to be considered in making the determination is the extent to which the employee "must foster public trust by preserving employee reputation for integrity, honesty and responsibility" (p. 24) and that..."These positions encompass national security considerations and require the trust and confidence of the public at large." (p. A-1)

Therefore, the following positions are ones that will exist in 1992:

Executive Director
Special Assistant to the Director
Executive Assistant to the Director
Executive Assistant to the Chairman
General Counsel
Director, Research and Analysis
Deputy Director, Research and Analysis
Special Assistant to the Director, Research and Analysis
Navy Team Leader
Director of Administration
Chief Financial Officer
House Liaison
Systems Analyst
Analyst/Database Manager
Staff Assistant/Receptionist

Alonzo -
pls see me if you have any? [illegible]
I will circulate the attached memo to all staff upon your return.

General Provisions
Drug-Free Workplace Plan

1. The Drug-Free Workplace Plan (Plan), is established to implement Executive Order 12564, which established the goal of a Drug-Free Federal Workplace.

2. The Plan will be operated in conjunction with the drug-free workplace plan currently in operation in the Office of the Secretary of Defense and Organization of the Joint Chiefs of Staff, Washington Headquarters Services (WHS).

3. The Plan will be operated under the procedures set forth in the WHS Procedures Manual and Drug-Free Workplace Plan. Copies of the Procedures Manual and Drug-Free Workplace Plan will be available for review from Caroline Cimons.

4. A policy of random testing will be instituted no less than thirty (30) days after an employee receives notice of his/her assignment to a Testing Designated Position (TDP). TDPs are those positions sufficiently critical to the mission or to the protection of public safety that screening for illegal drug use is warranted as a job-related requirement.

5. Caroline Cimons has been appointed the Drug Program Coordinator (DPC). The DPC shall be responsible for informing supervisors of the names of employees who are selected for random testing, receive drug results for employees, inform supervisors of verified positive results, answer questions of employees and supervisors regarding the Plan, and generally be the liaison between the Drug Program Coordinator for WHS and the employees

for your review.

DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION

M E M O F O R A C T I O N

To: Joan Hicks
From: Mary Ann Hook, Acting General Counsel
Re: Submission of Names for Drug Testing Program
Dt: March 28, 1994

Please forward these names for the drug testing program administered by DoD. All of the below have signed waivers and have been given proper notice of the program.

Matthew Behrmann
Benton Borden
Edward Brown
Caroline Cimons
Francis Cirillo
Robert Cook
William Dunhke
Mary Ann Hook
Thomas Houston
Robert Keltie
Tobias Messitt
James Phillips
Althnett Turner
Mary E. Woodward
Samuel Alex Yellin

Thank you for your assistance.

MEMORANDUM FOR DRUG TESTING COORDINATOR

SUBJECT: Acknowledgment of Receipt of Notice of Commencement of Random Drug Testing Program

I have received and read the notice which states that my position has been designated for random drug testing, and that refusal to submit to testing will result in initiation of disciplinary action, up to and including dismissal.

_____

Signature Date

_____

(Print Name)

MEMORANDUM FOR DRUG TESTING COORDINATOR

SUBJECT: Acknowledgment of Receipt of Notice of Commencement of Random Drug Testing Program

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_____

Signature Date

_____

(Print Name)

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_____

Signature Date

_____

(Print Name)

MEMORANDUM FOR DRUG TESTING COORDINATOR

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_____

Signature Date

_____

(Print Name)

MEMORANDUM FOR DRUG TESTING COORDINATOR

SUBJECT: Acknowledgment of Receipt of Notice of Commencement of Random Drug Testing Program

I have received and read the notice which states that my position has been designated for random drug testing, and that refusal to submit to testing will result in initiation of disciplinary action, up to and including dismissal.

2-4-94

Signature Date

William Duhnke

(Print Name)

MEMORANDUM FOR DRUG TESTING COORDINATOR

SUBJECT: Acknowledgment of Receipt of Notice of Commencement of Random Drug Testing Program

I have received and read the notice which states that my position has been designated for random drug testing, and that refusal to submit to testing will result in initiation of disciplinary action, up to and including dismissal.

Mary E. Wood 2-4-94

Signature Date

Mary E. Woodward

(Print Name)

MEMORANDUM FOR DRUG TESTING COORDINATOR

SUBJECT: Acknowledgment of Receipt of Notice of Commencement of Random Drug Testing Program

I have received and read the notice which states that my position has been designated for random drug testing, and that refusal to submit to testing will result in initiation of disciplinary action, up to and including dismissal.

Thomas F. Houston 4 Feb 94

Signature Date

Thomas F. Houston

(Print Name)

MEMORANDUM FOR DRUG TESTING COORDINATOR

SUBJECT: Acknowledgment of Receipt of Notice of Commencement of Random Drug Testing Program

I have received and read the notice which states that my position has been designated for random drug testing, and that refusal to submit to testing will result in initiation of disciplinary action, up to and including dismissal.

Robert C. Keltie Jr. 2-4-94

Signature Date

ROBERT C. KELTIE JR.

(Print Name)

MEMORANDUM FOR DRUG TESTING COORDINATOR

SUBJECT: Acknowledgment of Receipt of Notice of Commencement of Random Drug Testing Program

I have received and read the notice which states that my position has been designated for random drug testing, and that refusal to submit to testing will result in initiation of disciplinary action, up to and including dismissal.

Signature 2-4-94
Date

TOBY G. MESSITT
(Print Name)

MEMORANDUM FOR DRUG TESTING COORDINATOR

SUBJECT: Acknowledgment of Receipt of Notice of Commencement of Random Drug Testing Program

I have received and read the notice which states that my position has been designated for random drug testing, and that refusal to submit to testing will result in initiation of disciplinary action, up to and including dismissal.

Caroline Cimons 2/3/94
Signature Date

Caroline Cimons
(Print Name)

MEMORANDUM FOR DRUG TESTING COORDINATOR

SUBJECT: Acknowledgment of Receipt of Notice of Commencement of Random Drug Testing Program

I have received and read the notice which states that my position has been designated for random drug testing, and that refusal to submit to testing will result in initiation of disciplinary action, up to and including dismissal.

Benton L Borden 1/31/94

Signature Date

BENTON L. BORDEN

(Print Name)

MEMORANDUM FOR DRUG TESTING COORDINATOR

SUBJECT: Acknowledgment of Receipt of Notice of Commencement of Random Drug Testing Program

I have received and read the notice which states that my position has been designated for random drug testing, and that refusal to submit to testing will result in initiation of disciplinary action, up to and including dismissal.

Robert Cook 1/31/94

Signature Date

ROBERT COOK

(Print Name)

MEMORANDUM FOR DRUG TESTING COORDINATOR

SUBJECT: Acknowledgment of Receipt of Notice of Commencement of Random Drug Testing Program

I have received and read the notice which states that my position has been designated for random drug testing, and that refusal to submit to testing will result in initiation of disciplinary action, up to and including dismissal.

Edward A. Brown III 31 Jan 94

Signature Date

EDWARD A. BROWN III

(Print Name)

MEMORANDUM FOR DRUG TESTING COORDINATOR

SUBJECT: Acknowledgment of Receipt of Notice of Commencement of Random Drug Testing Program

I have received and read the notice which states that my position has been designated for random drug testing, and that refusal to submit to testing will result in initiation of disciplinary action, up to and including dismissal.

M. P. Behrmann 2-31-94

Signature Date

MATHEW P. BEHRMANN

(Print Name)

MEMORANDUM FOR DRUG TESTING COORDINATOR

SUBJECT: Acknowledgment of Receipt of Notice of Commencement of Random Drug Testing Program

I have received and read the notice which states that my position has been designated for random drug testing, and that refusal to submit to testing will result in initiation of disciplinary action, up to and including dismissal.

1-31-94

Signature Date

FRANCIS A CIRILLO SR

(Print Name)

MEMORANDUM FOR DRUG TESTING COORDINATOR

SUBJECT: Acknowledgment of Receipt of Notice of Commencement of Random Drug Testing Program

I have received and read the notice which states that my position has been designated for random drug testing, and that refusal to submit to testing will result in initiation of disciplinary action, up to and including dismissal.

James K Phillips 1/31/94

Signature Date

JAMES K. PHILLIPS

(Print Name)

MEMORANDUM FOR DRUG TESTING COORDINATOR

SUBJECT: Acknowledgment of Receipt of Notice of Commencement of Random Drug Testing Program

I have received and read the notice which states that my position has been designated for random drug testing, and that refusal to submit to testing will result in initiation of disciplinary action, up to and including dismissal.

Signature

Jan 31, 1994
Date

ALTHNETT TURNER
(Print Name)

MEMORANDUM FOR DRUG TESTING COORDINATOR

SUBJECT: Acknowledgment of Receipt of Notice of Commencement of Random Drug Testing Program

I have received and read the notice which states that my position has been designated for random drug testing, and that refusal to submit to testing will result in initiation of disciplinary action, up to and including dismissal.

Signature 31JAN94
Date

S. ALEXANDER YELLIN
(Print Name)

MEMORANDUM FOR DRUG TESTING COORDINATOR

SUBJECT: Acknowledgment of Receipt of Notice of Commencement of Random Drug Testing Program

I have received and read the notice which states that my position has been designated for random drug testing, and that refusal to submit to testing will result in initiation of disciplinary action, up to and including dismissal.

Mary Hook 2/4/94

Signature Date

MARY HOOK

(Print Name)

IX. RANDOM TESTING

A. Positions Designated for Random Drug Testing

The position titles designated for random drug testing are listed in Appendix A, along with the criteria and procedures applied in designating such positions for drug testing, including the justification for such criteria and procedures.

B. Sensitive Employees in Testing Designated Positions

The Executive Order requires random testing for employees in sensitive positions that have been designated as testing designated positions. As further specified in Appendix A, the Director, WHS has determined that these positions are testing designated positions that will be randomly tested. Accompanying the list of testing designated positions are the criteria and procedures used in designating such positions, pursuant to the Act including the justification for such criteria and procedures.

C. Determining the Testing Designated Position

Among the factors the Director, WHS has considered in determining a testing designated position, are the extent to which the OSD/OJCS:

1. Considers its mission inconsistent with illegal drug use;
2. Is engaged in law enforcement;
3. Must foster public trust by preserving employee reputation for integrity, honesty and responsibility;
4. Has national security responsibilities;
5. Has drug interdiction responsibilities; or

The extent to which the position considered:

1. Authorizes employees to carry firearms;
2. Gives employees access to sensitive information;
3. Authorizes employees to engage in law enforcement;
4. Requires employees, as a condition of employment, to obtain a security clearance; or
5. Requires employees to engage in activities affecting public health or safety.

APPENDIX A

POSITIONS DESIGNATED FOR TESTING

Positions, with the exception of intermittent Experts and Consultants, in the OSD/OJCS designated as Special-Sensitive, Critical-Sensitive, or Noncritical-Sensitive shall be considered to fall into the "pool" of positions potentially subject to random drug testing, e. g. "testing designated positions" (TDP's).

This appendix lists approximately 3,500 positions that have been identified as testing designated positions. Employees in these positions will have an equal statistical chance of being selected for testing within a specified time frame. A random sample comprising 10% of the total number of TDP's will be selected each year for unannounced testing, which could occur on any scheduled workday. TDP's will be selected for testing on an individual basis but, in some instances, selection may be restricted to a particular OSD/OJCS Component. The total number selected for unannounced testing will not exceed 10% of the total number of TDP's during a one year period.

In determining the positions to identify as TDP's subject to random selection for unannounced testing, the following were taken into consideration. The Office of the Secretary of Defense and the Organization of the Joint Chiefs of Staff are at the highest echelon of the Department of Defense. These positions encompass national security considerations and require the trust and confidence of the public at large. The likely risk of harm to the public, the agency and the national security as a result of errors or misconduct of employees occupying these positions cannot be overemphasized. All positions described were reviewed to determine whether they meet the description in Section 7(d) of the Executive Order.

The determination to exclude intermittent experts and consultants was based on the fact that these individuals provide specialized opinions or professional or technical advice which is reviewed by high level agency officials. The extent of their authority and responsibility does not directly and immediately impact the public health or safety, the protection of life and property, law enforcement or the national security. Also, the majority of these individuals work 30 days or less per year on an as-needed, intermittent basis, therefore it would be impractical to include them for random testing.

The drug impact statements contained in this appendix were prepared and reviewed to ensure that no position had been improperly identified. As an additional safeguard, the plan provides that, upon receiving formal written notice that his or her position has been identified as a TDP, any employee may file an administrative appeal to the designated official who has authority to remove the employee from the TDP list, of any reason why the position should not be so designated. The Official shall reconsider

the designation of the position in question as a TDP and make the final determination, which is not subject to further administrative review.

The statements that follow identify each TDP by job title and organizational location, describe the characteristics of the positions that justify identification as a TDP and specify the adverse consequences that could occur if an incumbent in that position were to use illegal drugs.

Since new positions may be established and the sensitivity on current positions may change, the fact that a position is not listed will not exempt an employee from random testing if such position is determined to be a testing designated position.

MEMORANDUM FOR DRUG TESTING COORDINATOR

SUBJECT: Acknowledgment of Receipt of Notice of Commencement of Random Drug Testing Program

I have received and read the notice which states that my position has been designated for random drug testing, and that refusal to submit to testing will result in initiation of disciplinary action, up to and including dismissal.

Toby G. Messitt 11/22/91

Signature Date

TOBY GERARD MESSITT

(Print Name)

MEMORANDUM FOR DRUG TESTING COORDINATOR

SUBJECT: Acknowledgment of Receipt of Notice of Commencement of Random Drug Testing Program

I have received and read the notice which states that my position has been designated for random drug testing, and that refusal to submit to testing will result in initiation of disciplinary action, up to and including dismissal.

Benton L Borden 11/25/91

Signature Date

BENTON L. BORDEN

(Print Name)

MEMORANDUM FOR DRUG TESTING COORDINATOR

SUBJECT: Acknowledgment of Receipt of Notice of Commencement of Random Drug Testing Program

I have received and read the notice which states that my position has been designated for random drug testing, and that refusal to submit to testing will result in initiation of disciplinary action, up to and including dismissal.

Jill Lehtonen 11/25/91

Signature Date

JILL LEHTONEN

(Print Name)

MEMORANDUM FOR DRUG TESTING COORDINATOR

SUBJECT: Acknowledgment of Receipt of Notice of Commencement of Random Drug Testing Program

I have received and read the notice which states that my position has been designated for random drug testing, and that refusal to submit to testing will result in initiation of disciplinary action, up to and including dismissal.

Erin McElroy 11-22-91

Signature Date

ERIN McELROY

(Print Name)

MEMORANDUM FOR DRUG TESTING COORDINATOR

SUBJECT: Acknowledgment of Receipt of Notice of Commencement of Random Drug Testing Program

I have received and read the notice which states that my position has been designated for random drug testing, and that refusal to submit to testing will result in initiation of disciplinary action, up to and including dismissal.

James K. Phillips 11/21/91

Signature Date

JAMES KENT PHILLIPS

(Print Name)

MEMORANDUM FOR DRUG TESTING COORDINATOR

SUBJECT: Acknowledgment of Receipt of Notice of Commencement of Random Drug Testing Program

I have received and read the notice which states that my position has been designated for random drug testing, and that refusal to submit to testing will result in initiation of disciplinary action, up to and including dismissal.

Signature 21 NOV 91
Date

S. ALEXANDER YELLIN
(Print Name)

MEMORANDUM FOR DRUG TESTING COORDINATOR

SUBJECT: Acknowledgment of Receipt of Notice of Commencement of Random Drug Testing Program

I have received and read the notice which states that my position has been designated for random drug testing, and that refusal to submit to testing will result in initiation of disciplinary action, up to and including dismissal.

Paul J Hirsch Nov 26 '91

Signature Date

PAUL J. HIRSCH

(Print Name)

MEMORANDUM FOR DRUG TESTING COORDINATOR

SUBJECT: Acknowledgment of Receipt of Notice of Commencement of Random Drug Testing Program

I have received and read the notice which states that my position has been designated for random drug testing, and that refusal to submit to testing will result in initiation of disciplinary action, up to and including dismissal.

James P. Gallagher 11/20/91

Signature Date

James P. Gallagher

(Print Name)

MEMORANDUM FOR DRUG TESTING COORDINATOR

SUBJECT: Acknowledgment of Receipt of Notice of Commencement of Random Drug Testing Program

I have received and read the notice which states that my position has been designated for random drug testing, and that refusal to submit to testing will result in initiation of disciplinary action, up to and including dismissal.

Lynn M. Schmidt 11/20/91

Signature Date

Lynn M. Schmidt

(Print Name)

MEMORANDUM FOR DRUG TESTING COORDINATOR

SUBJECT: Acknowledgment of Receipt of Notice of Commencement of Random Drug Testing Program

I have received and read the notice which states that my position has been designated for random drug testing, and that refusal to submit to testing will result in initiation of disciplinary action, up to and including dismissal.

Robert Moore 11-20-81

Signature Date

Robert J. Moore

(Print Name)

MEMORANDUM FOR DRUG TESTING COORDINATOR

SUBJECT: Acknowledgment of Receipt of Notice of Commencement of Random Drug Testing Program

I have received and read the notice which states that my position has been designated for random drug testing, and that refusal to submit to testing will result in initiation of disciplinary action, up to and including dismissal.

R C N 11/21/91

Signature Date

R. CLAY NETTLES

(Print Name)

MEMORANDUM FOR DRUG TESTING COORDINATOR

SUBJECT: Acknowledgment of Receipt of Notice of Commencement of Random Drug Testing Program

I have received and read the notice which states that my position has been designated for random drug testing, and that refusal to submit to testing will result in initiation of disciplinary action, up to and including dismissal.

Jill C Bates 11/21/91

Signature Date

Jill C Bates

(Print Name)

MEMORANDUM FOR DRUG TESTING COORDINATOR

SUBJECT: Acknowledgment of Receipt of Notice of Commencement of Random Drug Testing Program

I have received and read the notice which states that my position has been designated for random drug testing, and that refusal to submit to testing will result in initiation of disciplinary action, up to and including dismissal.

Signature

11/21/91
Date

DAVID ANDERSON
(Print Name)

Document Separator

The Office of the Secretary of Defense
Organization of the Joint Chiefs of Staff

DRUG-FREE WORKPLACE PLAN

Director
Washington Headquarters Services

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DRUG FACTS

FORWARD

FORWARD

This handbook contains the Executive Order requiring the establishment of the OSD/OJCS Drug-Free Workplace Plan, a copy of our plan, and facts concerning drugs for which employees will be tested.

The handbook is provided for information purposes for all employees and is to be used as a guide for supervisors and managers in the administration of the program.

EXECUTIVE ORDER

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release September 15, 1986

EXECUTIVE ORDER

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DRUG-FREE FEDERAL WORKPLACE

I, RONALD REAGAN, President of the United States of America, find that:

Drug use is having serious adverse effects upon a significant proportion of the national work force and results in billions of dollars of lost productivity each year;

The Federal government, as an employer, is concerned with the well-being of its employees, the successful accomplishment of agency missions, and the need to maintain employee productivity;

The Federal government, as the largest employer in the Nation, can and should show the way towards achieving drug-free workplaces through a program designed to offer drug users a helping hand and, at the same time, demonstrating to drug users and potential drug users that drugs will not be tolerated in the Federal workplace;

The profits from illegal drugs provide the single greatest source of income for organized crime, fuel violent street crime, and otherwise contribute to the breakdown of our society;

The use of illegal drugs, on or off duty, by Federal employees is inconsistent not only with the law-abiding behavior expected of all citizens, but also with the special trust placed in such employees as servants of the public;

Federal employees who use illegal drugs, on or off duty, tend to be less productive, less reliable, and prone to greater absenteeism than their fellow employees who do not use illegal drugs;

The use of illegal drugs, on or off duty, by Federal employees impairs the efficiency of Federal departments and agencies, undermines public confidence in them, and makes it more difficult for other employees who do not use illegal drugs to perform their jobs effectively. The use of illegal drugs, on or off duty, by Federal employees also can pose a serious health and safety threat to members of the public and to other Federal employees;

The use of illegal drugs, on or off duty, by Federal employees in certain positions evidences less than the complete reliability, stability, and good judgment that is consistent with access to sensitive information and creates the possibility of coercion, influence, and irresponsible action under pressure that may pose a serious risk to national security, the public safety, and the effective enforcement of the law; and

Federal employees who use illegal drugs must themselves be primarily responsible for changing their behavior and, if necessary, begin the process of rehabilitating themselves.

By the authority vested in me as President by the Constitution and laws of the United States of America, including section 3301(2) of Title 5 of the United States Code, section 7301 of Title 5 of the United States Code, section 290ee-1 of Title 42 of the United States Code, deeming such action in the best interests of national security, public health and safety, law enforcement and the efficiency of the Federal service, and in order to establish standards and procedures to ensure fairness in achieving a drug-free Federal workplace and to protect the privacy of Federal employees, it is hereby ordered as follows:

Section 1. Drug-Free Workplace.

(a) Federal employees are required to refrain from the use of illegal drugs.

(b) The use of illegal drugs by Federal employees, whether on duty or off duty, is contrary to the efficiency of the service.

(c) Persons who use illegal drugs are not suitable for Federal employment.

Sec. 2. Agency Responsibilities.

(a) The head of each Executive agency shall develop a plan for achieving the objective of a drug-free workplace with due consideration of the rights of the government, the employee, and the general public.

(b) Each agency plan shall include:

(1) A statement of policy setting forth the agency's expectations regarding drug use and the action to be anticipated in response to identified drug use;

(2) Employee Assistance Programs emphasizing high level direction, education, counseling, referral to rehabilitation, and coordination with available community resources;

(3) Supervisory training to assist in identifying and addressing illegal drug use by agency employees;

(4) Provision for self-referrals as well as supervisory referrals to treatment with maximum respect for individual confidentiality consistent with safety and security issues; and

(5) Provision for identifying illegal drug users, including testing on a controlled and carefully monitored basis in accordance with this Order.

Sec. 3. Drug Testing Programs.

(a) The head of each Executive agency shall establish a program to test for the use of illegal drugs by employees in sensitive positions. The extent to which such employees are tested and the criteria for such testing shall be determined by the head of each agency, based upon the nature of the agency's mission and its employees' duties, the efficient

use of agency resources, and the danger to the public health and safety or national security that could result from the failure of an employee adequately to discharge his or her position.

(b) The head of each Executive agency shall establish a program for voluntary employee drug testing.

(c) In addition to the testing authorized in subsections (a) and (b) of this section, the head of each Executive agency is authorized to test an employee for illegal drug use under the following circumstances:

(1) When there is a reasonable suspicion that any employee uses illegal drugs;

(2) In an examination authorized by the agency regarding an accident or unsafe practice; or

(3) As part of or as a follow-up to counseling or rehabilitation for illegal drug use through an Employee Assistance Program.

(d) The head of each Executive agency is authorized to test any applicant for illegal drug use.

Sec. 4. Drug Testing Procedures.

(a) Sixty days prior to the implementation of a drug testing program pursuant to this Order, agencies shall notify employees that testing for use of illegal drugs is to be conducted and that they may seek counseling and rehabilitation and inform them of the procedures for obtaining such assistance through the agency's Employee Assistance Program. Agency drug testing programs already ongoing are exempted from the 60-day notice requirement. Agencies may take action under section 3(c) of this Order without reference to the 60-day notice period.

(b) Before conducting a drug test, the agency shall inform the employee to be tested of the opportunity to submit medical documentation that may support a legitimate use for a specific drug.

(c) Drug testing programs shall contain procedures for timely submission of requests for retention of records and specimens; procedures for retesting; and procedures, consistent with applicable law, to protect the confidentiality of test results and related medical and rehabilitation records. Procedures for providing urine specimens must allow individual privacy, unless the agency has reason to believe that a particular individual may alter or substitute the specimen to be provided.

(d) The Secretary of Health and Human Services is authorized to promulgate scientific and technical guidelines for drug testing programs, and agencies shall conduct their drug testing programs in accordance with these guidelines once promulgated.

Sec. 5. Personnel Actions.

(a) Agencies shall, in addition to any appropriate personnel actions, refer any employee who is found to use illegal drugs to an Employee Assistance Program for assessment, counseling, and referral for treatment or rehabilitation as appropriate.

(b) Agencies shall initiate action to discipline any employee who is found to use illegal drugs, provided that such action is not required for an employee who:

(1) Voluntarily identifies himself as a user of illegal drugs or who volunteers for drug testing pursuant to section 3(b) of this Order, prior to being identified through other means;

(2) Obtains counseling or rehabilitation through an Employee Assistance Program; and

(3) Thereafter refrains from using illegal drugs.

(c) Agencies shall not allow any employee to remain on duty in a sensitive position who is found to use illegal drugs, prior to successful completion of rehabilitation through an Employee Assistance Program. However, as part of a rehabilitation or counseling program, the head of an Executive agency may, in his or her discretion, allow an employee to return to duty in a sensitive position if it is determined that this action would not pose a danger to public health or safety or the national security.

(d) Agencies shall initiate action to remove from the service any employee who is found to use illegal drugs and:

(1) Refuses to obtain counseling or rehabilitation through an Employee Assistance Program; or

(2) Does not thereafter refrain from using illegal drugs.

(e) The results of a drug test and information developed by the agency in the course of the drug testing of the employee may be considered in processing any adverse action against the employee or for other administrative purposes. Preliminary test results may not be used in an administrative proceeding unless they are confirmed by a second analysis of the same sample or unless the employee confirms the accuracy of the initial test by admitting the use of illegal drugs.

(f) The determination of an agency that an employee uses illegal drugs can be made on the basis of any appropriate evidence, including direct observation, a criminal conviction, administrative inquiry, or the results of an authorized testing program. Positive drug test results may be rebutted by other evidence that an employee has not used illegal drugs.

(g) Any action to discipline an employee who is using illegal drugs (including removal from the service, if appropriate) shall be taken in compliance with otherwise applicable procedures, including the Civil Service Reform Act.

(h) Drug testing shall not be conducted pursuant to this Order for the purpose of gathering evidence for use in criminal proceedings. Agencies are not required to report to the Attorney General for investigation or prosecution any information, allegation, or evidence relating to violations of Title 21 of the United States Code received as a result of the operation of drug testing programs established pursuant to this Order.

Sec. 6. Coordination of Agency Programs.

(a) The Director of the Office of Personnel Management shall:

(1) Issue government-wide guidance to agencies on the implementation of the terms of this Order;

(2) Ensure that appropriate coverage for drug abuse is maintained for employees and their families under the Federal Employees Health Benefits Program;

(3) Develop a model Employee Assistance Program for Federal agencies and assist the agencies in putting programs in place;

(4) In consultation with the Secretary of Health and Human Services, develop and improve training programs for Federal supervisors and managers on illegal drug use; and

(5) In cooperation with the Secretary of Health and Human Services and heads of Executive agencies, mount an intensive drug awareness campaign throughout the Federal work force.

(b) The Attorney General shall render legal advice regarding the implementation of this Order and shall be consulted with regard to all guidelines, regulations, and policies proposed to be adopted pursuant to this Order.

(c) Nothing in this Order shall be deemed to limit the authorities of the Director of Central Intelligence under the National Security Act of 1947, as amended, or the statutory authorities of the National Security Agency or the Defense Intelligence Agency. Implementation of this Order within the Intelligence Community, as defined in Executive Order No. 12333, shall be subject to the approval of the head of the affected agency.

Sec. 7. Definitions.

(a) This Order applies to all agencies of the Executive Branch.

(b) For purposes of this Order, the term "agency" means an Executive agency, as defined in 5 U.S.C. 105; the Uniformed Services, as defined in 5 U.S.C. 2101(3) (but excluding the armed forces as defined by 5 U.S.C. 2101(2)); or any other employing unit or authority of the Federal government, except the United States Postal Service, the Postal Rate Commission, and employing units or authorities in the Judicial and Legislative Branches.

(c) For purposes of this Order, the term "illegal drugs" means a controlled substance included in Schedule I or II, as defined by section 802(6) of Title 21 of the United States Code, the possession of which is unlawful under chapter 13 of that Title. The term "illegal drugs" does not mean the use of a controlled substance pursuant to a valid prescription or other uses authorized by law.

(d) For purposes of this Order, the term "employee in a sensitive position" refers to:

(1) An employee in a position that an agency head designates Special Sensitive, Critical-Sensitive, or Noncritical-Sensitive under Chapter 731 of the Federal Personnel Manual or an employee in a position that an agency head designates as sensitive in accordance with Executive Order No. 10450, as amended;

(2) An employee who has been granted access to classified information or may be granted access to classified information pursuant to a determination of trustworthiness by an agency head under Section 4 of Executive Order No. 12356;

(3) Individuals serving under Presidential appointments;

(4) Law enforcement officers as defined in 5 U.S.C. 8331(20); and

(5) Other positions that the agency head determines involve law enforcement, national security, the protection of life and property, public health or safety, or other functions requiring a high degree of trust and confidence.

(e) For purposes of this Order, the term "employee" means all persons appointed in the Civil Service as described in 5 U.S.C. 2105 (but excluding persons appointed in the armed services as defined in 5 U.S.C. 2102(2)).

(f) For purposes of this Order, the term "Employee Assistance Program" means agency-based counseling programs that offer assessment, short-term counseling, and referral services to employees for a wide range of drug, alcohol, and mental health programs that affect employee job performance. Employee Assistance Programs are responsible for referring drug-using employees for rehabilitation and for monitoring employees' progress while in treatment.

Sec. 8. Effective Date. This Order is effective immediately.

RONALD REAGAN

THE WHITE HOUSE,
September 15, 1986.

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THE OFFICE OF THE SECRETARY OF DEFENSE
ORGANIZATION OF THE JOINT CHIEFS OF STAFF
DRUG-FREE WORKPLACE PLAN

DIRECTOR, WASHINGTON HEADQUARTERS SERVICES

CHAPTER I
INTRODUCTION

I. INTRODUCTION

A. Background

On September 15, 1986, President Reagan signed Executive Order 12564, establishing the goal of a Drug-Free Federal Workplace. The Order made it a condition of employment for all federal employees to refrain from using illegal drugs on or off-duty. In a letter to all Executive Branch employees dated October 4, 1986, the President reiterated his goal of ensuring a safe and drug-free workplace for all federal workers.

The Executive Order recognized that illegal drug use is seriously impairing a portion of the national work force, resulting in the loss of billions of dollars each year. As the largest employer in the nation, the Federal Government has a compelling proprietary interest in establishing reasonable conditions of employment. Prohibiting employee drug use is one such condition. The Office of the Secretary of Defense (OSD) and the Organization of the Joint Chiefs of Staff (OJCS) are concerned with the well being of their employees, the successful accomplishment of agency missions, and the need to maintain employee productivity. The intent of the policy is to offer a helping hand to those who need it, while sending a clear message that any illegal drug use is, quite simply, incompatible with federal service.

On July 11, 1987, Congress passed legislation affecting implementation of the Executive Order under Section 503 of the Supplemental Appropriations Act of 1987, PL 100-71, 101 Stat. 391, 468-471, codified at 5 U.S.C. 7301 note (1987), (hereafter, the "Act"), in an attempt to establish uniformity among federal agency drug testing plans, reliable and accurate drug testing, employee access to drug testing records, confidentiality of drug test results, and centralized oversight of the Federal Government's drug testing program.

The purpose of the OSD/OJCS Drug-Free Workplace Plan is to set forth objectives, policies, procedures, and implementation guidelines, to achieve a drug-free Federal workplace, consistent with the Executive Order and Section 503 of the Act.

B. Statement of Policy

The OSD/OJCS, as a result of its national security responsibilities, as well as the sensitive nature of its work, has a compelling obligation to eliminate illegal drug use from its workplace.

The Office of the Secretary of Defense is responsible for the formulation and execution of general defense policy and policy related to all matters of direct and primary concern to the Department of Defense. Positions located in the OSD relate to the protection and preservation of military, economic, and productive strength of the United States, including the security of the Government in domestic and foreign affairs, against or

from espionage, sabotage, and subversion, and any and all other acts or situations likely to weaken or destroy the United States.

Staff elements of the Office of the Secretary of Defense exercise direction, authority, and control over the Department of Defense in:

1. The development and promulgation of policies in support of United States national security objectives;

2. Oversight to assure the effective allocation and efficient management of resources consistent with OSD approved plans and programs;

3. Development of appropriate evaluation mechanisms to provide effective supervision of policy implementation and program execution at all levels of the DoD;

4. Advanced basic and applied research and development projects essential to the DoD; and

5. The provision of a focal point for departmental participation in the United States security community and other Government activities.

The Organization of the Joint Chiefs of Staff (OJCS) consists of the Chairman who is the principal military advisor to the President, the National Security Council, and the Secretary of Defense; the Chief of Staff, U.S. Army; the Chief of Naval Operations; the Chief of Staff, U.S. Air Force; and the Commandant of the Marine Corps, supported by the Joint Staff, and constitute the immediate military staff of the Secretary of Defense.

The Chairman, JCS assists the President and the Secretary of Defense in providing for the strategic direction of the armed forces; by preparing strategic plans, joint logistic and mobility plans to support the strategic plans and prepares military strategy and assessments of the associated risks.

Field support of the OSD is provided by the Director, Washington Headquarters Services, the functions of which are to:

1. Provide administrative support in the areas of budget and accounting; civilian and military personnel management; office services, personnel and physical security, correspondence and records management, criminal investigations, contracting, and travel.

2. Administer information and data systems in support of the OSD decision and policymaking process. This includes management information collection and reports preparation in the areas of procurement, logistics, manpower, and economics.

3. Provide computer services and associated support to OSD, to include: validation of automatic data processing (ADP) requirements, management and control of ADP resources, systems development and operation, and the provision of consulting services.

4. Provide administrative and operational support to specified DoD activities in the National Capital Region (NCR). This support includes space management, law enforcement, maintenance, repair and alteration of assigned buildings, custodial, physical security, building administration, concessions, graphics services, acquisition, property management, and other support services.

The above stated functions of the Office of the Secretary of Defense, Organization of the Joint Chiefs of Staff, and the Washington Headquarters Services are not meant to be all-inclusive, but to give the reader background information as to why drug testing is necessary in this DoD Component.

Drug abuse as a whole translates into: loss of efficiency, absenteeism, reduced productivity, increased potential for accidents, impaired judgement and overall deterioration of an employees physical and mental health. In the OSD/OJCS this could create a danger to the nation's defense, pose a threat to public safety, jeopardize the national security, lead to corruption of employees and undermine public confidence.

Although the OSD/OJCS does not believe it currently has a drug abuse problem, in light of its national security responsibilities and the imperative that public confidence in the integrity and law-abidingness of its employees be maintained, all special-sensitive, critical-sensitive, and noncritical-sensitive positions have been designated for random testing, with the exception of Experts and Consultants hired on an intermittent basis.

Applicants selected for testing designated positions in the OSD/OJCS will be tested for drug use prior to entrance on duty.

The mark of a successful drug-free workplace program also depends on how well the OSD/OJCS can inform employees of the hazards of drug use, and on how much assistance can be provided to drug users. Equally important is the assurance to employees that personal dignity and privacy will be respected in reaching the OSD/OJCS goal of a drug-free workplace. Therefore, this plan includes policies and procedures for:

1. Employee assistance;

2. Supervisory training;

3. Employee education; and

4. Identification of illegal drug use through drug testing on a carefullly controlled and monitored basis.

C. <u>Nature, Frequency, and Type of Drug Testing to be Instituted</u>

Section 503 of the Act requires the OSD/OJCS Plan to specify the nature, frequency, and type of drug testing to be instituted. The OSD/OJCS Plan includes the following types of drug testing:

1. Random testing of employees in testing designated positions;

2. Reasonable suspicion testing;

3. Accident or unsafe practice testing;

4. Voluntary testing;

5. Testing as part of or as a follow-up to counseling or rehabilitation; and

6. Applicant testing.

The frequency of testing for random testing, voluntary testing, and follow-up testing is specified in Appendix A-3, Section XII(B), and Section XII(C), respectively. The Director, WHS reserves the right to increase or decrease the frequency of testing based on the Agency's mission, availability of resources, and experience in the program, consistent with the duty to achieve a drug-free workplace under the Executive Order.

D. Drugs for Which Individuals Are Tested

Section 503 of the Act requires the OSD/OJCS Plan to specify the drugs for which individuals shall be tested. These are listed in Appendix B.

E. Scope

When each Executive Branch agency as specified in Section 503(a)(2) of the Act has complied with the provisions of Section 503(a) of the Act, this order shall be effective immediately for all of the Office of the Secretary of Defense, the Organization of the Joint Chiefs of Staff, and activities administratively supported by the Washington Headquarters Services.

F. Union Cooperation

The active participation and support of labor organizations can contribute to the success of this program. Management will seek ways in which recognized bargaining unit representatives might assist in program implementation, such as in acquainting employees with rehabilitation facilities and by enhancing employee confidence in the program. Management will continue to observe agreements already reached, will include union representatives in general orientation programs, and will continue to meet its obligations under Title VII of the Civil Service Reform act of 1978.

G. References

1. Authorities

a. Executive Order 12564;

b. Executive Order 10450;

c. Section 503 of the Supplemental Appropriations Act of 1987,

P.L. 100-71, 101 Stat. 391, 468-471, codified at 5 U.S.C. 7301 note (1987);

d. Scientific and Technical Guidelines for Drug Testing Programs, Alcohol, Drug Abuse and Mental Health Administration (ADAMHA), Department of Health and Human Services (HHS), as amended;

e. Standards for Certification of Laboratories Engaged in Urine Drug Testing for Federal Agencies, Alcohol, Drug Abuse and Mental Health Administration (ADAMHA), Department of Health and Human Services (HHS), as amended;

f. Civil Service Reform Act of 1978, P.L. 95-454;

g. 42 CFR Part 2, establishing requirements for assuring the confidentiality of alcohol and drug-abuse patient treatment records;

h. The Privacy Act of 1974 (5 U.S.C. Section 552a), prescribing requirements governing the maintenance of records by agencies pertaining to the individuals and access to these records by the individual(s) to whom they pertain;

i. 49 CFR Part 10, implementing the Privacy Act of 1974 within the Department of Defense;

j. Federal Employees Substance Abuse Education and Treatment Act of 1986, P.L. 99-570;

k. DoD Directive 1010.1, "Drug Abuse Testing Program;"

l. DoD Directive 1010.3, "Drug and Alcohol Abuse Reports;"

m. DoD Directive 1010.4, "Alcohol & Drug Abuse by DoD Personnel;"

n. DoD Directive 1010.5, "Education and Training in Alcohol and Drug Abuse Prevention;"

o. DoD Directive 1010.6, "Rehabilitation and Referral Services for Alcohol and Drug Abusers;"

p. DoD Directive 1010.9, "DoD Civilian Employee Drug Abuse Testing Program;" and

q. DoD Directive 1010.14, "Prevention, Early Identification and Treatment of Alcohol and Other Drug Impairment in DoD Health Care Providers;" and

r. Administrative Instruction No. 17, "Civilian Employee Alcohol and Drug Abuse Prevention, Testing and Control Program," the implementing directive for this Plan.

2. Guidance

a. Office of Personnel Management (OPM), Federal Personnel Manual (FPM) Letters 792-16 (November 28, 1986), and 792-17 (March 9, 1987), setting forth guidelines for Federal civilian agencies in establishing a drug-free workplace pursuant to Executive Order 12564;

b. FPM Chapter 792, Federal Health and Counseling Programs, providing guidance to Federal agencies in establishing alcoholism and drug abuse programs (subchapter 5) and employee counseling services programs (subchapter 6) for Federal employees with alcohol or drug problems; and

c. FPM Supplement, Chapter 792-2, providing guidance for developing and maintaining appropriate prevention, treatment, and rehabilitation programs and services for alcoholism and and drug abuse among Federal employees.

CHAPTER II
DEFINITIONS

II. DEFINITIONS

A. Applicant means any individual tentatively selected for employment with the OSD/OJCS for placement in a testing designated position.

B. Drug Program Coordinator means the individual assigned the responsibility to arrange for all testing under this plan, ensures that employees subject to random testing receive proper prior notice and is responsible for administering and managing the drug free workplace program in the OSD/OJCS Component.

C. Employee Assistance Program (EAP) means the OSD/OJCS-based counseling program that offers assessment, short-term counseling, and referral services to employees for a wide range of drug, alcohol, and mental health problems, and monitors the progress of employees while in treatment.

D. Employee Assistance Program Administrator means the individual responsible for ensuring the development, implementation and review of the agency EAP.

E. Employee Assistance Program Coordinator means the individual designated by the Employee Assistance Program Administrator responsible for implementing and operating the EAP within the OSD/OJCS, by providing counseling, treatment, and education services to employees and supervisors regarding the OSD/OJCS EAP.

F. Medical Review Official means the individual responsible for reviewing laboratory results generated from the OSD/OJCS Drug-Free Workplace Program who is a licensed physician with knowledge of substance abuse disorders and the appropriate medical training to interpret and evaluate all positive test results together with an individual's medical history and any other relevant biomedical information.

G. Illegal Drugs means a controlled substance included in schedule I or II, as defined by section 802(6) of Title 21 of the United States Code, the possession of which is unlawful under chapter 13 of that Title. The term "illegal drugs" does not mean the use of a controlled substance pursuant to a valid prescription or other uses authorized by law.

H. Management Official means an employee required or authorized by the OSD/OJCS to formulate, determine, or influence the policies of the OSD/OJCS. 5 U.S.C. 7103 (a)(11).

I. Random Testing means a system of drug testing imposed without individualized suspicion that a particular individual is using illegal

drugs. Random testing may either be uniform-unannounced testing of employees in testing designated positions occupying a specified area, element or position, or may be a statistically random sampling of such employees based on a neutral criterion, such as social security number.

J. Employees in Sensitive Positions mean:

1. Employees in positions designated by an OSD Component Head or the Chairman, OJCS as Special-Sensitive, Critical-Sensitive, or Noncritical-Sensitive under Chapter 731 of the Federal Personnel Manual; or employees in positions that a OSD Component Head or the Chairman, OJCS designate as sensitive in accordance with Executive Order No. 10450, as amended.

2. Employees granted access to classified information or who may be granted access to classified information pursuant to a determination of trustworthiness by an OSD Component Head or the Chairman, OJCS under Section 4 of Executive Order No. 12356;

3. Individuals serving under Presidential appointments;

4. Law enforcement officers as defined in 5 U.S.C. 8331(20) and 8401(17); or

5. Other positions that an OSD Component Head or the Chairman, OJCS determines involve law enforcement, national security, the protection of life and property, public health or safety, and other functions requiring a high degree of trust and confidence.

K. Supervisor means an employee having authority to hire, direct, assign, promote, reward, transfer, furlough, layoff, recall, suspend, discipline, or remove other employees, to adjust their grievances, or to effectively recommend such action, if the exercise of the authority is not merely routine or clerical in nature, but requires the consistent exercise of independent judgement. 5 U.S.C. 7103 (a)(10).

L. Verified Positive Test Result means a test result that has been screened positive by an FDA-approved immunoassay test, confirmed by a Gas Chromatography/Mass Spectrometry assay, (or other confirmatory tests approved by HHS), evaluated by the Medical Review Official and determined by him to be unjustified under Section XIII of this plan.

CHAPTER III
EMPLOYEE ASSISTANCE PROGRAMS

III. EMPLOYEE ASSISTANCE PROGRAMS

A. Function

The OSD/OJCS EAP is provided by the Pentagon Employee Referral Service (PERS). The EAP plays an important role in preventing and resolving employee drug use by: demonstrating the OSD/OJCS commitment to eliminating illegal drug use; providing employees an opportunity, with appropriate assistance, to discontinue their drug use; providing educational materials to supervisors and employees on drug use issues; assisting supervisors in confronting employees who have performance and/or conduct problems; and making referrals to appropriate treatment and rehabilitative facilities; and follow-up with individuals during the rehabilitation period to track their progress and encourage successful completion of the program. The EAP, however, shall not be involved in the collection of urine samples or the initial reporting of test results. Specifically, the EAP shall:

1. Provide counseling and assistance to employees who self-refer for treatment or whose drug tests have been confirmed positive, and monitor the employees' progress through treatment and rehabilitation.

2. Provide needed education and training to all levels of the OSD/OJCS on types and effects of drugs, symptoms of drug use and its impact on performance and conduct, relationship of the EAP with the drug testing program, and related treatment, rehabilitation, and confidentiality issues; and

3. Ensure that confidentiality of test results and related medical treatment and rehabilitation records is maintained in accordance with Section XIV.

B. Referral and Availability

Any employee found to be using drugs shall be referred to the EAP. The EAP shall be administered separately from the testing program, and shall be available to all employees without regard to a finding of drug use. The EAP shall provide counseling or rehabilitation for all referrals, as well as education and training regarding illegal drug use. The EAP is available not only to OSD/OJCS employees, but, when feasible, to the families of employees with drug problems, and to employees with family members who have drug problems.

C. Leave Allowance

Employees shall be allowed up to one hour (or more as necessitated by travel time) of excused absence for each counseling session, and an additional reasonable amount of time depending on the circumstances to be determined by the PERS, during the assessment/referral phase of rehabilitation. Absences during duty hours for rehabilitation or treatment in community facilities must be charged to the appropriate leave category in accordance with law and leave regulations.

D. Records and Confidentiality

All EAP operations shall be confidential in accordance with Section XIV of the Plan relating to records and confidentiality.

E. Structure

The Assistant Secretary of Defense (Health Affairs) shall be responsible for oversight and implementation of the OSD/OJCS EAP, and will provide, with the support of the Director, Washington Headquarters Services, high level direction and promotion of the EAP.

In accordance with the contract currently in effect, the Pentagon Employee Referral Service (PERS) shall:

1. Assist civilian employees of the Department of Defense in achieving optimal job performance through resolution of the presenting problem(s);

2. Properly safeguard client records and information contained therein in accordance with the provision of the Federal Confidentiality and Privacy Statutes and Regulations.

3. Encourage employees of DoD agencies who themselves feel they may be suffering from alcohol, drug or emotional problems to voluntarily seek counseling and information on a completely confidential basis by contacting the PERS directly.

4. Refer troubled employees to established community resources for appropriate treatment and rehabilitative care.

5. Assist families of employees in certain cases:

a. When the Departmental employee is involved in the PERS; or

b. When the employee is an alcoholic, drug abuser, or experiencing emotional/behavioral problems and the situation is causing stress which impacts on the employee's job performance.

CHAPTER IV
SUPERVISORY TRAINING

IV. SUPERVISORY TRAINING

A. Objectives

As supervisors have a key role in establishing and monitoring a drug-free workplace, the OSD/OJCS shall provide training to assist supervisors and managers in recognizing and addressing illegal drug use by agency employees. The purpose of supervisory training is to understand:

1. Departmental policies relevant to work performance problems, drug use, and the OSD/OJCS EAP (PERS);

2. The responsibilities of offering EAP services;

3. How employee performance and behavioral changes should be recognized and documented;

4. The roles of the medical staff, supervisors, personnel, and EAP personnel;

5. The ways to use the OSD/OJCS EAP;

6. How the EAP is linked to the performance appraisal and the disciplinary process; and

7. The process of reintegrating employees into the workforce.

B. Implementation

The Employee Assistance Program Administrator shall provide supervisory training to fully inform supervisors and managers of the OSD/OJCS Drug-Free Workplace Plan.

C. Training Package

Supervisory training shall be required of all supervisors and may be presented as a separate course, or be included as part of an ongoing supervisory training program. Training shall be provided as soon as possible after a person assumes supervisory responsibility. Training courses should include:

1. Overall Departmental policy;

2. The prevalence of various employee problems with respect to drugs and alcohol;

3. The EAP approach to handling problems;

4. How to recognize employees with possible problems;

5. Documentation of employee performance or behavior;

6. How to approach the employee;

7. How to use the EAP;

8. Disciplinary action, and removals from sensitive positions as required by Section 5(c) of the Executive Order.

9. Reintegration of employees into the workforce; and

10. Written materials which the supervisor can use at the work site.

CHAPTER V
EMPLOYEE EDUCATION

V. EMPLOYEE EDUCATION

A. Objectives

The EAP Administrator and the servicing Civilian Personnel Office, shall offer drug education to all OSD/OJCS employees. Drug education should include education and training to all levels of the OSD/OJCS on:

1. Types and effects of drugs;
2. Symptoms of drug use, and the effects on performance and conduct;
3. The relationship of the EAP to the drug testing program; and
4. Other relevant treatment, rehabilitation, and confidentiality issues.

B. Means of Education

Drug education activities may include:

1. Distribution of written materials;
2. Videotapes;
3. Lunchtime employee forums;
4. Employee drug awareness days; and
5. Awareness Seminars

CHAPTER VI
SPECIAL DUTIES & RESPONSIBILITIES

VI. SPECIAL DUTIES AND RESPONSIBILITIES

A. Drug Program Coordinator. Each Civilian Personnel Office servicing employees covered by this Plan shall have a Drug Program Coordinator (DPC) assigned to carry out the purposes of this plan. The DPC's shall be responsible for implementing, directing, administering, and managing the drug program within the OSD/OJCS. The DPC shall serve as the principal contact with the collection site and the laboratory in assuring the effective operation of the testing portion of the program. In carrying out this responsibility, the DPC should, among other duties:

1. Arrange for all testing authorized under this order;

2. Insure that all employees subject to random testing receive individual notice as described in Section VII B. of this Plan, prior to implementation of the program, and that such employees return a signed acknowledgment of receipt form;

3. Document, through written inspection reports, all results of laboratory inspections conducted;

4. Coordinate with and report to the Director, Washington Headquarters Services on DPC activities and findings that may affect the reliability or accuracy of laboratory results;

5. In coordination with the EAP Administrator, publicize and disseminate drug program educational materials, and oversee training and education sessions regarding drug use and rehabilitation;

6. Coordinate all DPC duties in field offices wherever possible to conserve resources and to efficiently and speedily accomplish reliable and accurate testing objectives.

B. Employee Assistance Program Administrator/Employee Assistance Program Coordinator should:

1. Assume the lead role in the development, implementation, and evaluation of the EAP;

2. Supervise the Employee Assistance Counselors,;

3. Submit annual statistical reports to OSD/OJCS components on EAP activity;

4. Provide initial counseling and treatment services to all employees referred to the EAP by their supervisors or on self-referral, and

otherwise offer employees the opportunity for counseling and rehabilitation;

5. Coordinate with the DPC, the MRO and supervisors, as appropriate;

6. Work with the DPC to provide educational materials and training to managers, supervisors, and employees on illegal drugs in the workplace;

7. Assist supervisors with performance and/or personnel problems that may be related to illegal drug use;

8. Monitor the progress of referred employees during and after the rehabilitation period;

9. Ensure that training is provided to assist supervisors in the recognition and documentation of facts and circumstances that support a reasonable suspicion that an employee may be using illegal drugs;

10. Maintain a list of rehabilitation or treatment organizations which provide counseling and rehabilitative programs, and include the following information on each such organization:

    a. Name, address, and phone number;

    b. Types of services provided;

    c. Hours of operation, including emergency hours;

    d. The contact person's name and phone number;

    e. Fee structure, including insurance coverage;

    f. Client specialization; and

    g. Other pertinent information.

11. Periodically visit rehabilitative or treatment organizations to meet administrative and staff members, tour the site, and ascertain the experience, certification and educational level of staff, and the organization's policy concerning progress reports on clients and post-treatment follow-up.

C. <u>Employee Assistance Counselors</u> should:

1. Serve as the initial point of contact for employees who ask or are referred for counseling;

2. Be familiar with all applicable law and regulations, including drug treatment and rehabilitation insurance coverage available to employees through the Federal Employee Health Benefits Program;

3. Be qualified by the EAP Administrator and be trained in counseling employees in the occupational setting, and identifying drug use;

4. Document and sign the treatment plan prescribed for all employees referred for treatment, after obtaining the employee's signature on this document; and

5. In making referrals, consider the:

   a. Nature and severity of the problem;

   b. Location of the treatment;

   c. Cost of the treatment;

   d. Intensity of the treatment environment;

   e. Availability of inpatient/outpatient care;

   f. Other special needs, such as transportation and child care;

   g. The preferences of the employee.

In the event the employee is not satisfied with the program of treatment or rehabilitation, such employee may seek review of the EAP Counselor's referral by notifying the EAP Administrator prior to completion of the program. The decision of the EAP Administrator shall be final and shall not be subject to further administrative review. Regardless of the treatment program chosen, the employee remains responsible for successful completion of the treatment, and assertions that the counselor failed to consider one or more of the above factors in making a referral shall not constitute either an excuse for continuing to use illegal drugs or a defense to disciplinary action if the employee does not complete treatment.

D. Medical Review Official. The OSD/OJCS shall have an MRO assigned to carry out the purposes of this Order. The MRO should, among other duties:

1. Receive all laboratory test results;

2. Assure that an individual who has tested positive has been afforded an opportunity to justify the test result in accordance with Section XIII. D. of this Plan;

3. Consistent with confidentiality requirements, refer written determinations regarding all verified positive test results to the DPC, including a positive drug test result form indicating that the positive result is "unjustified," together with all relevant documentation and a summary of findings; and

4. Coordinate with and report to the Director, WHS, through the DPC, on all activities and findings on a regular basis.

E. Supervisors

Supervisors will be trained to recognize and address illegal drug use by employees, and will be provided information regarding referral of employees to the EAP, procedures and requirements for drug testing, and behavioral patterns that give rise to a reasonable suspicion that an employee may be using illegal drugs. Except as modified by the Director, WHS to suit specific program responsibilities, first-line supervisors should:

1. Attend training sessions on illegal drug-use in the workplace;

2. Initiate a reasonable suspicion test, after first making appropriate factual observations and documenting those observations and obtaining approval from a higher-level supervisor;

3. Refer employees to the EAP for assistance in obtaining counseling and rehabilitation, upon a finding of illegal drug use;

4. Initiate appropriate disciplinary action upon a finding of illegal drug use; and

5. In conjunction with personnel specialists, and consultation with the EAP Administrator, advise higher-level supervisors regarding employee performance and or personnel problems that may be related to illegal drug use.

A higher-level supervisor shall review and concur, in advance, with all reasonable suspicion tests ordered under their supervision.

F. Implementation

At the direction of the Director, WHS, each OSD/OJCS Component Head shall implement the Drug-Free Workplace Plan within the Component, and ensure that the Plan is efficiently and effectively accomplished in accordance with this order and all other applicable regulations. The Director, Department of Defense Dependents Schools (DoDDS), shall implement the Drug-Free Workplace Plan throughout the school system overseas in accordance with their own DS Regulation 5792.2, Department of Defense Dependents Schools Drug-Free Workplace.

G. General Program/Structural Provisions

The Director, WHS shall develop implementation procedures to enable Agency activities which are not physically located in the Washington D.C. Metropolitan Area (Agency field offices) efficiently and swiftly to implement all aspects of this order, taking into account the unique geographical, personnel, budgetary and other relevant factors of the field offices. Such procedures will permit field office implementation to proceed independently of headquarters implementation, and of any other field office

implementation. Testing may proceed under this order as soon as any field office or operating site is prepared to commence testing, and without regard to whether any other field office or operating site or headquarters is prepared to commence with testing. Such procedures shall also encourage cooperation and coordination among components so as to conserve resources and efficiently implement this order.

H. Government Contractors or Department of Defense Agreements:

Wherever existing facilities are inadequate to implement this order, the Director, WHS shall:

1. Enter into an appropriate agreement with the Secretary of the Army, or contract with an approved outside source to provide specimen collection, laboratory testing and ancillary administrative requirements for employees covered under this Plan.

2. Ensure that contractors or DoD facilities chosen to perform the drug screening tests are duly certified pursuant to the HHS guidelines and that all contracts conform to the technical specifications of the HHS guidelines (see Appendix C); and

3. Establish, by contract, DoD agreement, or with OSD Component employees as deemed appropriate, the positions and specific responsibilities of the DPC and the MRO as required by the HHS guidelines.

CHAPTER VII
NOTICE

VII. NOTICE

A. General Notice

A general notice from the Director, WHS announcing the testing program, as required by the Executive Order Section 4(a), will be provided to all employees no later than sixty (60) days prior to the implementation date of the Plan. The notices shall be provided immediately upon completion of the congressional certification procedures pursuant to Sections 503(a)(1)(A), 503 (a)(1)(B), and 503 (a)(1)(C) of the Act and shall explain:

1. The purpose of the Drug-Free Workplace Plan;

2. That the Plan will include both voluntary and mandatory testing;

3. That those who hold positions selected for random testing will also receive an individual notice, prior to the commencement of testing, indicating that their position has been designated for testing;

4. The availability and procedures necessary to obtain counseling and rehabilitation through the EAP;

5. The circumstances under which testing may occur;

6. That opportunity will be afforded to submit medical documentation of lawful use of an otherwise illegal drug;

7. That the laboratory assessment is a series of tests which are highly accurate and reliable, and that, as an added safeguard, laboratory results are reviewed by the MRO;

8. That positive test results verified by the MRO may only be disclosed to the employee, the appropriate EAP administrator, the DPC, the appropriate management officials necessary to process an adverse action against the employee, or a court of law or administrative tribunal in any adverse personnel action;

9. That all medical and rehabilitation records in an EAP will be deemed confidential "patient" records and may not be disclosed without the prior written consent of the patient.

B. Individual Notice

In addition to the general notice, an individual notice will be distributed to all employees in testing designated positions explaining, in addition to the information provided above:

1. That each employee serving in a testing designated position will be subject to random testing.

2. That the employee will have the opportunity to voluntarily identify himself or herself as a user of illegal drugs and to receive counseling or rehabilitation and shall not be subject to disciplinary action.

3. That the employee's position will be subject to random testing no sooner than thirty days.

C. Signed Acknowledgement

Each employee in a testing designated position shall be asked to acknowledge in writing that:

> The employee has received and read the notice which states that the employee's position has been designated for random drug testing; and that refusal to submit to testing will result in initiation of disciplinary action, up to and including dismissal.

If the employee refuses to sign the acknowledgement, the employee's supervisor shall note on the acknowledgement form that the employee received the notice. This acknowledgement shall be centrally collected for easy retrieval by the Component Administrative or Executive Officer and forwarded to the DPC for filing. This notice is advisory only, therefore an employee's failure to sign the notice shall not preclude testing that employee or otherwise affect the implementation of this order since the general sixty-day notice will previously have notified all agency employees of the requirement to be drug-free.

D. Administrative Relief

If an employee believes his or her position has been wrongly determined a testing designated position (TDP), that employee may file an administrative appeal to the designated official who has the authority to remove the employee from the TDP list. The appeal must be submitted by the employee, in writing, to the designated official within 15 days of notification, setting forth all relevant information. The designated official shall review the appeal based upon the criteria applied in designating that employee's position as a TDP. The official's decision is final and is not subject to further administrative review.

CHAPTER VIII
FINDING OF DRUG USE & DISCIPLINARY CONSEQUENCES

VIII. FINDING OF DRUG USE AND DISCIPLINARY CONSEQUENCES

A. Determination

An employee may be found to use illegal drugs on the basis of any appropriate evidence including, but not limited to:

1. Direct observation;

2. Evidence obtained from an arrest or criminal conviction;

3. A verified positive test result; or

4. An employee's voluntary admission.

B. Mandatory Administrative Actions

The supervisor shall refer an employee found to use illegal drugs to the EAP, and, if the employee occupies a sensitive position, immediately remove the employee from that position. At the discretion of the Component Head or his/her designee, however, and as part of an EAP, an employee may return to duty in a sensitive position if the employee's return would not endanger public health or safety or national security.

C. Range of Consequences

The severity of the disciplinary action taken against an employee found to use illegal drugs will depend on the circumstances of each case, and will be consistent with the Executive Order, and includes the full range of disciplinary actions, including removal. A supervisor or management official shall initiate disciplinary action against any employee found to use illegal drugs but shall not discipline an employee who voluntarily admits to illegal drug use in accordance with section VIII. F. of this Plan. (Safe Harbor).

Such disciplinary action, consistent with the requirements of this Plan, the Civil Service Reform Act and other statutes, DoD and Component Instructions and Regulations, may include any of the following measures but some disciplinary action must be initiated:

1. Reprimanding the employee in writing;

2. Placing the employee in an enforced leave status;

3. Suspending the employee for 14 days or less (does not apply to SES members);

4. Suspending the employee for 15 days or more;

5. Suspending the employee until the employee successfully completes the EAP or until the relevant management official determines that action other than suspension is more appropriate;

6. Removing the employee from service.

D. Initiation of Mandatory Removal From Service

The OSD/OJCS shall initiate action to remove an employee for:

1. Refusing to obtain counseling or rehabilitation through the Employee Assistance Program as required by the Executive Order after having been found to use illegal drugs; or

2. Having been found not to have refrained from illegal drug use by a second finding of illegal drug use.

All letters to propose and decide on a separation action shall be worked out in consultation with the servicing Civilian Personnel Office.

E. Refusal to Take Drug Test When Required

1. An employee who refuses to be tested when so required will be subject to the full range of disciplinary action, including dismissal.

2. No applicant who refuses to be tested shall be extended an offer of employment.

3. Attempts to alter or substitute the specimen provided will be deemed a refusal to take the drug test when required.

F. Voluntary Referral

Under Executive Order 12564, the OSD/OJCS is required to initiate action to discipline any employee found to use illegal drugs in every circumstance except one. If an employee (1) voluntarily admits his or her drug use; (2) completes counseling or rehabilitation through an EAP; and (3) and thereafter refrains from drug use, such discipline "is not required."

1. Because the Order permits an agency to create a "safe harbor" for an employee who meets all three of these conditions, the OSD/OJCS has decided to create such a "safe harbor" and will not initiate disciplinary action against employees who satisfy the provisions of this section.

2. A fundamental purpose of the OSD/OJCS's Drug Testing Plan is to assist employees who themselves are seeking treatment for drug use. For this reason, the OSD/OJCS will not initiate disciplinary action against any employee who meets all three of these conditions:

a. Voluntarily identifies him/herself as a user of illegal drugs prior to being identified through other means;

b. Obtains counseling or rehabilitation through an Employee Assistance Program, and;

c. Thereafter refrains from using illegal drugs.

This self-referral option allows any employee to step forward and identify him/herself as an illegal drug user for the purpose of entering a drug treatment program under the EAP. In stepping forward, an employee may volunteer for a drug test as a means of identification. Although this self-identification test may yield a verified positive test result, such result shall merely constitute an identification for purposes of this Section.

3. Since the key to this provision's rehabilitative effectiveness is an employee's willingness to overcome "denial" by means of a voluntary self-identification -- a decision on the employee's part to admit his or her problem to him/herself and to others -- this provision will not be available to an employee who is asked to provide a urine sample when required, or who is found to have used illegal drugs pursuant to Sections VIII(A)(1), or VIII(A)(2) requests protection under this provision.

CHAPTER IX
RANDOM TESTING

IX. RANDOM TESTING

A. Positions Designated for Random Drug Testing

The position titles designated for random drug testing are listed in Appendix A, along with the criteria and procedures applied in designating such positions for drug testing, including the justification for such criteria and procedures.

B. Sensitive Employees in Testing Designated Positions

The Executive Order requires random testing for employees in sensitive positions that have been designated as testing designated positions. As further specified in Appendix A, the Director, WHS has determined that these positions are testing designated positions that will be randomly tested. Accompanying the list of testing designated positions are the criteria and procedures used in designating such positions, pursuant to the Act including the justification for such criteria and procedures.

C. Determining the Testing Designated Position

Among the factors the Director, WHS has considered in determining a testing designated position, are the extent to which the OSD/OJCS:

1. Considers its mission inconsistent with illegal drug use;

2. Is engaged in law enforcement;

3. Must foster public trust by preserving employee reputation for integrity, honesty and responsibility;

4. Has national security responsibilities;

5. Has drug interdiction responsibilities; or

The extent to which the position considered:

1. Authorizes employees to carry firearms;

2. Gives employees access to sensitive information;

3. Authorizes employees to engage in law enforcement;

4. Requires employees, as a condition of employment, to obtain a security clearance; or

5. Requires employees to engage in activities affecting public health or safety.

These positions are characterized by critical safety or security responsibilities as related to the mission of the OSD/OJCS. The job functions associated with these positions directly and immediately relate to public health and safety, the protection of life and property, law enforcement, or national security. These positions are singled out for random testing because they require the highest degree of trust and confidence.

The Director, WHS reserves the right to add or delete positions determined to be testing designated positions pursuant to the criteria established in the Executive Order and this plan. Moreover, pursuant to 42 U.S.C. 290ee-1(b)(2), and subject to the pertinent provisions of the Federal Personnel Manual, the Director, WHS has determined that all positions which have been or will be designated as testing designated positions under this plan are "sensitive positions."

D. Implementing Random Testing

In implementing the program of random testing the Drug Program Coordinator shall:

1. Ensure that the means of random selection remains confidential; and

2. Evaluate periodically whether the numbers of employees tested and the frequency with which those tests will be administered satisfy the OSD/OJCS's duty to achieve a drug-free workplace.

The number of employees occupying testing designated positions and the frequency with which random tests will be administered are specified in Appendix A.

E. Notification of Selection

An individual selected for random testing, and the individual's first-line supervisor, shall be notified the same day the test is scheduled, preferably, within two hours of the scheduled testing. The supervisor should explain to the employee that the employee is under no suspicion of taking drugs and that the employee's name was selected randomly.

F. Deferral of Testing

An employee selected for random drug testing may obtain a deferral of testing if the employee's first and second-line supervisors concur that a compelling need necessitates a deferral on the grounds that the employee is:

1. In a leave status (sick, annual, administrative or leave without pay); or

2. In official travel status away from the test site or is about to embark on official travel scheduled prior to testing notification.

An employee whose random drug test is deferred will be subject to an unannounced test within the following 60 days.

CHAPTER X
REASONABLE SUSPICION TESTING

X. REASONABLE SUSPICION TESTING

A. Grounds

Reasonable suspicion testing may be based upon, among other things:

1. Observable phenomena, such as direct observation of drug use or possession, and/or the physical symptoms of being under the influence of a drug;

2. A pattern of abnormal conduct or erratic behavior;

3. Arrest or conviction for a drug-related offense, or the identification of an employee as the focus of a criminal investigation into illegal drug possession, use, or trafficking;

4. Information provided either by reliable and credible sources or independently corroborated; or

5. Newly discovered evidence that the employee has tampered with a previous drug test.

Although reasonable suspicion testing does not require certainty, mere "hunches" are not sufficient to meet this standard.

B. Procedures

If an employee is suspected of using illegal drugs, the next level supervisor above the supervisor making the finding that a reasonable suspicion of illegal drug use exists, will gather all information, facts, and circumstances leading to and supporting this suspicion.

When reasonable suspicion has been established, the appropriate supervisor will promptly detail, for the record and in writing, the circumstances which formed the basis to warrant the testing. A written report will be prepared to include, at a minimum, the appropriate dates and times of reported drug related incidents, reliable and/or credible sources of information, rationale leading to the test, findings of the test, and the action taken.

C. Obtaining the Sample

The employee may be asked to provide the urine sample under observation in accordance with the criteria in Section XIII B.

D. Supervisory Training

In accordance with Section IV, supervisors will be trained to address illegal drug use by employees, to recognize facts that give rise to a reasonable suspicion, and to document facts and circumstances to support a finding of reasonable suspicion. Failure to receive such training, however, shall not invalidate proper reasonable suspicion testing.

CHAPTER XI
APPLICANT TESTING

XI. APPLICANT TESTING

A. Objectives

To maintain the high professional standards of the OSD/OJCS workforce, it is imperative that individuals who use illegal drugs be screened out during the initial employment process before they are placed on the employment rolls of the OSD/OJCS. This procedure will have a positive effect on reducing instances of illegal drug use by employees working within the OSD/OJCS, and will provide for a safer work environment.

B. Extent of Testing

Drug testing shall be required of all individuals selected for employment with the OSD/OJCS in a testing designated position.

C. Vacancy Announcements

Each vacancy announcement for positions designated for applicant testing shall state:

> "All applicants tentatively selected for this position will be required to submit to a urinalysis to screen for illegal drug use prior to appointment."

In addition, the applicant will be notified that appointment to the position will be contingent upon a negative drug test result. Failure of the vacancy announcement to contain this statement will not preclude applicant testing if advance written notice is provided applicants in some other manner.

D. Procedures

The DPC shall direct applicants to an appropriate collection facility. The drug test must be undertaken as soon after notification as possible, and no later than 48 hours of notice to the applicant. Where appropriate, applicants may be reimbursed for reasonable travel expenses.

Applicants will be advised of the opportuntiy to submit medical documentation that may support a legitimate use for a specific drug and that such information will be reviewed only by the MRO or the staff of the MRO to determine whether the individual is licitly using an otherwise illegal drug.

E. Personnel Officials

Upon notification that an individual has been tentatively selected for employment with the OSD/OJCS, the servicing Civilian Personnel Office shall assure, after consultation with the MRO or the staff of the MRO, that a drug test has been conducted on that individual and determine whether the test result is a verified positive result.

F. Consequences

The OSD/OJCS will decline to extend a final offer of employment to any applicant with a verified positive test result. The personnel Official working on the applicant's certificate shall be directed to object to the applicant on the basis of failure to pass the physical, a lack of personal characteristics necessary to relate to public employment or failure to support the goals of the OSD/OJCS. The Department shall inform the applicant that it will not hire the applicant because of a confirmed presence of drug in the applicant's urine precluding the OSD/OJCS from hiring the applicant.

G. Prior Drug Abuse by Applicant

Under 42 U.S.C. 290ee-1(b)(1), "[n]o person may be denied or deprived of Federal civilian employment or a Federal professional or other license or right solely on the ground of prior drug abuse." The Director, WHS has determined that the term "prior drug abuse" excludes any individual who has obtained a verified positive test result within any preceding 6 month period. Such person shall, however, be provided an opportunity to demonstrate to the MRO, consistent with procedures established by the MRO, that such person no longer suffers from current drug abuse.

The MRO shall review the individual's medical history, including all medical records made available by the individual, and whether the individual has successfully completed a program of counseling, treatment or rehabilitation. If the individual has successfully completed a program of counseling, treatment or rehabilitation, and if the MRO determines that the individual is no longer suffering from current drug abuse, then the MRO shall certify to the Personnel Office that the individual may not be deprived of federal civilian employment solely on the basis of 42 U.S.C. 290ee-1(b)(1).

Nothing in this section shall be construed to preclude the agency from exercising other authority granted by law.

CHAPTER XII
ADDITIONAL TYPES OF DRUG TESTING

XII. ADDITIONAL TYPES OF DRUG TESTING

A. Accident or Unsafe Practice Testing

The OSD/OJCS is committed to providing a safe and secure work environment. Employees involved in on-the-job accidents or who engage in unsafe on-duty job-related activities that pose a danger to others or the overall operation of the OSD/OJCS, may be subject to testing. Based on the circumstances of the accident or unsafe act, a supervisor may require testing when death, personal injuries, damage to government or private property, or damage to vehicles has occurred.

B. Voluntary Testing

In order to demonstrate their commitment to the OSD/OJCS's goal of a drug-free workplace and to set an example for other federal employees, employees not in testing designated positions may volunteer for unannounced random testing by notifying the DPC. These employees will then be included in the pool of testing designated positions subject to random testing, and be subject to the same conditions and procedures, including the same disciplinary consequences for a finding of illegal drug use.

Volunteers shall remain in the TDP pool for the duration of the position which the employee holds, or until the employee withdraws from participation.

C. Follow-up Testing

All employees who undergo a counseling or rehabilitation program for illegal drug use through the EAP will be subject to unannounced testing following completion of such a program for a period of one year. Such employees shall be tested at the frequency stipulated in the abeyance contract, or, in the alternative, at an increased frequency of once a quarter through placement in a separate random pool. Such testing is distinct from testing which may be imposed as a component of the EAP.

CHAPTER XIII
TEST PROCEDURES IN GENERAL

XIII. TEST PROCEDURES IN GENERAL

A. Technical Guidelines for Drug Testing

The OSD/OJCS shall adhere to all scientific and technical guidelines for drug testing programs promulgated by HHS consistent with the authority granted by Executive Order 12564, and to the requirements of Section 503 of the Act. The OSD/OJCS Drug Testing Program shall have professionally trained collection personnel, a laboratory certification program, rigorous analytical standards and quality assurance requirements for urinalysis procedures, and strict confidentiality requirements.

B. Privacy Assured

Any individual subject to testing under this order, shall be permitted to provide urine specimens in private, and in a rest room stall or similar enclosure so that the employee is not observed while providing the sample. Collection site personnel, however, may observe the individual provide the urine specimen when such personnel have reason to believe the individual may alter or substitute the specimen to be provided. Collection site personnel may have reason to believe that a particular individual may alter or substitute the specimen to be provided when:

1. The individual being tested pursuant to Section X relating to reasonable suspicion testing;

2. Facts and circumstances suggest that the individual is an illegal drug user;

3. Facts and circumstances suggest that the individual is under the influence of drugs at the time of the test;

4. The individual has previously been found by the OSD/OJCS to be an illegal drug user;

5. Facts and circumstances suggest that the individual has equipment or implements capable of tampering or altering urine samples; or

6. The individual has previously tampered with a sample.

C. Failure to Appear for Testing

Failure to appear for testing without a deferral will be considered refusal to participate in testing, and will subject an employee to the full range of disciplinary actions, including dismissal. If an individual fails to appear at the collection site at the assigned time, the collector shall contact the DPC to obtain guidance on action to be taken.

D. Opportunity to Justify a Positive Test Result

When a confirmed positive result has been returned by the laboratory, the MRO shall perform the duties set forth in the HHS Guidelines. For example, the MRO may choose to conduct employee medical interviews, review employee medical history, or review medical records made available by the tested employee when a confirmed positive test could have resulted from legally prescribed medication. Evidence to justify a positive result may include, but is not limited to:

1. A valid prescription; or

2. A verification from the individual's physician verifying a valid prescription.

Individuals are not entitled, however, to present evidence to the MRO in a trial-type administrative proceeding, although the MRO has the discretion to accept evidence in any manner the MRO deems most efficient or necessary.

If the MRO determines that the records do not "justify" the positive result, such result will then be considered a verified positive test result. The MRO shall immediately contact the DPC upon obtaining a verified positive test result.

E. Employee Counseling and Assistance

While participating in a counseling or rehabilitation program, and at the request of the Program Administrator, and with the concurrence of the EAP Administrator and the DPC, the employee may be exempted from the random testing pool for a period not to exceed sixty days, or for a time period specified in an abeyance contract or rehabilitation plan approved by an appropriate management official. Upon completion of the program, the employee immediately shall be subject to follow up testing pursuant to Section XII C.

F. Savings Clause

To the extent that any of the procedures specified in this section are inconsistent with any of those specified in the Scientific and Technical Guidelines promulgated by the Department of Health and Human Services, or any subsequent amendment thereto, such HHS Guidelines or amendment shall supersede the procedures specified in this section, but only to the extent of the inconsistency.

CHAPTER XIV
RECORDS AND REPORTS

XIV. RECORDS AND REPORTS

A. Confidentiality of Test Results

The laboratory shall disclose confirmed laboratory test results only to the MRO. Any positive result which the MRO justifies by licit and appropriate medical or scientific documentation to account for the result as other than the intentional ingestion of an illegal drug will be treated as a negative test result and may not be released for purposes of identifying illegal drug use. Test Results will be protected under the provisions of the Privacy Act, 5 U.S.C. 552a, et seq., and section 503(e) of the Act, and may not be released in violation of either Act. The MRO or the staff of the MRO may maintain only those records necessary for compliance with this order. Any records of the MRO, including drug test results, may be released to any supervisor or management official having authority to take adverse personnel actions for purposes of auditing the activities of the MRO, except that the disclosure of the results of any audit may not include personal identifying information on any employee.

In order to comply with Section 503(e) of the Act, the results of a drug test of an OSD/OJCS employee may not be disclosed without the prior written consent of such employee, unless the disclosure would be:

1. To the MRO;

2. To the EAP Administrator in which the employee is receiving counseling or treatment or is otherwise participating;

3. The DPC or to any supervisory or management official within the OSD/OJCS with authority to take adverse personnel action against such employee; or

4. Pursuant to the order of a court of competent jurisdiction or where required by the United States Government to defend against any challenge against any adverse personnel action.

For purposes of this Section, "management official" includes any management or government official whose duties necessitate review of the test results in order to process adverse personnel action against the employee.

In addition, test results with all identifying information removed shall also be made available to OSD/OJCS personnel, including the DPC, for data collection and other activities necessary to comply with Section 503(f) of the Act.

B. Employee Access to Records

Any employee who is the subject of a drug test shall, upon written request, have access to any records relating to:

1. Such employee's drug test; and

2. The results of any relevant certification, review, or revocation of proceedings, as referred to in Section 503(a)(1)(A)(ii)(III) of the Act.

Except as authorized by law, an applicant who is the subject of a drug test, however, shall not be entitled to this information.

C. Confidentiality of Records in General

All drug testing information specifically relating to individuals is confidential and should be treated as such by anyone authorized to review or compile program records. In order to efficiently implement this order and to make information readily retrievable, the DPC shall maintain all records relating to reasonable suspicion testing, suspicion of tampering evidence, and any other authorized documentation necessary to implement this order.

All records and information of the personnel actions taken on employees with verified positive test results should be forwarded to the DPC. Such shall remain confidential, locked in a combination safe, with only authorized individuals who have a "need-to-know" having access to them.

D. Employee Assistance Program Records

The EAP Administrator shall maintain only those records necessary to comply with this order. After a Component Head refers an employee to an EAP, the EAP will maintain all records necessary to carry out its duties. All medical and or rehabilitation records concerning the employee's drug abuse, including EAP records of the identity, diagnosis, prognosis, or treatment are confidential and may be disclosed only as authorized by 42 C.F.R. Part 2, including the provision of written consent by the employee. With written consent, the patient may authorize the disclosure of those records to the patient's employer for verification of treatment or for a general evaluation of treatment progress. (42 C.F.R. 2.1 et seq. (1986), revised regulations promulgated at 52 F.R. 21796, June 9, 1987).

E. Maintenance of Records

The OSD/OJCS shall establish or amend a recordkeeping system to maintain the records of the OSD/OJCS Drug Free Workplace Program consistent with the OSD/OJCS Privacy Act System of Records and with all applicable federal law, rules and regulations regarding confidentiality of records including the Privacy Act 5 U.S.C. 552a. If necessary, records may be maintained as required by subsequent administrative or judicial proceedings, or at the discretion of the Director, WHS. The recordkeeping system should capture sufficient documents to meet the operational and statistical needs of this order, and include:

1. Notices of verified positive test results referred by the MRO;

2. Written materials justifying reasonable suspicion testing or evidence that an individual may have altered or tampered with a specimen;

3. Anonymous statistical reports; and

4. Other documents the DPC, MRO, or EAP Administrator deems necessary for efficient compliance with this order.

F. Records Maintained by Government Contractors

Any contractor hired to satisfy any part of this order shall comply with the confidentiality requirements of this order, and all applicable federal laws, rules, regulations and guidelines.

G. Statistical Information

The DPC shall collect and compile anonymous statistical data for reporting the number of:

1. Random tests, reasonable suspicion tests, accident or unsafe practice tests, follow-up tests, or applicant tests administered;

2. Verified positive test results;

3. Voluntary drug counseling referrals;

4. Involuntary drug counseling referrals;

5. Terminations or denial of employment offers resulting from refusal to submit to testing;

6. Terminations or denial of employment offers resulting from alteration of specimens;

7. Terminations or denial of employment offers resulting from failure to complete a drug abuse counseling program; and

8. Employees who successfully complete EAP.

This data, along with other pertinent information, shall be compiled for inclusion in the OSD/OJCS annual report to Congress required by Section 503(f) of the Act. This data shall also be provided to HHS semi-annually to assist in overall program evaluation and to determine whether changes to the HHS Guidelines may be required.

APPENDIX A
POSITIONS DESIGNATED FOR TESTING
FREQUENCY OF TESTING

APPENDIX A

POSITIONS DESIGNATED FOR TESTING

Positions, with the exception of intermittent Experts and Consultants, in the OSD/OJCS designated as Special-Sensitive, Critical-Sensitive, or Noncritical-Sensitive shall be considered to fall into the "pool" of positions potentially subject to random drug testing, e. g. "testing designated positions" (TDP's).

This appendix lists approximately 3,500 positions that have been identified as testing designated positions. Employees in these positions will have an equal statistical chance of being selected for testing within a specified time frame. A random sample comprising 10% of the total number of TDP's will be selected each year for unannounced testing, which could occur on any scheduled workday. TDP's will be selected for testing on an individual basis but, in some instances, selection may be restricted to a particular OSD/OJCS Component. The total number selected for unannounced testing will not exceed 10% of the total number of TDP's during a one year period.

In determining the positions to identify as TDP's subject to random selection for unannounced testing, the following were taken into consideration. The Office of the Secretary of Defense and the Organization of the Joint Chiefs of Staff are at the highest echelon of the Department of Defense. These positions encompass national security considerations and require the trust and confidence of the public at large. The likely risk of harm to the public, the agency and the national security as a result of errors or misconduct of employees occupying these positions cannot be overemphasized. All positions described were reviewed to determine whether they meet the description in Section 7(d) of the Executive Order.

The determination to exclude intermittent experts and consultants was based on the fact that these individuals provide specialized opinions or professional or technical advice which is reviewed by high level agency officials. The extent of their authority and responsibility does not directly and immediately impact the public health or safety, the protection of life and property, law enforcement or the national security. Also, the majority of these individuals work 30 days or less per year on an as-needed, intermittent basis, therefore it would be impractical to include them for random testing.

The drug impact statements contained in this appendix were prepared and reviewed to ensure that no position had been improperly identified. As an additional safeguard, the plan provides that, upon receiving formal written notice that his or her position has been identified as a TDP, any employee may file an administrative appeal to the designated official who has authority to remove the employee from the TDP list, of any reason why the position should not be so designated. The Official shall reconsider

the designation of the position in question as a TDP and make the final determination, which is not subject to further administrative review.

The statements that follow identify each TDP by job title and organizational location, describe the characteristics of the positions that justify identification as a TDP and specify the adverse consequences that could occur if an incumbent in that position were to use illegal drugs.

Since new positions may be established and the sensitivity on current positions may change, the fact that a position is not listed will not exempt an employee from random testing if such position is determined to be a testing designated position.

FREQUENCY OF TESTING

Random testing shall be administered to 10% of the designated positions annually (approximately 350 positions), unless a determination is made that a more statistically valid percentage will satisfy the OSD/OJCS duty to achieve a drug-free workplace.

Testing shall be performed on a monthly basis.

Effective February 1, 1990, random testing shall be administered to 25% of the designated positions in the Defense Protective Service, excluding administrative and clerical.

APPENDIX B
DRUGS FOR WHICH INDIVIDUALS WILL BE TESTED

APPENDIX B

DRUGS FOR WHICH INDIVIDUALS WILL BE TESTED

MARIJUANA

COCAINE

OPIATES

AMPHETAMINES

PHENCYCLIDINE (PCP)

APPENDIX C
COST ESTIMATES OF THE OSD/OJCS DRUG TESTING PROGRAM

DEPARTMENT OF DEFENSE

OSD/OJCS

POSITION AND TESTING DATA

	1987	1988	1989	1990	1991	1992	1993
Total agency positions	5,300	5,300	5,300	5,300	5,300	5,300	5,300
Testing designated positions (TDPs)	3,500	3,500	3,500	3,500	3,500	3,500	3,500
Percent tested	0	10	10	10	10	10	10
Total TDPs filled	3,400	3,400	3,400	3,400	3,400	3,400	3,400
Estimated number of employees tested	0	230	350	350	350	350	350
Estimated number of applicants tested	0	210	420	420	420	420	420
Total number of employees and applicants tested	0	440	770	770	770	770	770
Percent of employees tested positive	0	2	2	2	2	2	2
Total employees tested positive	0	5	7	7	7	7	7

DEPARTMENT OF DEFENSE

OSD/OJCS

COST ESTIMATE OF DRUG TESTING PROGRAM
(Obligations in thousands of dollars)

	1987	1988	1989	1990	1991	1992	1993
Direct Program (Category A):							
Collection	0	11.00	19.25	19.25	19.25	19.25	19.25
Drug Testing	0	8.80	19.25	19.25	19.25	19.25	19.25
Medical Review Officer	0	.50	.70	.70	.70	.70	.70
Supervisor Training	0	18.60	18.60	4.50	4.50	4.50	4.50
Employee Education	0	2.00	2.00	2.00	2.00	2.00	2.00
Administration	10.40	21.73	25.57	13.55	14.36	15.23	16.14
Subtotal	10.40	62.63	85.37	59.25	60.06	60.93	61.84
Reallocated Staff (Category B):							
Collection	0	0	0	0	0	0	0
Drug Testing	0	0	0	0	0	0	0
Medical Review Officer	0	0	0	0	0	0	0
Supervisor Training	0	0	0	0	0	0	0
Employee Education	0	.50	.50	.50	.50	.50	.50
Administration	0	.35	.50	.50	.50	.50	.50
Subtotal	0	.85	1.00	1.00	1.00	1.00	1.00

	1987	1988	1989	1990	1991	1992	1993
Total Program (Category C):							
Collection	0	11.00	19.25	19.25	19.25	19.25	19.25
Drug Testing	0	8.80	19.25	19.25	19.25	19.25	19.25
Medical Review Officer	0	.50	.70	.70	.70	.70	.70
Supervisor Training	0	18.60	18.60	4.50	4.50	4.50	4.50
Employee Education	0	2.50	2.50	2.50	2.50	2.50	2.50
Administration	10.40	22.08	26.07	14.05	14.86	15.78	16.64
Total	10.40	63.48	86.37	60.25	61.06	61.98	62.84

JUSTIFICATION:

Category A:

Supervisor Training: Assumes that all current first level supervisors will be trained during 1988 and 1989. After that date, newly hired or promoted supervisors will need to be trained.

Employee Education: Covers cost of printed pamphlets and other written information.

Administration: Salary costs of Drug Program Coordinator - 50% through 1989, 25% after that date.

Category B:

Employee Education: Additional costs of EAP for education of employees by in-house seminars.

Administration: EAP drug abuse counseling.

Prepared by: Lydia Markgraf
Date: January 26, 1988
Phone: 694-8582

APPENDIX D
AMENDMENT IN ACCORDANCE WITH PL 100-440, SECTION 628

APPENDIX D

1. The OSD/OJCS hereby adopts the following amendments to the Drug-Free Workplace Plan.

a. The following language is adopted as a free standing paragraph at the end of Chapter I, Section B. "Statement of Policy:"

> It is OSD/OJCS policy that its workplace be free from the illegal use, possession, or distribution of controlled substances, (as specified in Schedules I through V, as defined in 21 U.S.C. 802(6) and listed in Part B, Subchapter 13 of that Title) by the officers and employees of OSD/OJCS. The possession and distribution of controlled substances will be dealt with promptly in accordance with legal and administrative disciplinary procedures. However, the policy's primary goal is to ensure that illegal drug use is eliminated and that the OSD/OJCS workplace be safe, healthful, productive, and secure.

b. In any references to grounds for "reasonable suspicion testing," the term "trafficking" shall also mean "distribution."

c. In addition to all grounds contained in this plan, there shall be grounds for reasonable suspicion testing of an employee if the employee is the focus of a criminal investigation into the illegal use, possession, or distribution of controlled substances.

d. The following authority and guidance is added to Chapter I, Subsection G.1. "Authorities," and Chapter I, Subsection G.2. "References" respectively:

s. (Authority). Section 628 of the Treasury, Postal Service, and General Government Appropriations Act of 1989, Pub. L. 100-440, as amended.

d. (Guidance). Office of Personnel Management (OPM) Federal Personnel Manual (FPM) Letter 792-18, December 30, 1988, setting forth guidelines to agencies, departments, and instrumentalities in establishing a drug-free workplace pursuant to Pub. L. 100-440.

2. This amendment is effective upon the signature of the agency head or the senior management official authorized to sign for the agency head.

10 Jan 89
Date

Director,
Washington Headquarters Services

DRUG FACTS

DRUG FACTS

A. MARIJUANA

APPEARANCE AND USE. Marijuana consists of the flowering tops and leaves of the dried plant Cannabis Sativa and frequently contains seeds, stems and other materials. It ranges in color from greyish-green to greenish-brown, and in texture from a fine substance that looks like oregano to a coarse substance that looks like tea. Hasish, which is also a derivative of cannabis, is the dried, cake resin produced from the flowers and leaves of the female plant. The product is a more potent preparation and is sold in solid pieces. Its color ranges from light or medium brown to nearly black; the texture varies. Hash Oil is a reddish-brown or green oily extract of cannabis and is the most potent preparation of the drug.

Marijuana may be smoked in either hand-rolled cigarettes or special pipes. Solid hasish, mixed with tobacco, is used in the same way. Hash oil is usually put on the end of a tobacco cigarette or wiped onto the paper before a marijuana or tobacco cigarette is rolled. Cannabis preparations can also be cooked into foods such as brownies. Cannabis is not suitable for injection.

EFFECTS. The most common short term effects of a small dose of marijuana are the "high" (euphoria, tendency to talk and laugh more than usual), increase in pulse rate and reddening of the eyes; later the user becomes quiet, reflective and sleepy. With larger doses these effects are enhanced, and the user may misjudge the passage of time. Perception of sound, color and other sensations may be sharpened or distorted. Cannabis impairs attention, short-term memory, logical thinking and the ability to drive or perform other complex tasks. With very large doses the effects may become hallucinogenic. Heavy cannabis users tend to be heavy tobacco smokers and often have chronic bronchitis and other respiratory diseases.

B. COCAINE

APPEARANCE AND USE. Cocaine is extracted from the leaves of a coca bush in the Andes, mainly in Peru and Bolivia. It is generally sold on the street as hydrochloride salt, which is a fine, white, crystalline powder known as "coke," "snow," "flake," or "blow." It is frequently diluted with substances such as cornstarch, talcum powder, sugars or with other active drugs such as benzocaine. The most common mode of use is inhaling ("snorting") the substance into the nostrils. The drug may also be applied directly to the mucous lining of the mouth, rectum or vagina. Intravenous injection accelerates the effects and increases intensity. Cocaine is often chemically altered to its free base, and the drug vaporized and inhaled for particularly fast acting and potent effects. This form of cocaine is commonly called "crack" or "rock." Crack is beige or slightly brownish, white or yellowish white and sold in pellet-size chips; generally packaged in small plastic vials. Crack produces an intense, short-lived high that is quickly followed by an equally as intense low. The drug is relatively inexpensive and easily obtainable. Addiction occurs in a matter of weeks and is as powerful an addiction as heroin.

EFFECTS. Short-term effects of cocaine taken in low doses are euphoria accompanied by feelings of increased energy, enhanced mental alertness and greater sensory awareness. It also temporarily dispels the need for food, rest, or sleep. Large doses intensify the user's "high" but may also lead to bizarre, erratic and violent behavior. Physical symptoms include accelerated heartbeat, increased blood pressure, faster breathing, rise in body temperature, dilation of the pupils, sweating and pallor. Sensitivity to the drug or overdose may cause restlessness, agitation and intense anxiety. There may be evidence of overactive reflexes, tremors, uncoordination and muscular twitching. In severe cases delirium and hallucinations may develop along with physical symptoms resulting in pain or pressure in the chest, nausea, blurred vision, fever, muscle spasms and convulsions. Death following overdose may be caused by failure of breathing, convulsions, heart failure or very high fever. Long term effects among chronic users include restlessness, insomnia and suspiciousness, hallucinations and delusions. The user may suffer weight loss, constipation and difficulty in urinating. Male users may experience impotence. Conditions associated with chronic cocaine use are stuffiness and runny nose, dry skin around the nostrils and perforation of the nasal septum. In addition, intravenous drug users who share needles are in great risk of contracting AIDS.

C. OPIATES

APPEARANCE AND USE. Opiates are found in the juice extracted from the seed pod of the Asian poppy. The drugs derived from this extract include opium, codeine, morphine and heroin. Opium appears as either dark brown chunks or in powder form. It is generally eaten or smoked. Heroin usually appears as a white or brownish powder, which is dissolved in water for injection. Most street preparations are diluted with sugar, quinine, or other substances. Other opiate analgesics (painkillers) are obtainable as capsules, tablets, syrups and suppositories. Usually opiate solutions are injected under the skin or directly into a vein or muscle. They may also be "snorted" into the nose or taken orally or rectally.

EFFECTS. Opiates briefly stimulate the higher centers of the brain but then depress activity of the central nervous system. Immediately after injection into a vein, the user feels a surge of pleasure or a "rush" that gives way to a state of gratification into which hunger, pain and sexual urges usually do not intrude. Restlessness, nausea and vomiting may result. With moderately high doses the body feels warm, the extremities heavy and the mouth dry. Soon, the user goes "on the nod", an alternately wakeful and drowsy state during which the world is forgotten. As the dosage is increased, breathing becomes depressed, and the user cannot be roused. The pupils are contracted to pinpoints; the skin is cold, moist, and bluish; and profound respiratory depression resulting in death may occur. Chronic opiate users may develop endocarditis, abcesses, cellulitis, liver disease, AIDS and possibly brain damage as a result of unsterile injection techniques.

D. AMPHETAMINES

APPEARANCE AND USE. Under the slang name "uppers," amphetamines have been widely used for their mood-altering effects. "Speed" refers to an injectable amphetamine-related drug. These drugs have been used for a variety of non-medical reasons such as to avoid sleep, to improve athletic performance, to counter the effects of depressant drugs and to experience euphoria. Amphetamines usually appear as yellowish crystals and may be mixed with other materials. They may be taken by mouth in tablet or capsule form, sniffed or injected. Various forms of amphetamines are often combined with caffene in capsule form and misrepresented as "speed." These are produced to resemble legally manufactured amphetamines and are termed "look alike" stimulants.

EFFECTS. At the low doses usually prescribed medically, the physical effects include reductioon of appetite, increased breathing and heart rate, a rise in blood presure and dialation of the pupils. Increased alertness and energy, postponement of fatigue and a feeling of well being result. If larger doses are taken, dry mouth, fever, sweating, headache, blurred vision and dizziness may occur. Users may become talkative, restless and excited and may feel a sense of power and superiority. They may behave in a bizarre, repetitive fashion. Chronic users fail to eat properly and are generally in a run down condition. They may develop amphetamine psychosis, a disturbance very similar to paranoid schizophrenia. Heavy users may be prone to sudden, violent acts of an irrational nature. Violence is generally the leading cause of amphetamine related deaths.

E. PHENCYCLIDINE (PCP)

APPEARANCE AND USE. PCP is known among illicit users as "angel dust," "horse tranquilizer," and "animal tranquilizer." It is often sold in combination with another drug such as LSD. PCP is a white crystalline powder that is readily soluble in water or alcohol. As a street drug, PCP may be "snorted" into the nose, injected or ingested as a liquid or in a capsule. Most frequently, however, it is smoked in a "joint" together with marijuana or dried parsley. Preparations vary considerably in color, purity, and potency.

EFFECTS. PCP is a difficult drug to classify accurately because different doses produce different effects. These may resemble the action of a stimulant, analgesic, anethetic or hallucinogen. Not all people react similarly even after using the same doses. Often PCP is represented as something else, and the user may experience the unpredictable and unpleasant effects of PCP. Moreover, because the content of the drug varies so much, the duration and intensity of its effect are unpredictable. Given at low doses, PCP causes a slight increase in breathing rate and a more pronounced rise in blood presure and heart rate. Respiration becomes shallow, and flushing and profuse sweating frequently occur. Numbness of the arms and legs and muscular uncoordanation may also develop. At higher doses, there is a drop in blood pressure, heart rate and respiration. This may be accompanied by nausea, vomiting, blurred vision, rolling and watering of the eyes, loss of balance and dizziness. Large amounts of the drug may cause convulsions and coma. After taking a small dose of PCP, a user experiences distinct alterations in body awareness and changes in the perception of time, space and auditory and visual stimuli. Concentration, learning, and memory are impaired, and the ability to think in an orderly, logical way may be lost. Hostility toward the surroundings and violent outbursts may occur, although fearfulness, anxiety or even panic is more common. Among the effects of higher doses are delusions, mental confusion, a sensation of distance from one's environment and hallucinations. Long term effects may include flashbacks, prolonged anxiety, severe depression and social withdrawal. Deaths have been attributed to overdose and as a result of the drug's effect on behavior.

Document Separator

The Office of the Secretary of Defense
Organization of the Joint Chiefs of Staff

DRUG-FREE WORKPLACE PLAN

PROCEDURES MANUAL

Directorate for

Personnel and Security, WHS

FOREWARD

This Procedures Manual provides information and guidance to supervisors and management officials to assist them in performing their responsibilities with regard to the OSD/OJCS Drug-Free Workplace Plan.

This Manual, together with the Plan, provides the background, current policy, and procedures with regard to the illegal use, possession, or distribution of controlled substances by employees of the OSD/WHS/Joint Staff.

It will also be useful to Administrative/Executive Officers in the performance of their duties.

(REVISED JUNE 1990)

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APPENDIX A - STANDARD COLLECTION PROCEDURES (UNOBSERVED) A-1

APPENDIX B - DIRECT OBSERVATION COLLECTION PROCEDURES B-1

CHAPTER I. GENERAL PROVISIONS

A. DIRECTORATE FOR PERSONNEL & SECURITY, WHS

The Directorate for Personnel & Security, WHS, Assistant Director, Labor and Management Employee Relations (LMER), is responsible for ensuring the procedures contained in this guide are uniformly implemented to support the OSD/OJCS Drug-Free Workplace Plan.

B. DRUG PROGRAM COORDINATOR (DPC)

The DPC, under the supervision of the Assistant Director, LMER Division, is responsible for the implementation, direction, administration and management of drug program activities for the OSD/OJCS.

C. SITE COORDINATOR (SC)

For those locations where testing is scheduled to be conducted and where the DPC is not physically present, an appropriate management official shall designate a SC to coordinate activities on the day of collection. The responsibilities of the SC shall include the following:

1. Coordinating the scheduling of employees selected for testing with the collector, appropriate supervisor, and/or DPC;

2. Assisting the collector with logistical arrangements, if required.

D. JOINT STAFF-DRUG PROGRAM COORDINATOR (JS DPC)

The Joint Staff DPC shall be responsible for informing supervisors of the names of employees assigned to the Joint Staff who are selected for random testing, receive drug test results for Joint Staff employees, inform supervisors of verified positive test results, answer questions of Joint Staff employees and managers regarding the Plan, and generally be the liaison between the DPC and Joint Staff members.

E. SAFEGUARDING OF RECORDS RELATED TO DRUG TEST RESULTS

Test results will be protected under the provisions of the Privacy Act, 5 U.S.C. 552a and P.L. 100-71, section 503(e), and may not be released in violation of these statutes. Disclosure of drug test results under the "routine use" exception to the Privacy Act's disclosure prohibition is strictly limited.

F. TRANSMISSION OF TEST RESULTS

Test results shall be transmitted by the laboratory to the Medical Review Officer (MRO) in a manner consistent with the Privacy Act and other appropriate laws and regulations.

G. RELEASE OF TEST RESULTS

1. All employees selected for random drug testing will receive written notification of negative test results from the DPC.

2. Verified positive test results will be disclosed by the MRO only to the DPC and the EAP Administrator. The DPC shall notify the Joint Staff DPC or the immediate supervisor or in his or her absence a higher level management official. This official shall inform the employee.

3. Test results on applicants shall be disclosed to the Personnel Specialist who requested the applicant drug test. If the test is negative, the Specialist will proceed with the processing procedures. If the test is positive, the Specialist will notify the applicant and withdraw the tentative job offer.

H. RECORDS MAINTENANCE AND RETENTION

1. All random test lists shall be clearly annotated, dated, and forwarded to the DPC by the Chief, Personnel Management Information Systems Office. The DPC shall maintain all donor lists in such a manner as to prevent unauthorized access to information contained therein. No test lists will be maintained other than by the DPC.

2. Records resulting from the testing of employees for use of illegal drugs will be maintained in accordance with the Privacy Act and PL 100-71.

I. ADMINISTRATIVE RELIEF

1. If an employee believes his or her position has been wrongly determined to be a testing designated position (TDP), that employee may file an administrative appeal to the Director, WHS through his or her immediate supervisor.

2. Such appeal must be submitted in writing within 15 calendar days of notification that his or her position has been designated as a TDP. The appeal must set forth all relevant information.

3. The supervisor shall review the appeal. Since all sensitive positions have been designated as TDPs, in order to remove an employee from a TDP the position must be re-designated as nonsensitive. If the supervisor concurs with the employee, the supervisor shall submit a SF-52, Request for Personnel Action, to the servicing civilian personnel office, denoting "Change in Position Sensitivity" to nonsensitive. The employee shall be informed that the request is granted.

4. If the supervisor determines that the position has been correctly designated as either nonsensitive critical, sensitive critical or special sensitive, the supervisor shall set forth the reasons for that decision and forward the appeal with the reasons for such determination to the Director, WHS through the DPC.

5. The Director, WHS shall review the appeal based upon the criteria applied in designating that employee's position as a TDP. The Director's decision is final and is not subject to further administrative review.

J. GENERAL PROCEDURES DURING COLLECTION PROCESS

1. Instructions for Providing a Urine Sample. Each employee who is being testing will be furnished a copy of the Instructions (page 1-5) by his or her supervisor prior to departing the work site.

2. Standard Collection Procedures (Unobserved). Refer to Appendix A.

3. Direct Observation Collection Procedures. Refer to Appendix B.

4. Failure of Employee to Report to the Collection Site

a. If the employee fails to appear for a scheduled collection, the collector shall immediately notify the DPC/SC who in turn shall immediately contact the employee's supervisor.

b. The supervisor shall solicit an explanation from the employee and, if appropriate, initiate action in accordance with Chapter IX, Disciplinary/Adverse Action, "Failure of Employee to Report to Designated Collection Site."

c. If the supervisor accepts the employee's explanation as valid, the employee shall be rescheduled and no disciplinary action taken.

5. Employee Refusal to Provide Specimen at the Collection Site

In the event an employee refuses to provide a specimen:

a. The employee shall be informed by the collector that:

(1) The DPC/SC will be contacted.

(2) He/she is to report back to the work site supervisor and await further instructions.

b. The collector shall immediately notify the DPC/SC and document the refusal in writing.

c. The DPC/SC shall contact the employee's supervisor or the Joint Staff DPC. The supervisor shall initiate action in accordance with Chapter IX, Disciplinary/Adverse Action.

6. Failure of Employee to Provide Specimen

If the employee fails to provide a sufficient quantity of urine (at least 60 milliliters):

a. The employee will be given a reasonable period of time to provide a specimen.

b. The employee shall be asked to drink fluids to facilitate urination.

c. If at the end of the waiting period the individual still cannot provide a specimen of sufficient quantity, this inability shall be recorded by the collector and the DPC shall be notified.

d. The DPC shall solicit the reason from the employee and if the employee's reason is acceptable, reschedule the employee. If the employee is unable to provide the required quantity of urine the second time, the employee will be requested to provide medical evidence to support his/her reasons for this inability. In the absence of medical reasons, the supervisor will be notified and it shall be considered a refusal to take the drug test.

7. Tampering, Adulteration or Substitution of Urine Sample

a. Should the collector, in his/her professional judgment, believe the employee has tampered, adulterated, or substituted his/her sample, the collector shall:

(1) Request the employee to remain at the collection site, preferably in the presence of a second collector.

(2) Immediately contact a higher level supervisor and the DPC/SC to detail the reasons for this belief. If the SC is contacted, he or she will immediately contact the DPC for further instruction.

(3) Proceed with the collection of a second specimen under direct observation if authorized by the DPC.

b. The DPC shall take the following action:

(1) Authorize the collection under direct observation if the circumstances establish a reasonable suspicion. In questionable cases, the DPC shall consult with the Director, WHS or a designee, or other appropriate personnel such as the legal counsel.

(2) Document the collector's phone call, reasons for requesting observation, and the final decision, including rationale for this decision.

OSD/OJCS DRUG-FREE WORKPLACE PROGRAM

INSTRUCTIONS FOR PROVIDING A URINE SAMPLE FOR DRUG TESTING PROGRAM

You will be participating in the OSD/OJCS Drug-Free Workplace Program designed to support President Reagan's Executive Order 12564 for a drug-free federal workforce.

The following set of instructions has been developed to ensure that uniform and accurate collection procedures are followed with each individual participating in the program.

1. Please arrive at the collection site on time. Collection personnel are required to contact the OSD/OJCS Drug Program Coordinator for guidance if you do not appear at the assigned time.

2. Collection site personnel will ask you to verify your social security number and provide a photo ID such as a driver's license or agency badge. Again, collection personnel are required to contact the OSD/OJCS DPC for guidance if proper identification is not obtained. You will be asked to verify your social security number and provide your initials/signatures at several stages throughout the collection process. These precautions are for your protection and will help ensure that all specimens are labeled correctly.

3. Collection site procedures will be explained by a technician. Personnel will also be available to answer any questions you might have or they will refer you to the appropriate individual from the OSD/Joint Staff.

4. You will be asked to remove outer garments such as overcoats and suit jackets. You may not take a carrying bag into the collection room, but you may take your wallet with you.

5. Your technician will provide you with a collection container and instructions.

6. You must wash and dry your hands before entering the collection room.

7. Unless otherwise directed by the OSD/OJCS DPC, you will provide your sample within the privacy of the collection room or otherwise partitioned area such as a stall.

8. Do not flush the toilet until you are ready to leave the toilet/stall area.

9. You will give the collection container to the technician who, after checking the temperature (within four minutes of collection) and general appearance of the sample, will transfer the sample to a sealable shipping bottle. If the temperature reading is found to be outside the acceptable range (90.5-99.8°F) you may request that the collector take an oral temperature. The technician will tighten the bottle cap and place the prepared evidence tape over the cap and down the sides of the bottle. You should then initial the seal and the label confirming that it is your sample in the bottle and that the social security number and other information is correct. You must observe this process continuously.

   If the collector has reason to believe that the urine specimen has been altered or substituted he/she will notify a higher level supervisor. Should you tamper, adulterate or in any other manner attempt to alter the specimen, the collector will request authorization from the OSD/OJCS DPC to collect a second specimen under direct observation by a same gender collection site individual. Both specimens will be sent to the laboratory for analysis.

10. You may then wash your hands.

11. You will be asked to read and sign a statement in the collection site ledger book certifying that the specimen came from your body.

12. If you have any concerns or questions about the collection process, you should immediately bring them to the attention of your supervisor, the OSD Drug Program Coordinator, the Site Coordinator, or the Joint Staff Drug Program Coordinator.

Thank you for your cooperation and participation in this important program.

Portions of these instructions were excerpted from the National Institute on Drug Abuse Urinalysis Collection Handbook for Federal Drug Testing Programs, U.S. Dept. of Health and Human Services, and are subject to change.

CHAPTER II. RANDOM TESTING

A. PROCEDURES PRIOR TO ACTUAL COLLECTION

1. Employee Identification

a. The DPC shall generate random test lists identifying all employees selected for random drug testing. Under no circumstances shall an employee not on the list be tested. The lists will contain the following information for each employee selected.

(1) Name of employee.
(2) Occupational series, title and grade.
(3) Social Security Number.
(4) Gender
(5) Organization
(6) Duty location

b. The lists shall be divided by geographic area, if appropriate.

2. Contractor Notification and Collection Scheduling

a. The DPC shall notify the collection contractor as to the location and number of employees to be tested at a time designated by by the contractor prior to the commencement of each collection and this information shall remain confidential.

b. The contractor will contact the DPC to resolve scheduling conflicts.

3. Site Notification - Outside the National Capital Region (NCR)

a. On the actual date that drug testing is scheduled to be conducted, the DPC shall notify the appropriate management official located at the specific site.

b. When the DPC is not physically located at the collection site, the DPC shall request that a SC assist the collector.

4. Supervisor Notification

a. The DPC/SC shall notify the selected employee's first level supervisor or the Joint Staff DPC approximately 2 hours prior to the actual collection. All scheduling shall be arranged in close coordination with the collector.

b. In situations where the first level supervisor is unavailable, the next higher management official shall be contacted.

c. The DPC/SC or Joint Staff DPC shall provide the supervisor with any information to be conveyed to the employee.

d. The DPC shall annotate the test list when a supervisor has been contacted.

5. Employee Notification

a. Approximately 60 minutes (allowing for travel time) prior to the actual collection, the supervisor shall verbally and privately inform the employee that he/she has been identified through a random selection process for drug testing by urinalysis. The employee shall be clearly informed as to the time and exact location to report for testing and instructed to take appropriate photo identification. Acceptable identification includes a DoD building pass with photo or a driver's license with photo. A metro pass shall be provided to each employee working in the NCR.

b. Every effort shall be made by the supervisor to personally provide the above information to the employee to avoid any misunderstanding. In addition, a copy of "Instructions for Providing Urine Sample for Drug Testing Program" (see page 1-5) shall be given to each employee designated for random testing.

c. The supervisor shall be knowledgeable about the drug testing program and able to provide information in response to employee questions that may extend beyond the information provided in written notices.

d. The supervisor shall immediately report to the DPC/SC or Joint Staff DPC any problem encountered during employee notification. These problems shall be recorded on the test list by the DPC. The DPC/SC shall assume the employee has received proper notification in the absence of any such call from the supervisor.

6. Unavailability of Employee

When an employee selected for random testing is unavailable for legitimate reasons (working a different shift, in a leave status, or on official travel or about to embark on official travel scheduled prior to testing notification), the DPC shall annotate the list indicating the specific reason and the name of the supervisor who provided the information. The DPC shall reschedule the employee for unannounced testing within the next 60 days.

7. Test Lists

The official test list shall be annotated, signed, dated, and retained by the DPC in a file cabinet that is secured.

B. PROCEDURES DURING COLLECTION

Procedures will be followed for standard (unobserved) collection in accordance with Appendix A. The procedures in Appendix B (observed) will be followed if the collector determines an employee has tampered, adulterated or substituted a urine sample, and the DPC concurs.

OSD/OJCS DRUG-FREE WORKPLACE PROGRAM

CHECKLIST FOR SUPERVISORS - RANDOM DRUG TESTING

On the actual date that random drug testing is scheduled to be conducted, your Drug Program Coordinator (DPC), Site Coordinator (SC), or the Joint Staff DPC will notify you if one of your employees has been selected for drug testing and the proposed schedule. This information is confidential. The following procedures shall be followed in notifying employees of the collection process.

1. Approximately 60 minutes prior to the actual collection (allowing for travel time), inform the employee verbally, and privately, that he/she has been identified through a random selection process for drug testing by urinalysis. Assure the individual that such selection in no way reflects that there is any specific cause to suspect the usage of illegal drugs.

2. Issue the employee a metro pass and clearly inform the employee as to the time and exact location to report for testing and instruct him/her to take photo identification. The employee will be carried in an official duty status.

3. Employees normally will be scheduled to report to the collection site in 15-minute intervals. In no instance will an employee not identified on the official test list be tested.

4. The collection will be performed by a Government contractor, who will ensure the process is properly administered. Advise employees to be prepared to provide a urine specimen at the scheduled collection time.

5. Give scheduled employees a copy of the "Instructions for Providing Urine Sample for Drug Testing Program," which provides helpful information about the collection process.

6. When an employee selected for random testing is unavailable for legitimate reasons (e.g. working different shift, travel, leave), you <u>must</u> immediately inform the DPC/SC who will annotate the random test list by indicating the reason for the unavailability and will reschedule the employee for a later date.

7. Immediately report any problems encountered during employee notification to the DPC/SC or Joint Staff DPC. Employees who fail to cooperate with the collection procedures will be subject to disciplinary actions in accordance with Chapter IX of this manual. You must obtain guidance from your servicing personnel office in these instances.

8. If an employee is unable to provide a sufficient quantity of urine, he/she will be given a reasonable period of time to provide a specimen. If, at the end of the waiting period the employee still cannot provide a specimen, the collector will inform the employee to return to the work site. If the employee gives an acceptable reason, he/she will be rescheduled for drug testing by the DPC.

9. If you have any questions or concerns, you should share them with your Drug Program Coordinator, Directorate for Personnel & Security, WHS, 694-0877, or the Joint Staff Drug Program Coordinator 694-6464.

CHAPTER III. REASONABLE SUSPICION TESTING

A. PROCEDURES PRIOR TO ACTUAL COLLECTION

1. Management Determination of Reasonable Suspicion

a. Reasonable suspicion testing is authorized when management believes an employee may be using illegal drugs. This belief must be based on specific objective facts and reasonable inferences drawn from these facts in the light of experience. Reasonable suspicion does not require certainty; however, mere "hunches" are not sufficient to meet this standard. Reasonable suspicion testing will be ordered only by a management official (at least the second-level supervisor) after consulting with the Drug Program Coordinator.

b. For purposes of this type of testing, reasonable suspicion that an employee uses illegal drugs may be based upon, among other things:

(1) Observable phenomena, such as direct observation of drug use and/or the physical symptoms of being under the influence of a drug.

(2) A pattern of abnormal conduct or erratic behavior.

(3) Arrest or conviction for a drug-related offense; or the identification of an employee as the focus of a criminal investigation into the illegal use, possession, or distribution of controlled substances.

(4) Information provided either by reliable and credible sources or independently corroborated.

(5) Newly discovered evidence that the employee has tampered with a previous drug test or has just given a specimen, and the temperature measurement indicates possible adulteration/substitution.

2. Documentation

The supervisor shall discuss the problem with the employee. Documentation shall be developed describing the circumstances which formed the basis that reasonable suspicion exists to authorize such testing. The employee should be scheduled for testing within 48 hours of the current event which caused the determination.

3. Contractor Notification

a. The DPC shall notify the contractor immediately when a determination is made to conduct reasonable suspicion testing. The notification shall include the following data:

(1) Name of employee.
(2) Social Security Number.
(3) Gender.
(4) Organization.
(5) Duty location.

b. The contractor shall respond promptly after notification by the DPC and in accordance with contractual agreements. (Normally within 24 hours). Requests for reasonable suspicion testing may occur at any time or day of the week and at any location. Testing will either be accomplished on site or at the contractor's facility, depending upon the circumstances.

4. Supervisor Notification

a. The DPC shall notify by telephone the Joint Staff DPC or the employee's immediate supervisor, or if absent, the next higher management official that emergency collection procedures have been initiated.

b. The DPC shall provide the supervisor or the Joint Staff DPC with the time and location of collection and any necessary information to be conveyed to the employee.

5. Employee Notification

a. The supervisor or management official shall provide the employee with specific written notice that he/she is being tested for reasonable suspicion. The employee will be instructed to take appropriate photo identification and be issued a metro pass if geographically located in the NCR. A sample letter is provided at page 3-5. The specific written notice shall include the following information:

(1) A precise and detailed statement describing all relevant circumstances which formed the basis for the decision to conduct reasonable suspicion drug testing.

(2) Assurance that the quality of testing procedures is tightly controlled, that the test used to confirm use of illegal drugs is highly reliable, and that test results will be handled with maximum respect for individual confidentiality, consistent with safety and security.

(3) Notice of the opportunity and procedures for submitting supplemental medical documentation that may support a legitimate use for a specific drug.

(4) The consequences of a confirmed positive result or refusal to be tested, including disciplinary or adverse action.

(5) The availability of professional drug abuse counseling by certified addictions counselors and referral services, including the the name and telephone number of the EAP.

(6) That the sample will be collected under direct observation.

b. The employee shall be informed of the date, time, and location for the collection.

c. The supervisor shall be knowledgeable about the drug testing program and able to provide information in response to employee questions that may extend beyond the information provided in written notices.

d. The supervisor shall immediately report to the DPC or the Joint Staff DPC by telephone, any problem encountered during employee notification that would preclude testing. The DPC shall assume the employee has received proper written notification in the absence of any such call from the supervisor.

B. PROCEDURES DURING COLLECTION

Procedures will be followed for direct observation collection in accordance with Appendix B.

OSD/OJCS DRUG-FREE WORKPLACE PROGRAM

CHECKLIST FOR SUPERVISORS - REASONABLE SUSPICION TESTING

When information is obtained from the collector as to the date and time the employee is scheduled for reasonable suspicion testing, the DPC/SC or Joint Staff DPC will inform you. The following procedures shall be followed in notifying employees of the collection process.

1. Approximately 60 minutes prior to the actual collection (allowing for travel time), inform the employee verbally, and privately, that he/she has been scheduled for drug testing by urinalysis.

2. Issue the employee a metro pass and clearly inform the employee as to the time and exact location to report for testing and instruct him/her to take photo identification. The employee will be carried in an official duty status. The employee will will be escorted to the collection facility unless arrangements are made to do the test on site due to extenuating circumstances.

3. The collection will be performed by a Government contractor, who will ensure the process is properly administered. Advise employees to be prepared to provide a urine specimen at the scheduled collection time.

4. Give scheduled employees a copy of the "Instructions for Providing Urine Sample for Drug Testing Program," which provides helpful information about the collection process. Inform the employee that the sample will be collected under direct observation.

5. Immediately report any problems encountered during employee notification to the DPC/SC or Joint Staff DPC. Employees who fail to cooperate with the collection procedures will be subject to disciplinary actions in accordance with Chapter IX of this manual. You must obtain guidance from your servicing personnel office in these instances.

6. If an employee is unable to provide a sufficient quantity of urine, he/she will be given a reasonable period of time to provide a specimen. If, at the end of the waiting period the employee still cannot provide a specimen, the collector will inform the employee to return to the work site.

7. If you have any questions or concerns, you should share them with your Drug Program Coordinator, Directorate for Personnel & Security, WHS, 694-0877, or the Joint Staff Drug Program Coordinator 694-6464.

SAMPLE

MEMORANDUM FOR (EMPLOYEE'S NAME)

SUBJECT: Notice of Reasonable Suspicion Testing for Illegal Drugs

Pursuant to Executive Order 12564, "Drug-Free Federal Workplace," the Department of Defense has initiated a comprehensive program to achieve the goal of a drug-free workplace. This program is set forth in A.I. No. 17, "Civilian Employee Alcohol and Drug Abuse Prevention, Testing, and Control Program," and the OSD/OJCS Drug-Free Workplace Plan.

It has been determined by agency officials that sufficient grounds exist to authorize collection of a urine specimen from you on the basis of reasonable suspicion. This drug test is sought to be performed since management has formed a reasonable belief that you may be using illegal drugs. Collection procedures under reasonable suspicion testing will require you to provide a specimen under direct observation.

(NOTE: The supervisor or management official <u>must</u> provide a statement describing all relevant circumstances which formed the basis for the decision to conduct reasonable suspicion drug testing.)

Drug testing for OSD/JS/WHS is performed through urinalysis by a certified Forensic Toxicology Drug Testing Laboratory. The testing methodology reflects the scientific and technical procedures necessary to assure the results are highly reliable and accurate. DoD or HHS certification provides for strict quality control procedures. These procedures will include an initial screen of the urine sample you provide for drugs and confirmation by gas chromatography/mass spectrometry.

To assure that the sample collected from you is not accidentally confused with any other sample, strict procedures will be used when collecting and transferring the specimen. The total of these procedures is known as the chain of custody. The test results from your sample will be handled with maximum respect for individual confidentiality consistent with safety and security. A confirmed positive test result reported by the laboratory will be reviewed by a Medical Review Officer (MRO) before a determination is made that an employee has used illegal drugs. You will be given an opportunity to provide the MRO with a list all prescription drugs that could affect the outcome of the drug test and which may be identified through the confirmation procedure.

If it is determined that you are using illegal drugs on-or off-duty by means of this drug test or any other means, you will be provided the opportunity to use the services of the Pentagon Employee's Referral Service (PERS). Through this program, you will receive counseling and learn about the availability of rehabilitation. Information concerning PERS may be obtained by calling 697-6830.

If you are an employee in a Testing Designated Position (TDP) as described in the OSD/OJCS Drug-Free Workplace Plan, and it is determined that you are using illegal drugs, you will be immediately removed from that position by reassignment or detail to a non-sensitive position, denied access to classified information, or other action, as appropriate. You will be subject to disciplinary/adverse action. You may be returned to your TDP when a determination is made that such action would not pose a danger to public health or safety or the national security. In addition, if a determination is made that you are using illegal drugs, you will be subject to unannounced follow-up testing for a period of 1 year after your return to the TDP, completion of a rehabilitation/abatement program, or as prescribed in an abeyance agreement. Refusal to enter or successfully complete a rehabilitation/abatement program will be grounds for removal from the Federal service. If you test positive a second time as a result of any subsequent drug test or a second determination of illegal drug use by you is made, you also will be subject to removal.

Refusal to submit to testing or failure to cooperate with the collection procedures will be grounds for disciplinary or adverse action, including, in appropriate cases, removal from the Federal service.

If you have other questions after providing a urine specimen, you may contact the Drug Program Coordinator, Directorate, for Personnel & Security, WHS, at 694-0877.

Signature (Immediate Supervisor)	Signature (Second level Management Official or above)

Copy to:
DPC
Servicing Personnel Office

CHAPTER IV. APPLICANT TESTING

A. INDIVIDUALS SUBJECT TO APPLICANT TESTING

1. Coverage

All applicants tentatively selected for appointment, promotion, reassignment, or change to lower grade to a TDP will be tested prior to employment/appointment. This includes current employees who are applying for covered positions whether or not they are currently assigned to a TDP. Employees in TDPs who are assigned to OSD/JS/WHS, who are competitively promoted, reassigned, or request a change to lower grade will be exempted from a drug test if they previously were tested an an applicant within the previous 120 days. For schedule C and non-career SES positions, an individual is considered an applicant only upon initial appointment. NO FINAL OFFER OF EMPLOYMENT SHALL BE MADE UNTIL A NEGATIVE TEST RESULT HAS BEEN RECEIVED BY THE DPC AND THE APPROPRIATE STAFFING SPECIALIST HAS BEEN NOTIFIED.

2. Details

Employees detailed or temporarily assigned to TDPs from non-sensitive positions will be tested if the term of the detail or temporary assignment is expected to exceed 180 days. For all details or temporary assignments to TDPs, regardless of the position duration, the individual occupying the position will be subject to other types of drug testing, including random testing.

B. PROCEDURES PRIOR TO ACTUAL COLLECTION

1. Drug Program Coordinator Notification

The Personnel Specialist staffing the vacancy shall notify the DPC in writing when an individual is selected for a TDP. The selectee shall be required to sign the appropriate "Notice of Employment Requirement" and will be provided a copy of "Instructions for Providing a Urine Sample for Drug Testing Program" (page 1-5) by the Personnel Specialist. The "Request for Applicant Testing" (Page 4-5) should be prepared and forwarded to the DPC at the same time the NIP is sent to Security. This may preclude the necessity for an expensive security investigation if the applicant has a verified positive test result. The notification to the DPC shall include the following information:

a. Name of applicant
b. Social security number
c. Gender
d. Occupational series, title and grade of TDP
e. Organization
f. Tentative EOD Date
g. Where applicant should be tested (most often the home area of the applicant).
h. Contact daytime telephone number.

2. Notification to Collector

The DPC shall notify the contractor of the above requirements or make necessary arrangements with the closest DoD activity to the applicant's home. The DPC will provide the appropriate information concerning the collection to the Staffing Specialist requesting the drug test so that the applicant may be informed.

3. Test Scheduling/Applicant Notification

a . Upon notification by the DPC, the Staffing Specialist shall provide the applicant the name and address of the collector, the proper phone number, and the scheduled time of the appointment.

b. For collection outside the NCR, the applicant will be contacted by the collector to arrange a date and time for the test. The applicant will be informed to report to the collection site within 48 hours of notification.

C. PROCEDURES DURING COLLECTION

1. Standard Collection Procedures (Unobserved). Refer to Appendix A.

2. Direct Observation Collection Procedures. Refer to Appendix B.

Collection of urine specimens shall not be made under direct observation except in those unusual circumstances allowed in E.O. 12564 and FPM Letter 792-19. These circumstances are described in Appendix B.

3. Failure of Applicant to Report to the Collection Site

a. If the applicant fails to appear for a scheduled collection, the collector shall immediately notify the DPC by telephone, who in turn shall immediately contact the Staffing Specialist.

b. The Staffing Specialist will contact the applicant to determine the reason for the failure to report to the collection site. If the reason given is acceptable, testing will be rescheduled. The applicant shall be informed that if he or she fails to report for the rescheduled appointment, the offer will be withdrawn.

4. Applicant Refusal to Provide Specimen at the Collection Site

In the event an applicant refuses to provide a specimen:

a. The individual shall be informed by the collector that:

(1) The DPC will be contacted.

(2) He/she is to report back to the work site supervisor, if applicable, to await further instructions.

b. The collector shall immediately notify the DPC.

c. The DPC shall contact the Staffing Specialist that an applicant has refused to provide a specimen. Applicants who are not current employees and who refuse to be tested shall be refused employment. Refusal of a current employee of OSD/JS/WHS to provide a specimen for drug testing shall be regarded as a withdrawal of his/her application for the TDP.

5. Failure of Applicant to Provide Specimen

If the applicant is unable to provide a sufficient quantity of urine (at least 60 milliliters):

a. The individual will be given a reasonable period of time to provide a specimen and asked to drink fluids to facilitate urination.

b. If at the end of the waiting period the individual still cannot provide a specimen of sufficient quantity, this inability shall be recorded by the collector as failure to provide a specimen, and the DPC will be contacted.

c. The DPC shall contact the Staffing Specialist to convey this information. The applicant will be contacted to determine the reason for this failure. If an acceptable reason is given, testing will be rescheduled, otherwise it will be considered a refusal to provide a specimen.

6. Tampering, Adulteration, or Substitution of Urine Sample

a. Should the collector, in his/her professional judgment, believe the individual has tampered, adulterated, or substituted his/her sample, the collector shall:

(1) Request the individual remain at the collection site, preferably in the presence of another site collection person.

(2) Immediately contact a higher level supervisor and the DPC/SC to detail the reasons for this belief. If the SC is contacted, he or she will immediately contact the DPC for further instruction.

(3) Proceed with the collection of a second specimen under direct observation if authorized by the DPC.

b. The DPC shall take the following action:

(1) Authorize the collection under direct observation if the circumstances establish a reasonable suspicion. In questionable cases, the DPC shall consult with the Director, WHS or a designee, or other appropriate personnel such as the legal counsel.

(2) Document the collector's phone call, reasons for requesting observation, and final decision, including rationale for this decision.

SAMPLE REQUEST FOR APPLICANT TESTING

MEMORANDUM FOR DRUG PROGRAM COORDINATOR

SUBJECT: Applicant Testing

The following applicant has been tentatively selected for employment to the Testing Designated Position (TDP) indicated below. It is requested this individual be scheduled for drug testing in accordance with the OSD/OJCS Drug-Free Workplace Plan.

NAME: _____

SSN: _____

GENDER: _____

POSITION: _____

ORGANIZATION: _____

TENTATIVE EOD DATE: _____

GEOGRAPHIC LOCATION WHERE APPLICANT IS TO BE TESTED:

_____

DAYTIME CONTACT TELEPHONE NO. _____

_____
(Staffing Specialist)

- -

MEMORANDUM FOR _____

SUBJECT: Testing Date and Location

Above applicant has been scheduled for testing at the time, date, and location indicated below.

_____
Drug Program Coordinator

NOTICE OF EMPLOYMENT REQUIREMENT
CANDIDATE SELECTED FOR TESTING DESIGNATED POSITION

Name of Candidate:_____

Position Title, Series, and Grade: _____

Organization of Position: _____

1. The position identified above for which you have been tentatively selected is designated as a testing designated position (TDP) in accordance with E.O. 12564 and the OSD/OJCS Drug-Free Workplace Plan. For the purpose of this program, TDPs are those positions sufficiently critical to the OSD/OJCS mission or to the protection of public safety that screening to detect the presence of illegal drugs is warranted as a job-related requirements. Illegal drug use by employees in sensitive positions presents a clear threat to the mission of the OSD/OJCS, national security, and public safety.

2. To receive further consideration for this position, you must sign this notice and agree to submit to urinalysis testing in order to determine your fitness for assignment to this TDP prior to the effective date of the action.

3. If you sign this notice and then refuse to furnish a urine specimen as requested, or if illegal drug use is detected through a confirmed positive test result, you will be denied further consideration for this position. If a confirmed positive test result is received, you will be given an opportunity to submit medical documentation to the Medical Review Officer (MRO) to justify the legitimate use of prescription drugs. In the absence of medical documentation that justifies your legitimate use of a prescription drug, your confirmed positive test result will be provided to your current supervisor. Your current supervisor may take disciplinary action against you, up to and including removal based on the positive test result. If you are currently occupying a TDP, you will be removed from that position in accordance with EO 12564. You will, however, be offered referral to counseling or rehabilitation.

4. If you are placed in this TDP, the following employment requirements apply:

a. You must refrain from the use of illegal drugs and submit to urinalysis testing, if requested.

b. You will be subject to urinalysis testing (1) randomly on an unannounced basis, (2) when there is reasonable suspicion to believe that you are under the influence of drugs while on duty, (3) as part of an accident or unsafe practice investigation, and (4) as a part of or a follow-up to counseling or rehabilitation.

5. You will be allowed individual privacy while providing the urine specimen unless there is reason to believe the specimen will be altered. The collection, handling, and testing of urine samples will be conducted under chain of custody procedures established by the Department of Health and Human Services "Mandatory Guidelines for Federal Workplace Drug Testing Programs" to ensure accuracy of the test result. The quality of testing procedures is tightly controlled to ensure the test to confirm use of illegal drugs is highly reliable; and the test results will be handled with maximum respect for individual confidentiality.

6. If you believe you may have a drug problem, you are encouraged to voluntarily seek counseling and/or referral services by contacting the Pentagon Employee Referral Service (PERS), telephone 697-6830.

7. Your signature below certifies you have read and understand this notice, you agree to submit to urinalysis testing as required, you understand the mandatory employment requirement as stated above, and your questions have been answered to your satisfaction. Refusal to sign this letter will be determined a withdrawal from consideration for this TDP.

Leon Kniaz
Director, Personnel & Security

- -

I acknowledge receipt of this notice and have read its contents and questions have been satisfactorily answered. Upon assignment to this TDP I understand that I may be selected for random drug testing and other types of testing described above. I understand that if I refuse to sign this letter that I am withdrawing from consideration for this position, and if I test positive for illegal drugs I will be subject to disciplinary action, and removal from my sensitive poisition if I currently occupy a TDP.

_____ _____

Signature of Candidate Date

Copy to: OPF

NOTE: This notice shall be provided to each OSD/JS/WHS employee tentatively selected for a TDP. It must be signed by the prospective incumbent prior to drug testing. Only a candidate who has a negative drug test will be selected. Upon placement in the position, a signed copy of this notice shall be filed on the left side of the OPF.

NOTICE OF EMPLOYMENT REQUIREMENT
APPLICANT SELECTED FOR TESTING DESIGNATED POSITION

Name of Applicant: _____

Position Title, Series, and Grade: _____

Organization of Position _____

1. The position identified above for which you have been tentatively selected is designated as a testing designated position (TDP) in accordance with E.O. 12564 and the OSD/OJCS Drug-Free Workplace Plan. For the purpose of this program, TDPs are those positions sufficiently critical to the OSD/OJCS mission or to the protection of public safety that screening to detect the presence of illegal drugs is warranted as a job-related requirement. Illegal drug use by employees in sensitive positions presents a clear threat to the mission of OSD/OJCS, national security, and public safety.

2. To receive further consideration for this position, you must sign this notice and agree to submit to urinalysis testing in order to determine your fitness for appointment to this TDP prior to the effective date of the action.

3. If you sign this notice and then refuse to furnish a urine specimen as requested, or if illegal drug use is detected through a confirmed positive test result, you will be denied further consideration for this position. If a confirmed positive test result is received, you will be given an opportunity to submit medical documentation to a Medical Review Officer (MRO) to justify the legitimate use of prescription drugs.

4. If you are appointed to this TDP, the following employment requirements apply:

a. You must refrain from the use of illegal drugs and submit to urinalysis testing, if requested.

b. You will be subject to urinalysis testing (1) randomly on an unannounced basis, (2) when there is reasonable suspicion to believe that you are under the influence of drugs while on duty, (3) as part of an accident or unsafe practice investigation, and (4) as part of or a follow-up to counseling or rehabilitation.

c. After appointment, if illegal drug use is detected, you will be subject to disciplinary action, up to and including removal from Federal Service. You will, however, be offered referral to counseling or rehabilitation.

5. You will be allowed individual privacy while providing the urine specimen unless there is reason to believe the specimen will be altered. The collection, handling, and testing of urine samples will be conducted under chain of custody procedures established by the Department of Health and Human Services "Mandatory Guidelines for Federal Workplace Drug Testing Programs" to ensure accuracy of the test result. The quality of testing procedures is tightly controlled to ensure the test to confirm use of illegal drugs is highly reliable; and the test results will be handled with maximum respect for individual confidentiality.

6. Your signature below certifies you have read and understand this notice, you agree to submit to urinalysis testing as required, you understand the mandatory employment requirement as stated above, and your questions have been answered to your satisfaction. If you refuse to sign this letter, you will be denied further consideration for this position.

Leon Kniaz
Director, Personnel & Security

- -

I acknowledge receipt of this notice and have read its contents and questions have been satisfactorily answered. I understand that I may be selected for random drug testing and other types of testing described above. I understand I will be denied further consideration for this position if I refuse to sign this notice.

_____ _____

Signature of Applicant Date

Copy to: OPF

NOTE: This notice shall be provided to each applicant selected for a TDP who is not currently employed by the OSD/JS/WHS. It must be signed by the prospective incumbent of the TDP prior to drug testing. Only an applicant with a negative drug test will be appointed. Upon appointment, a copy of this signed notice shall be filed on the left side of the OPF.

CHAPTER V. POST-ACCIDENT DRUG TESTING

A. POST-ACCIDENT TESTING (GENERAL)

1. Covered Events

Testing for the presence of drugs will be conducted following an accident or other occurrence that involves one or more of the following in the performance of official duties:

a. A fatality.
b. A serious injury requiring immediate hospitalization.
c. Substantial damage to Government or private property estimated to be in excess of $10,000.

2. Event Determination

a. The appropriate supervisor(s) in coordination with the Safety & Occupational Health Specialist, WHS, Real Estate & Facilities, or other appropriate official, will determine as expeditiously as possible when an accident or other occurrence qualifies as one of the above listed events. It shall be the responsibility of these individuals to examine all the available facts as necessary to make this determination.

b. Any employee whose actions or activities during the performance of official duties is reasonably suspected of having caused or contributed to the accident or other covered event will be tested.

c. Following each accident or other covered event, the supervisor(s) shall present the facts and circumstances leading to and supporting the suspicion to a higher level supervisor or management official.

d. The process of determination must be completed, the proper notification given the employee, and the DPC must be notified within 24 hours after the supervisor(s) became aware of the accident or occurrence. Prompt action must be taken so that the specimen can be collected within 48 hours after the accident or other occurrence.

B. POST-ACCIDENT NOTIFICATION PROCEDURES

1. Contractor Notification

a. The DPC shall notify the contractor that emergency collection procedures are to be initiated. The notification shall include:

(1) Name of employee.
(2) Social Security Number.
(3) Gender.
(4) Organization.
(5) Duty Location.

b. The contractor shall respond promptly after notification by the DPC and in accordance with contractual agreements. (Normally within 24 hours). Requests for post-accident testing may occur at any time or day of the week and at any location. Testing will be accomplished on site, at the contractor's facility, hospital etc. depending upon the circumstances.

2. Supervisor Notification

a. The DPC shall notify by telephone the Joint Staff DPC, the SC or the employee's immediate supervisor or, in his/her absence, the next higher management official that emergency collection procedures have been initiated.

b. The DPC shall provide the time and location of collection and any other information needed to be conveyed to the employee.

3. Documentation

Documentation shall be developed describing the circumstances which formed the basis for conducting post-accident testing. This documentation shall be retained by the supervisor for appropriate action.

4. Employee Notification

a. The supervisor, with the approval of a higher level management official, shall provide the employee with specific written notice that he/she is being tested because his/her actions are reasonably suspected of having caused or contributed to the accident. The supervisor or management official will further instruct the employee to take appropriate photo identification when called for testing. Acceptable identification includes a DoD building pass, or, if unavailable, a driver's license with photo. A metro pass will be provided to employees in the NCR. A sample notice is provided at page 5-5. The written notice shall include the following information:

(1) The reasons for the urinalysis test, consistent with OSD/OJCS policy.

(2) Assurance that the quality of testing procedures is tightly controlled, that the test used to confirm use of illegal drugs is highly reliable, and that test results will be handled with maximum respect for individual confidentiality, consistent with safety and security.

(3) Notice of the opportunity and procedures for submitting supplemental medical documentation that may support a legitimate use for a specific drug.

(4) The consequences of a confirmed positive test result or refusal to be tested, including disciplinary action.

(5) The availability of drug abuse counseling and referral services including the name and telephone number of the EAP.

b. The employee shall be informed of the exact date, time and location for the test.

c. The supervisor shall be knowledgeable about the drug testing program and should be able to provide information in response to employee questions that may extend beyond the information provided in written notices.

d. The supervisor shall immediately report to the SC any problem encountered during employee notification that would prevent testing. The SC shall assume the employee has received proper notification in the absence of any such call from the supervisor.

C. PROCEDURES DURING COLLECTION

Procedures will be followed for standard (unobserved) collection in accordance with Appendix A. If sufficient justification for testing under the category of "Reasonable Suspicion" exists, the procedures in Appendix B shall be followed, i.e. direct observation.

OSD/OJCS DRUG-FREE WORKPLACE PROGRAM

CHECKLIST FOR SUPERVISORS - ACCIDENT OR UNSAFE PRACTICE TESTING

When information is obtained from the collector as to the date and time the employee is scheduled for accident or unsafe practice testing, the DPC or the SC will inform you. The following procedures shall be followed in notifying employees of the collection process.

1. Approximately 60 minutes prior to the actual collection (allowing for travel time), inform the employee verbally, and privately, that he/she has been scheduled for drug testing by urinalysis.

2. Issue the employee a metro pass and clearly inform the employee as to the time and exact location to report for testing and instruct him/her to take photo identification. The employee will be carried in an official duty status.

3. The collection will be performed by a Government contractor, who will ensure the process is properly administered. Advise employees to be prepared to provide a urine specimen at the scheduled collection time.

4. Give scheduled employees a copy of the "Instructions for Providing Urine Sample for Drug Testing Program," which provides helpful information about the collection process.

5. Immediately report any problems encountered during employee notification to the DPC/SC or Joint Staff DPC. Employees who fail to cooperate with the collection procedures will be subject to disciplinary actions in accordance with Chapter IX of this manual. You must obtain guidance from your servicing personnel office in these instances.

6. If an employee is unable to provide a sufficient quantity of urine, he/she will be given a reasonable period of time to provide a specimen. If, at the end of the waiting period the employee still cannot provide a specimen, the collector will inform the employee to return to the work site.

7. If you have any questions or concerns, you should share them with your Drug Program Coordinator, Directorate for Personnel & Security, WHS, 694-0877, or the Joint Staff Drug Program Coordinator 694-6464.

SAMPLE

MEMORANDUM FOR (EMPLOYEE'S NAME)

SUBJECT: Notice of Post-Accident Testing for Illegal Drugs

Pursuant to Executive Order 12564, "Drug-Free Federal Workplace," the Department of Defense has initiated a comprehensive program to achieve the goal of a drug-free workplace. This program is set forth in A.I. No. 17, "Civilian Employee Alcohol and Drug Abuse Prevention, Testing, and Control Program," and the OSD/OJCS Drug-Free Workplace Plan.

It has been determined by agency management that sufficient grounds exist to authorize collection of a urine specimen from you on the basis of an accident, injury or other occurrence because management has determined that your actions or activities in the performance of your duties could have caused or been a contributing factor in the event.

Drug testing for OSD/JS/WHS is performed through urinalysis by a certified Forensic Toxicology Drug Testing Laboratory. The testing methodology reflects the scientific and technical procedures necessary to assure the results are highly reliable and accurate. DoD or HHS certification provides for strict quality control procedures. These procedures will include an initial screen of the urine sample you provide for drugs and confirmation by gas chromatography/mass spectrometry.

To assure that the sample collected from you is not accidentally confused with any other sample, strict procedures will be used when collecting and transferring the specimen. The total of these procedures is known as the chain of custody. The test results from your sample will be handled with maximum respect for individual confidentiality consistent with safety and security. A confirmed positive test result reported by the laboratory will be reviewed by a Medical Review Officer (MRO) before a determination is made that an employee has used illegal drugs. You will be given an opportunity to list all prescription drugs that could affect the outcome of the drug test and which may be identified through the confirmation procedure.

If it is determined that you are using illegal drugs on-or off-duty by means of this drug test or any other means, you will be provided the opportunity to use the services of the Pentagon Employee's Referral Service (PERS). Through this program, you will receive counseling and learn about the availability of rehabilitation. Information concerning PERS may be obtained by calling 697-6830.

If you are an employee in a Testing Designated Position (TDP) as described in the OSD/OJCS Drug-Free Workplace Plan, and it is determined that you are using illegal drugs, you will be immediately removed from that position by reassignment or detail to a non-sensitive position, denied access to classified information, or other action, as appropriate. You will be subject to disciplinary/adverse action. You may be returned to your TDP when a determination is made that such action would not pose a danger to public health or safety or the national security. In addition, if a determination is made that you are using illegal drugs, you will be subject to unannounced follow-up testing for a period of 1 year after your return to the TDP, completion of a rehabilitation/abatement program, or as prescribed in an abeyance agreement. Refusal to enter or successfully complete a rehabilitation/abatement program will be grounds for removal from the Federal service. If you test positive a second time as a result of any subsequent drug test or a second determination of illegal drug use by you is made, you also will be subject to removal.

Refusal to submit to testing or failure to cooperate with the collection procedures will be grounds for disciplinary or adverse action, including, in appropriate cases, removal from the Federal service.

If you have other questions after providing a urine specimen, you may contact the Drug Program Coordinator, at 694-0877.

_____
(Supervisor)

Concur

_____
(Management Official) (2nd level or above)

Copy to:
DPC

CHAPTER VI. VOLUNTARY TESTING

A. PROCEDURES PRIOR TO ACTUAL COLLECTION

1. Employee's Request for Testing

a. An employee covered by the Plan, who is not occupying a TDP, may volunteer for drug testing by submitting a request in writing through his/her immediate supervisor to the DPC. The request shall include the following data:

(1) Name of employee.
(2) Occupational series, title and grade.
(3) Social Security Number.
(4) Gender.
(5) Organization.
(6) Duty location.

2. Acknowledgment and Confirmation of Employee Request

a. The DPC shall, within 10 working days of his/her receipt of a request for voluntary testing, provide to the requesting employee two copies of an acknowledgment notice of that request. A sample notice is provided at the end of this chapter. This notice shall:

(1) Acknowledge the employee's request for voluntary testing.

(2) Provide an explanation of the consequences of failing to meet OSD/OJCS test requirements.

(3) Explain the consequences of a positive test result (Chapter IX.D).

(4) Include a statement that the employee will be included in the pool of testing designated positions subject to random testing.

(5) Be signed and dated by the employee acknowledging receipt of the notice.

b. The employee shall be instructed to return this signed copy no later than 10 working days after receipt and that failure to do so will be viewed as a withdrawal of the request.

c. The DPC shall maintain one copy of the employee's signed acknowledgment.

3. Contractor Notification

The contractor shall be notified by the DPC in the same manner as Random Testing, Chapter II.

4. Supervisor Notification

a. The DPC/SC or the Joint Staff DPC shall notify the employee's first level supervisor approximately 2 hours prior to the actual collection.

b. In situations where the first level supervisor is unavailable, the next higher management official shall be contacted.

c. The DPC/SC or the Joint Staff DPC shall provide the supervisor with any information to be conveyed to the employee.

d. The DPC/SC shall annotate the test list when a supervisor has been contacted.

5. Employee Notification

a. Approximately 60 minutes prior to the actual collection (allowing for travel time), the supervisor shall verbally and privately inform the employee that he/she is scheduled for voluntary drug testing. The employee shall be clearly informed as to the time and exact location to report for testing and instructed to take appropriate photo identification. Acceptable identification includes a DoD building pass with photo, or, if unavailable, a driver's license with photo.

b. Every effort shall be made by the supervisor to personally provide the above information to the employee to avoid any misunderstandings.

c. The supervisor shall be knowledgeable about the drug testing program and should be able to provide information in response to questions that may extend beyond the information provided in written notices.

d. The supervisor shall immediately report to the DPC/SC or the Joint Staff DPC via telephone, any problem encountered during employee notification. These problems shall be recorded on the test list by the DPC/SC. The DPC/SC shall assume the employee has received proper notification in the absence of any such call from the supervisor.

6. Unavailability of Employee

When an employee scheduled for voluntary testing is unavailable on the scheduled day, the supervisor shall inform the DPC. The DPC shall inform the employee that, if he/she still wishes to be scheduled for voluntary drug testing, another appointment will be scheduled within the next 60 days. If the employee is unavailable for the second appointment, a second written request must be submitted. A second request shall be prepared in the same manner as the first request.

7. Cancellation by Employee

a. Volunteers shall remain in the TDP pool as long as the employee is assigned to his/her current position, or until the employee

withdraws from participation.

b. An employee may, up until the time collection procedures are initiated, submit a written request to the DPC through his or her supervisor canceling the request for voluntary drug testing.

B. PROCEDURES DURING COLLECTION

Procedures will be followed for standard collection procedures (unobserved), in accordance with Appendix A, unless the collector determines an employee has tampered, adulterated or substituted a urine sample, and the DPC concurs.

SAMPLE REQUEST FOR VOLUNTARY DRUG TESTING

MEMORANDUM FOR DRUG PROGRAM COORDINATOR, Directorate for Personnel & Security, WHS, Room 3B347, Pentagon, Washington, DC 20301

THROUGH: (Supervisor)

SUBJECT: Voluntary Drug Testing

This is a request to be included in the pool for random drug testing in accordance with the OSD/OJCS Drug-Free Workplace Plan. Pertinent data follows:

Name:

Occupational series, title and grade:

Social Security Number:

Gender:

Organization:

Duty Location:

_____

Signature of Employee

Acknowledged:

_____

Supervisor's Signature

SAMPLE

MEMORANDUM FOR (EMPLOYEE'S NAME)

SUBJECT: Acknowledgement of Request for Voluntary Drug Testing

This will acknowledge your recent written request to volunteer for agency drug testing. Pursuant to Executive Order 12564, "Drug-Free Federal Workplace," the Department of Defense has initiated a comprehensive program to achieve the goal of a drug-free workplace. This program is set forth in A.I. No. 17, "Civilian Employee Alcohol and Drug Abuse Prevention, Testing, and Control Program," and the OSD/OJCS Drug-Free Workplace Plan.

As a result of your request, you will be included in the pool of testing designated positions subject to random testing. You will remain in the pool as long as you are assigned to your current position or until you withdraw from participation.

Drug testing for OSD/JS/WHS is performed through urinalysis by a certified Forensic Toxicology Drug Testing Laboratory. The testing methodology reflects the scientific and technical procedures necessary to assure the results are highly reliable and accurate. DoD or HHS certification provides for strict quality control procedures. These procedures will include an initial screen of the urine sample you provide for drugs and confirmation by gas chromatography/mass spectrometry.

To assure that the sample collected from you is not accidentally confused with any other sample, strict procedures will be used when collecting and transferring the specimen. The total of these procedures is known as the chain of custody. The test results from your sample will be handled with maximum respect for individual confidentiality consistent with safety and security. A confirmed positive test result reported by the laboratory will be reviewed by a Medical Review Officer (MRO) before a determination is made that an employee has used illegal drugs. You will be given an opportunity to list all prescription drugs that could affect the outcome of the drug test and which may be identified through the confirmation procedure.

If it is determined that you are using illegal drugs on- or off-duty by means of this drug test or any other means, you will be provided the opportunity to use the services of the Pentagon Employee's Referral Service (PERS). Through this program, you will receive counseling and learn about the availability of rehabilitation. Information concerning PERS may be obtained by calling 697-6830.

You will be subject to the same conditions and procedures as an employee in a Testing Designated Position (TDP) as described in the OSD/OJCS Drug-Free Workplace Plan. If a determination is made that you are using illegal drugs, you will be subject to unannounced follow-up testing for a period of 1 year after you complete a rehabilitation/abatement program or as prescribed in a "last chance agreement." Refusal to enter or successfully complete a rehabilitation/abatement program will be grounds for removal from the Federal service. If you test positive a second time as a result of any subsequent drug test or a second determination of illegal drug use by you is made, you also will be subject to removal.

Refusal to submit to testing or failure to cooperate with the collection procedures will be grounds for disciplinary or adverse action, including, in appropriate cases, removal from the Federal service.

Sign and return one copy of this notice no later than 10 working days of receipt to the DPC. Failure to do so will be viewed as a withdrawal of the request.

If you have other questions after providing a urine specimen, please contact the undersigned.

_____
(Drug Program Coordinator)

- -

MEMORANDUM FOR DRUG PROGRAM COORDINATOR, Directorate for Personnel & Security, WHS, Room 3B347, Pentagon, Washington, DC 20301

SUBJECT: Same as Above

I hereby acknowledge receipt of this notice and agree to the conditions stated therein.

_____
Signature of Employee Date

CHAPTER VII. FOLLOW-UP TESTING

A. PROCEDURES PRIOR TO ACTUAL COLLECTION

1. Test Scheduling

a. Upon completion of counseling or rehabilitation, the EAP Coordinator will inform the immediate supervisor and the DPC. The employee shall agree in writing, in advance, that this information may be divulged.

b. The DPC will initiate action to place the employee in a separate testing pool for the period of one year as determined by the circumstances of the case. The employee shall be tested quarterly, or at a frequency specified in the abeyance contract or upon the advice of the rehabilitation facility. Such testing is distinct from testing which may be imposed as a component of the EAP. Follow-up testing may be initiated while the employee is in a counseling/rehabilitation program if that is stated in the abeyance contract.

c. Certain covered positions require a return to duty medical examination for any employee identified as an illegal drug abuser. This examination will, in all such instances, include drug testing. This test shall serve as the first follow-up test.

2. Supervisor Notification

a. The DPC/SC or the Joint Staff DPC shall notify the employee's supervisor approximately 2 hours prior to the actual collection.

b. In situations where the first level supervisor is unavailable, the next higher management official shall be contacted.

c. The DPC/SC or the Joint Staff DPC shall provide the supervisor with the information to be conveyed to the employee.

d. The DPC shall annotate the list when a supervisor has been contacted.

3. Employee Notification

a. On the day of collection approximately 60 minutes prior to actual collection (allowing for travel time), the supervisor or management official shall provide the employee with written notice that he/she has been scheduled for follow-up drug testing. The employee shall be clearly informed as to the exact time and location for the test and instructed to take appropriate photo identification. Acceptable identification includes a DoD building pass with photo or, if unavailable, a drivers license with photo. A metro pass will be provided to employees in the NCR.

b. The supervisor shall be knowledgeable about the drug testing program and able to provide information in response to employee questions that may extend beyond information provided.

c. The supervisor shall immediately report to the DPC/SC or the Joint Staff DPC via telephone, any problem encountered during employee notification that would would preclude notification. The DPC/SC shall assume the employee has received proper notification in the absence of any such call from the supervisor.

4. Unavailability of Employee

a. When an employee scheduled for follow-up testing is not available for legitimate reasons (e.g. on travel, leave), the supervisor shall immediately notify the DPC/SC or the Joint Staff DPC.

b. The DPC shall arrange a new date/time of collection with the contractor and inform the employee's supervisor of the new schedule.

c. The DPC shall annotate the list indicating the reason for rescheduling and the new date/time of the test.

B. PROCEDURES DURING COLLECTION

Procedures will be followed for direct observation collection in Appendix B.

C. REINSTATEMENT OF EMPLOYEE TO CRITICAL SAFETY/SECURITY DUTIES

1. EAP Responsibilities

a. To assist the EAP in determining whether an employee has successfully completed the rehabilitation program, the EAP Administrator shall request information such as the following from the rehabilitation facility:

(1) Evaluation reports which include a professional opinion regarding the type of substances used in the past, extent or frequency of use, results of any tests given, prognosis, follow-up recommendations, and a conclusion on whether the employee is attending and cooperating with treatment.

(2) Admission summary, interim progress reports and discharge summary where inpatient treatment or evaluation is involved.

(3) Where outpatient therapy or counseling is required beyond the initial treatment, progress reports at least quarterly.

b. Based on the information provided by the rehabilitation facility, and the EAP Counselor's assessment of the employee's progress, the EAP Counselor will inform the supervisor if the employee is cooperat-

b. Based on the information provided by the rehabilitation facility, and the EAP Counselor's assessment of the employee's progress, the EAP Counselor will inform the supervisor if the employee is cooperating with treatment and whether or not he or she is drug free. Only the information that the employee agrees to disclose will be released to the supervisor.

2. Organizational Responsibilities

The immediate supervisor shall take into consideration the progress report from the EAP Counselor, and his or her personal assessment of the employee's conduct and performance to determine when to recommend that the employee be returned to his or her former sensitive duties. The request to return the employee to sensitive duties, including information relevant to the request, will be forwarded to the Director, Washington Headquarters Services (WHS) or other designated official for approval. The employee shall not be returned to his/her sensitive position until approval is granted by the Director, WHS or a designee.

OSD/OJCS DRUG-FREE WORKPLACE PROGRAM

CHECKLIST FOR SUPERVISORS - FOLLOW-UP TESTING

When information is obtained from the collector as to the date and time the employee is scheduled for follow-up testing, the DPC/ SC or Joint Staff DPC will inform you. The following procedures shall be followed in notifying employees of the collection process.

1. Approximately 60 minutes prior to the actual collection (allowing for travel time), inform the employee verbally, and privately, that he/she has been scheduled for drug testing by urinalysis.

2. Issue the employee a metro pass and clearly inform the employee as to the time and exact location to report for testing and instruct him/her to take photo identification. The employee will be carried in an official duty status. Individuals in the National Capital Region (NCR) will report to the office of Tracor Technology Resources, 1612 K Street N.W., Suite 800, Washington, DC.

3. The collection will be performed by a Government contractor, who will ensure the process is properly administered. Advise employees to be prepared to provide a urine specimen at the scheduled collection time.

4. Give scheduled employees a copy of the "Instructions for Providing Urine Sample for Drug Testing Program," which provides helpful information about the collection process. Inform the employee that the sample will be collected under direct observation.

5. Immediately report any problems encountered during employee notification to the DPC/SC or Joint Staff DPC. Employees who fail to cooperate with the collection procedures will be subject to disciplinary actions in accordance with Chapter IX of this manual. You must obtain guidance from your servicing personnel office in these instances.

6. If an employee is unable to provide a sufficient quantity of urine, he/she will be given a reasonable period of time to provide a specimen. If, at the end of the waiting period the employee still cannot provide a specimen, the collector will inform the employee to return to the work site.

7. If you have any questions or concerns, you should share them with your Drug Program Coordinator, Directorate for Personnel & Security, WHS, 694-0877, or the Joint Staff Drug Program Coordinator 694-6464.

SAMPLE

MEMORANDUM FOR (EMPLOYEE'S NAME)

SUBJECT: Notice of Follow-up Testing for Illegal Drugs

When you elected to enter the Employee Assistance Program, you were advised that you would be subject to follow-up testing for illegal drug use. You are scheduled for follow-up testing today. Be prepared to present photo identification to the collector. You will be required to provide a urine specimen of at least 60 milliliters under direct observation.

Drug testing for the OSD/OJCS is performed through urinalysis by a certified Forensic Toxicology Drug Testing Laboratory. The testing methodology reflects the scientific and technical procedures necessary to assure the results are highly reliable and accurate. DoD or HHS certification provides for strict quality control procedures. These procedures will include an initial screen of the urine sample you provide for drugs and confirmation by gas chromatography/ mass spectrometry.

To assure that the sample collected from you is not accidentally confused with any other sample, strict procedures will be used when collecting and transferring the specimen. The total of these procedures is known as the chain of custody. The test results from your sample will be handled with maximum respect for individual confidentiality consistent with safety and security. A confirmed positive test result reported by the laboratory will be reviewed by a Medical Review Officer (MRO) before a determination is made that an employee has used illegal drugs. You will be given an opportunity to list all prescription drugs that could affect the outcome of the drug test and which may be identified through the confirmation procedure.

If you test positive you will be subject to removal. Refusal to submit to testing or failure to cooperate with collection procedures will also be grounds for removal from the Federal service.

If you have other questions after providing a urine specimen, you may contact the Employee Relations Specialist servicing your organization, or the Drug Program Coordinator.

_____

Supervisor

CHAPTER VIII. MEDICAL REVIEW OFFICER

A. GENERAL

1. Role

a. Duties and procedures for the MRO are promulgated by HHS National Institute on Drug Abuse, "Medical Review Officer Manual, A Guide to Evaluating Urine Drug Analysis," "Agreement Between Department of the Army and Director, Washington Headquarters Services," and any other pertinent DoD or DA instructions or regulations.

b. The role of the MRO is to review and interpret positive urinalysis test results to assure a scientifically valid result and to determine whether a legitimate medical explanation could account for the positive test result.

2. Organizational Relationships

a. The MRO receives records of all drug testing results from the laboratory through the MDW Installation Biochemical Test Collection Point (IBTCP).

b. The MRO shall inform the DPC and the EAP of all verified positive test results. The DPC will notify the immediate supervisor who will notify the employee, or the appropriate Staffing Specialist in the case of applicants. The Joint Staff DPC will be notified with regard to Joint Staff employees, and the Civilian Personnel Branch with regard to applicants.

3. Communications

a. Communications regarding sensitive medical information (positive drug test results, medical records reviews, medical interviews, consultations with treating physicians, etc.) will be conducted in a manner that provides the maximum protection of employees' right to privacy. Medical details in individual cases will be restricted to communications between health care professionals and only as required to arrive at a decision regarding a positive drug test result.

b. Telephone communication is permitted for the purpose of acquiring medical or other information necessary to arrive at a medical determination in individual cases. Only those persons who have information relevant to the case will be contacted.

c. Transmittal of written medical information will be by sealed envelope labeled: "Personal-Privacy Act. To be opened by addressee only."

B. TEST RESULTS

1. Receipt

Test results from the laboratory will be furnished the MRO by the IBTC within 2 working days of receipt.

2. Review

a. The medical review of each positive test result shall be performed by the MRO, a licensed physician with knowledge of substance abuse disorders. The purpose of the review is to determine if the positive result is evidence of illegal drug use.

b. There may be circumstances in which formal verification cannot be made immediately because of the need to obtain additional information. In such situations the MRO will obtain documentation needed for a final decision in as expeditious a manner as possible.

c. The MRO shall undertake the evaluation of alternative explanations of a positive test result. This may include the conduct of employee/applicant medical interviews, review of an individual's medical history or the review of other biomedical factors. The MRO will determine whether or not a personal interview is necessary. Any requests for medical information shall be made by the MRO directly to the employee/applicant to ensure maximum confidentiality.

d. The MRO shall review all medical records made available by the tested individual when a positive test could have resulted from legally prescribed medications.

e. In situations where interviews and consultations with employees/applicants are not considered to be necessary by the MRO, the individual may request to submit additional information. The MRO should determine if this information is pertinent to a medical review or if the information is primarily evidentiary in nature that should be considered by the appropriate management official.

f. The MRO review to verify a positive test result will not address any issues of innocent ingestion. These are matters to be considered by the appropriate management official.

g. The review of positive test results by the MRO shall be initiated immediately upon receipt of the laboratory test report, and shall be completed within 2 work days after receipt of all information pertinent to the review.

h. All verified positive test results will be reported to the DPC and the EAP. Any positive test result that the MRO has determined to be justified will be reported as a negative test.

3. Notification

a. The IBTC will inform the DPC of all negative test results. When a specimen of an employee has tested positive on a random test, the IBTC will only inform the DPC after the MRO has either verified the positive tests or justified the tests based on medical information provided by the tested individual. In the latter instance, the test will be reported as a negative test.

b. After verification of a positive test result, the MRO shall notify the DPC and the Administrator of the Employee Assistance Program in which the employee will receive counseling or treatment or is otherwise participating. The DPC shall notify the immediate supervisor who will inform the employee. If applicable, the DPC will notify the Joint Staff DPC. For applicants, the DPC will notify the appropriate Staffing Specialist. In addition, the DPC will ensure that an EAP referral is made.

c. Notification of management officials by the DPC shall normally be accomplished the same day as verification of the positive test result by the MRO.

d. Notifications shall be recorded in each case, listing the official notified, organization, date, and time notified.

CHAPTER IX. DISCIPLINARY/ADVERSE ACTION

A. GENERAL

1. Coverage

This chapter sets forth the appropriate remedial procedures that OSD/JS management officials and supervisors shall follow in administering the OSD/OJCS Drug-Free Workplace Program. All disciplinary procedures and adverse actions shall be taken pursuant to applicable laws, orders, and regulations and in accordance with A.I. No. 8, "Disciplinary and Adverse Actions" for GS/GM and Wage System employees; Senior Executive Service Handbook, DoD 1402.3-H; or applicable collective bargaining agreements.

2. Drug Use - Effect on Mission

A determination by a supervisor or manager to initiate disciplinary or adverse action against an employee on the basis of illegal drug use is warranted since such illegal drug use is inconsistent with the mission of the Office of the Secretary of Defense and the Joint Staff and the nature of the employee's duties. Prior to initiating appropriate action against an employee, management officials and supervisors shall determine if the action will promote the efficiency of the service.

3. Required Guidance/Consultation

Prior to initiating ANY disciplinary or adverse action against an employee, management officials and supervisors shall secure guidance from the servicing Personnel Specialist in the Directorate for Personnel & Security, WHS, LMER Division; Executive Personnel and Classification Division; or the Civilian Personnel Branch, Joint Staff. If required, the servicing personnel office will contact appropriate Agency legal counsel.

4. Mandatory Administrative Action

If the employee occupies a sensitive position, the employee shall be immediately removed from that position by reassignment or detail to a non-sensitive position, removing access to classified information, or other appropriate action. Upon successful completion of a rehabilitation program, or upon a determination that the employee's return would not endanger public health, safety or national security, the Component Head or a designee may return an employee to duty in a sensitive position.

5. Range of Consequences

The severity of the disciplinary action taken against an employee will depend on the circumstances of each case. Such disciplinary actions may include any of the following measures, but some disciplinary action must be initiated:

a. Written reprimand.

b. Placing the employee in an enforced leave status (Administrative leave). An employee may not be carried on annual or sick leave without his/her consent if such employee is ready, willing and able to work.

c. Suspending the employee for 14 days or less (does not apply to SES members).

d. Suspending the employee for 15 days or more.

e. Suspending the employee until the employee successfully completes the EAP or until the relevant management official determines that action other than suspension is more appropriate.

f. Removal.

B. ACTIONS BASED ON ON-DUTY OR ON AGENCY PROPERTY - USE OR POSSESSION OF ILLEGAL DRUGS AND DRUG TRAFFICKING

1. Use of Illegal Drugs On-Duty or On Agency Property (Reasonable Suspicion or Other Means)

a. Upon learning that an employee has used illegal drugs on-duty or on agency property, the supervisor shall be responsible for documenting all relevant details to support the disciplinary or adverse action to be taken against such an employee based on that use.

b. If a reasonable suspicion drug test has not been requested, it should be accomplished immediately upon discovering the employee is using illegal drugs on-duty or on agency property.

c. The procedures regarding administrative action in paragraph A.4. shall apply.

d. The supervisor shall initiate appropriate action consistent with the procedural requirements described in section A.1. above. The employee shall be charged with usage of illegal drugs on-duty or on agency property. The employee shall be offered an opportunity to enter a rehabilitation/abatement program consistent with the provisions of the Drug Abuse Prevention, Treatment and Rehabilitation Act of 1972, as amended (42 USC Section 290ee-1 et seq.).

e. The employee shall be charged with usage of illegal drugs on-duty or on agency property. Whether or not the employee agrees to counseling and rehabilitation, the supervisor may proceed with the adverse action.

2. Possession of Illegal Drugs On-Duty or On Agency Property

a. Upon learning that an employee has possessed illegal drugs on-duty or on agency property, the supervisor shall document all relevant details to support the disciplinary/adverse action taken against such an employee based on that possession.

b. The supervisor shall initiate appropriate disciplinary/adverse action against an employee consistent with the procedural requirements described in section A.1. above. The employee shall be charged with possession of illegal drugs on-duty or on agency property.

c. No opportunity to enter a rehabilitation/abatement program will be offered.

3. Drug Trafficking

a. Upon learning that an employee has engaged in illegal drug trafficking, e.g., sale, manufacture, growing, distribution or transportation, the supervisor shall document all relevant details to support the disciplinary/adverse action taken against an employee because of drug trafficking.

b. The supervisor shall initiate appropriate disciplinary/adverse action against the employee consistent with the procedural requirements described in section A.1. above. The employee shall be charged with illegal drug trafficking, i.e., sale, manufacture, growing or other appropriate charge.

c. No opportunity to enter a rehabilitation/abatement program will be offered.

4. In all cases of possession, use, or trafficking on-duty or on Agency property, the Defense Protective Service, telephone 697-5555 shall be immediately notified.

C. ACTIONS BASED ON FAILURE TO COMPLY WITH PROCEDURES DURING COLLECTION

1. Failure of Employee to Report to Designated Collection Site

a. Upon notification by the DPC that an employee has failed to appear for a scheduled collection, the supervisor shall discuss with the employee the reason(s) for failing to appear. If the employee provides a legitimate reason(s) for failing to report, no disciplinary action shall be taken.

b. If an employee does not provide a legitimate reason(s) for failing to report, the supervisor shall document the failure in writing and initiate action up to and including removal of the employee from the Federal service for such cause as will promote the efficiency of the service consistent with the procedural requirements described in section A.1. above. The employee shall be charged with failure or refusal to take a drug test authorized by EO 12564.

c. Given the nature of the offense, there is no obligation to offer the employee an opportunity to enter a rehabilitation/abatement program.

2. Refusal of Employee to Provide a Specimen at the Collection Site

a. Upon notification by the DPC that an employee has refused to provide a specimen at the collection site, the supervisor shall document all relevant details to support the disciplinary action taken against an employee because of refusal to provide a specimen, including the employee's reason(s).

b. The supervisor shall initiate appropriate disciplinary/ adverse action consistent with the procedural requirements described in section A.1. above. The employee shall be charged with refusal to take a drug test authorized by E. O. 12564.

c. No opportunity to enter a rehabilitation/abatement program will be offered.

3. Failure of Employee to Provide Specimen

a. Upon notification by the DPC that an employee has failed to provide a sufficient quantity of urine (at least 60 milliliters), the supervisor shall solicit the reason from the employee, e.g. medical reasons. The DPC will reschedule the employee for testing if circumstances warrant. If a rescheduled employee still fails to provide a specimen, the supervisor shall document all relevant details to support the disciplinary/ adverse action taken against an employee because of failing to provide a specimen.

b. The supervisor shall initiate appropriate disciplinary/ adverse action consistent with the procedural requirements described in section A.1. above. The employee shall be charged with failure to take a drug test authorized by E. O. 12564.

c. No opportunity to enter a rehabilitation/abatement program will be offered.

4. Tampering, Adulteration, or Substitution of Urine Specimens

a. Upon notification by the DPC that an employee has tampered, adulterated or substituted his or her sample, the supervisor shall document all relevant details to support the disciplinary/adverse action taken against an employee because of tampering, adulteration, or substitution of a urine sample.

b. The supervisor shall initiate appropriate disciplinary/ adverse action consistent with the procedural requirements described in section A.1. above. Attempts to alter or substitute the specimen provided will be deemed a refusal to take the drug test. The employee shall be charged with tampering, adulterating or substituting his/her urine sample.

c. No opportunity to enter a rehabilitation/abatement program will be offered.

D. ACTIONS BASED ON VERIFIED POSITIVE URINALYSIS FINDINGS

1. First Verified Positive Urinalysis Finding or First Determination of Illegal Drug Use

a. Upon receipt of a first verified positive urinalysis finding that an employee uses illegal drugs or a first determination that an employee uses illegal drugs, the supervisor shall assign an employee in a TDP to non-sensitive duties if such duties are available. An employee who possesses a security clearance of Secret, Top Secret, or special access, shall no longer have access to classified information. Such access shall be suspended pending successful completion of a rehabilitation/abatement program or the employee shall be reassigned to a non-sensitive position.

b. The supervisor shall issue a proposed disciplinary/adverse action, refer the employee to the appropriate EAP and offer the employee an opportunity to enter a rehabilitation/abatement program. The employee shall be charged with illegal drug use.

c. If the employee agrees to accept the offer of rehabilitation/abatement in writing, the employee shall be informed that his/her removal or disciplinary action may be held in abeyance pending successful completion of the rehabilitation/abatement program. Such an abeyance shall be at the discretion of the employee's supervisor.

d. If the employee refuses the offer of rehabilitation/abatement the appropriate management official shall proceed with the issuance of a final decision letter on the proposed disciplinary/adverse action consistent with the procedural requirements described in Section A.1. above.

2. Second Verified Positive Urinalysis Finding or Second Determination of Illegal Drug Use

a. Upon receipt by a management official of a second verified positive urinalysis finding that an employee uses illegal drugs or a second determination that an employee uses illegal drugs, removal of an employee from the Federal service is mandatory.

b. The supervisor shall initiate action to remove an employee from the Federal service for such cause as will promote the efficiency of the service consistent with the procedural requirements described in Section A.1. above. The employee shall be charged with failure to refrain from illegal drug use. The employee will not be offered a second opportunity to enter a rehabilitation/abatement program.

APPENDIX A
STANDARD COLLECTION PROCEDURES (UNOBSERVED)

1. The collection contractor shall adhere strictly to the schedule. Inability to adhere to the schedule shall be reported immediately to the appropriate DPC/SC. If an individual fails to arrive at the assigned time, the collection site person shall contact the DPC/SC for guidance.

2. Upon the employee's arrival at the collection site, the collector shall request the individual to present photo identification and verify his/her social security number. If the individual does not have proper identification, the collector shall notify the DPC/SC to obtain guidance on action to be taken. The DPC/SC shall then contact the employee's supervisor to confirm identification of the individual. If the identity of the individual cannot be established, the collection site person shall not proceed with the collection.

3. The collector shall require the individual to remove any unnecessary outer garments (e.g. coat, jacket) that might conceal items or substances that could be used to tamper with or adulterate the urine specimen. Also, all personal belongings (e.g., purse, briefcase) must remain with outer garments; the individual may, however, retain his/her wallet.

4. The individual shall be instructed to wash and dry his/her hands prior to urination. After washing hands, the donor shall remain in the presence of the collector and not have access to water fountains, faucets, soap dispensers, cleaning agents, or any other materials which could be used to adulterate the specimen.

5. To deter the dilution of specimens at the collection site, toilet bluing agents will be placed in the toilet bowl. There should not be any other source of water (e.g., shower, sink, etc.) in the enclosure where urination occurs.

6. The specimen shall be provided in the privacy of a stall or otherwise partitioned area that allows for individual privacy. The collector actually involved in the taking of the urine specimen should be of the same gender as the individual providing the specimen. The collector shall note in the permanent record book any unusual behavior.

7. The individual shall be asked to void into a disposable specimen container and instructed not to flush the toilet until ready to leave the toilet or stall area. The specimen is then transferred by the collector to the specimen container. Any transfer from the collection container to the specimen bottle will be observed by the donor.

8. If the collection site is a public restroom, a same gender collector shall accompany the individual into the public restroom. The restroom must be secured during the collection procedure and toilet bluing agents shall be placed in the toilet bowl by the collector. The individual shall be asked not to flush the toilet until ready to leave

the toilet or stall area. The collector shall remain in the restroom but outside the stall until the specimen is collected.

9. Upon receiving the specimen from the individual, the collector shall determine that it contains at least 60 milliliters of urine. If there is insufficient urine in the container, additional urine shall be collected in a separate container to reach a total of 60 milliliters. The individual may be given a reasonable amount of liquid to drink for this purpose (e.g., a glass of water).

10. Immediately after collection, the collector shall measure the temperature of the specimen. If partial specimens are collected, the temperature of each partial specimen shall be measured and the partial specimens shall be combined in one container. The collector shall also conduct an inspection to determine the color and signs of contaminants. Any unusual findings resulting from the inspection shall be noted in the permanent record book. The time from urination to delivery of the sample for temperature measurement is critical and in no case shall exceed 4 minutes. If the temperature of the specimen is outside the range of 32.5-37.7 degrees C/90.5-99.8 degrees F, this gives reason to believe the specimen has been tampered with. After consultation with and approval by the DPC, another specimen shall be collected under direct observation and both specimens forwarded to the laboratory. Any specimen suspected to be adulterated should always be forwarded for testing. An individual may volunteer to have his or her oral temperature taken to provide evidence to counter the reason to believe the individual may have altered or substituted the specimen caused by the specimen's temperature falling outside the prescribed range.

11. Both the individual being tested and the collector should keep the specimen in view at all times until it has been packaged, sealed, and labeled. If the specimen is transferred to a second container, the collector shall request the individual to observe the transfer and the placement of the tamperproof seal over the bottle cap and down the sides of the bottle.

12. The identification label shall contain the date of collection, the individual's specimen number, and any other identifying information required. The individual shall initial the label on the specimen bottle, using initials corresponding with the name on the chain of custody form, certifying that it is the specimen collected from him or her.

13. The individual may then wash his or her hands.

14. The collector shall enter in the permanent record book all information identifying the specimen, and sign the permanent record book next to the identifying information.

15. The individual shall be asked to read and sign a certification statement in the permanent record book certifying that the urine in the bottle came from his/her body at the time of collection.

16. The chain of custody form shall be completed for the collection process and the specimens delivered to the designated Forensic Toxicology Drug Testing Laboratory (FTDTL). All specimens should be delivered the day of collection but later than the next working day.

17. Specimens collected outside the NCR shall be shipped to the designated FTDTL by collection site personnel. The specimens shall be placed in containers designed to minimize the possibility of damage during shipment, e.g. specimen boxes or padded mailers; and those containers shall be securely sealed to eliminate the possibility of undetected tampering. The collection site personnel shall ensure that the chain of custody documentation is attached to each container secured in a manner to preclude any break in the chain of custody.

APPENDIX B
DIRECT OBSERVATION COLLECTION PROCEDURES

1. Collection under direct observation shall not be made by the collection site person without proper authorization from the DPC.

2. Collection of urine specimens shall not be made under direct observation except in those unusual circumstances allow in E.O. 12564 and FPM Letters 792-16 and 792-17. These exceptions may occur when facts and circumstances provide a reasonable basis to conclude that the person to be tested:

a. Is an illegal drug user.

b. Is under the influence of drugs at the time of the test.

c. Has previously been confirmed by the agency to be an illegal drug user.

d. Is seen to have equipment or implements used to tamper with urine samples.

e. Has recently been determined to have tampered with a sample.

f. Has just given a specimen, and the temperature measurement indicates possible adulteration/substitution.

3. Upon employee's arrival at the collection site, the collector shall request the individual to present photo identification and to verify his/her social security number. If the individual does not have proper identification, the collector shall notify the DPC immediately to obtain guidance on action to be taken. The DPC/SC shall then contact the employee's immediate supervisor to confirm identification of the individual. If the identity of the individual cannot be established, the collector shall not proceed with the collection.

4. The collector shall inform the employee that collection will be done under direct observation.

5. The collector shall require the individual to remove any unnecessary outer garments (e.g., coat, jacket) that might conceal items or substances that could be used to tamper with or adulterate the urine specimen. Also, all personal belongings (e.g. purse, briefcase) must remain with outer garments; the individual may, however, retain his/her wallet.

6. Only the employee and the collector shall be in the toilet area when the collection is made.

7. The collector, who shall be of the same gender as the employee, will serve as the observer.

8. The individual shall be instructed to wash and dry his/her hands prior to urination. After washing hands, the donor shall remain in the presence of the collector and not have access to water fountains, faucets, soap dispensers, cleaning agents or any other materials which could be used to adulterate the specimen.

9. To deter the dilution of specimens at the collection site, toilet bluing agents shall be placed in the toilet bowl. There should not be any source of water (e.g. shower, sink, etc.) in the enclosure where urination occurs.

10. The collector/observer shall position himself/herself in such a manner during collection so that he/she can be certain that the specimen passed directly from the employee's body into the specimen container. The collector shall note any unusual behavior or appearance in the permanent record book.

11. The individual shall be asked to void into a disposable specimen container and instructed not flush the toilet until ready to leave the toilet or stall area. The specimen is then transferred by the collector to the specimen container. Any transfer of urine from the collection container to the specimen bottles will be observed by the donor.

12. If the collection site is a public restroom, a same gender collector shall accompany the individual into the public restroom. The restroom must be secured during the collection procedure and toilet bluing agents placed in the toilet bowl by the collector. The individual shall be asked not to flush the toilet until ready to leave the toilet or stall area.

13. The direct observation of the collection of a urine specimen is highly confidential, and no information shall be released concerning the observation other than the fact that it was performed. All procedures shall be conducted in a detached objective manner.

14. Upon receiving the specimen from the individual, the collector shall determine that it contains at least 60 milliliters of urine. If there is insufficient urine in the container, additional urine shall be collected in a separate container to reach a total of 60 milliliters. The individual may be given a reasonable amount of liquid to drink to facilitate urination (e.g., a glass of water).

15. Immediately after collection, the collector shall measure the temperature of the specimen. If partial specimens are collected, the temperature of each partial specimen shall be measured and the partial specimens shall be combined in one container. The collector shall conduct an inspection to determine the color and signs of contaminants. Any unusual findings resulting from the inspection shall be noted in the permanent record book. The time from urination to delivery of the

sample for temperature measurement is critical and in no case shall exceed 4 minutes.

16. If the temperature of the specimen is outside the range of 32.5–37.7 degrees C/90.5–99.8 degrees F, this gives reason to believe the specimen has been tampered with. Another specimen shall be collected, again under direct observation, and both specimens forwarded to the laboratory. Any specimen suspected to be adulterated shall always be forwarded for testing. An individual may volunteer to have his or her oral temperature taken to provide evidence to counter the reason to believe the individual may have altered or substituted the specimen caused by the specimen's temperature falling outside the prescribed range.

17. Both the individual being tested and the collector should keep the specimen in view at all times until it has been packaged and sealed and labeled. If the specimen is transferred to a second container, the collector shall request the individual to observe the transfer of the specimen and the placement of the tamperproof seal over the bottle cap and down the sides of the bottle.

18. The identification label shall contain the date of collection, the individual's specimen number, and any other identifying information required. The individual shall initial the label on the specimen bottle, using initials corresponding with the name on the chain of custody form, certifying that it is the specimen collected from him or her.

19. The individual may then wash his or her hands.

20. The collector shall enter in the permanent record book all information identifying the specimen, and sign the permanent record book next to the identifying information.

21. The individual shall be asked to read and sign a certification statement in the permanent record book certifying that the urine in the bottle came from his/her body at the time of collection.

22. The chain of custody form shall be completed for the collection process and the specimens delivered to the designated Forensic Toxicology Drug Testing Laboratory (FTDTL). All specimens should be delivered the day of collection but no later than the next working day.

24. Specimens collected outside the National Capital Region (NCR) shall be shipped to the designated FTDTL by collection site personnel. The specimens shall be placed in containers designed to minimize the possibility of damage during shipment, e.g. specimen boxes or padded mailers; and those containers shall be securely sealed to eliminate the possibility of undetected tampering. The collection site personnel shall ensure that the chain of custody documentation is attached to each container secured in a manner to preclude any break in the chain of custody.

Document Separator

DEPARTMENT OF DEFENSE
BOARD OF OPERATING DIRECTORS FOR TEST AND EVALUATION

Department of the Army
HQ, U.S. Army Test and Evaluation Command
Aberdeen Proving Ground, MD 21005-5055

Department of the Navy
HQ, Naval Air Warfare Center
Arlington, VA 22243-5000

Department of the Air Force
HQ, Air Force Materiel Command
Wright-Patterson AFB, OH 45433-5714

AMSTE-PL (5)

30 JAN 1995

MEMORANDUM FOR Mr. Gary Holloway, Chairman, Test and Evaluation Reliance and Investment Board, U.S. Army Test and Evaluation Command, Aberdeen Proving Ground, MD 21005-5055

SUBJECT: Initial Preparations for Development of an Electronic Combat (EC) Consolidation Master Plan

1. Reference memorandum, T&E Executive Agent BOD, 29 Nov 94, SAB (encl 1).

2. Encl 1 is forwarded for your action. While development of the Master Plan cannot be completed until after the results of BRAC 95 have been released, the task should be initiated now by scoping the effort and developing a POA&M. You should be prepared to brief the POA&M at the next BoOD meeting scheduled for 23-24 Feb 95.

3. My staff POC is Mr. Francis Bartosik, DSN 298-1186.

Encl

RICHARD W. TRAGEMANN
Major General, USA
Chairman

CF:
RADM William E. Newman, Commander, Naval Air Warfare Center, 1421 Jefferson Davis Highway, Arlington, VA 22243-6000
MG Francis C. Gideon, Jr., Director, Operations, HQ AFMC/DO, U.S. Air Force Materiel Command, 4225 Logistics Ave, Suite 2, Wright-Patterson AFB, OH 45433-5714
Commander, Naval Air Warfare Center Weapons Division, ATTN: 4K000E/P03C (Mr. George Smith), Point Mugu, CA 93042-5000
Commander, Air Force Development Test Center, AFDTC/CA (ATTN: Dr. D. Stewart), Suite 117, 101 W. D Avenue, Eglin AFB, FL 32542-5495

cy: DR
TWCA

DOD ELECTRONIC COMBAT TESTING & EVALUATION

- BACKGROUND
  - EC EQUIPMENT EXPENSIVE, COMPLEX & SOFTWARE INTENSIVE FORCE MULTIPLIER
  - MUST TEST AGAINST MULTIPLE THREAT SYSTEMS WHICH ARE CONSTANTLY CHANGING
  - THREAT SYSTEMS, SIMULATORS & ACTUAL FOREIGN EQUIPMENT, MUST REPRESENT EXPECTED ADVERSARY CONFIGURATION
  - ACTUAL IADS & MULTIPLE AAA ENVIRONMENTS, MISSILES & GUNS, TOO EXPENSIVE TO DEPLOY - SIMULATION USED
  - OAR TESTING INSTRUMENTATION MUST BE ACCURATE ENOUGH TO MEASURE EC CAUSED TRACKING ERRORS & MISSILE MISS DISTANCE
  - TEST RESULTS MUST BE REPEATABLE TO ASSURE EC EFFECTIVENESS

DOD ELECTRONIC COMBAT TESTING & EVALUATION

- BACKGROUND (CONT)
  - QUESTIONABLE EC TESTING RESULTS DELAYED DEVELOPMENT, PROCUREMENT & DEPLOYMENT
    - » ALSO RESULTED IN INEFFECTIVE SYSTEM DEPLOYMENTS - ALQ-161
    - » CAUSED CONGRESSIONAL CONCERNS DUE TO EC SYSTEMS COST vs EFFECTIVENESS
  - RESULTED IN CONGRESSIONAL DIRECTION TO DEVELOP REALISTIC EC TEST FACILITIES
    - » HARDWARE-IN -THE LOOP, MAN-IN-THE- LOOP SIMULATORS
    - » OARs WITH THREAT SIMULATORS AND ACTUAL EQUIPMENT THAT COULD PROVE EC EFFECTIVENESS

DOD ELECTRONIC COMBAT TEST & EVALUATION

electronic combat

Eglin AFB

- BACKGROUND (CONT)
  - CONGRESSIONAL CONCERN DEMONSTRATED AGAIN IN 1995 DEFENSE AUTHORIZATION ACT
    - » DIRECTED DOD TO SUBMIT AN EC MASTER PLAN TO THE CONGRESS BEFORE CHANGING THE EC TEST INFRASTRUCTURE
  - SIMILARLY, SENATE APPROPRIATIONS COMMITTEE FY '95 REPORT
    - » DIRECTED DOD TO PROVIDE A STUDY CLEARLY DEMONSTRATING THAT ELECTRONIC LINKING OF HARDWARE-IN THE- LOOP EC TEST FACILITIES WAS INFEASIBLE BEFORE CONSOLIDATING THESE FACILITIES

House Armed Services Committee Report language to 1995

DOD ELECTRONIC COMBAT TESTING & EVALUATION

- DOD EC TEST CAPABILITY
  - OARs
    - » EGLIN - DT&E, OT&E, TRAINING
    - » CHINA LAKE - OT&E
    - » NELLIS - TRAINING, OT&E, LIMITED DT&E
  - ISTFs - HITL INTEGRATION FACILITIES
    - » EGLIN - PRIMES
    - » PAX RIVER - ACETEF
  - HITL SIMULATION FACILITIES
    - » REDCAP - AIR DEFENSE PENETRATION
    - » AFEWES - TERMINAL EFFECTS (AAA DEFENSES)
    - » PT MUGU - LIMITED TERMINAL EFFECTS
  - EDWARDS HAS NO EC CAPABILITY

DOD ELECTRONIC COMBAT TEST & EVALUATION

- RECOMMENDATIONS TO BRAC & COSTS
  - CLOSE EMTE, REDCAP & AFEWES
    - » EMTE EQUIPMENT TO NELLIS
    - » REDCAP & AFEWES EQUIPMENT TO EDWARDS
  - AF ESTIMATED COSTS & SAVINGS
    - » EMTE TO NELLIS - ONE TIME COSTS - $6.2m SAVINGS $48M
    - » REDCAP TO EDWARDS - ONE TIME COSTS - $1.7M SAVINGS $11M
    - » AFEWES TO EDWARDS - ONE TIME COSTS - $5.8M SAVINGS $5.8M

DOD ELECTRONIC COMBAT TEST & EVALUATION

- RECOMMENDATIONS TO BRAC & COSTS
  - INDEPENDENT* ESTIMATE OF COSTS & SAVINGS
    - » EMTE TO NELLIS - ONE TIME COSTS $16.1M SAVINGS - NEG $88M
    - » REDCAP TO EDWARDS - ONE TIME COSTS $13M SAVINGS - NEG $9.1M
    - » AFEWES TO EDWARDS - ONE TIME COSTS $100M SAVINGS - NEG $92M
  - * REDCAP BY CALSPAN, AFEWES BY LOCKHEED, EMTE BY OKALOOSA COUNTY EDC

DOD ELECTRONIC COMBAT TEST & EVALUATION

- RECOMMENDATIONS TO BRAC - IMPLICATIONS
  - CAPABILITY LOST - UNREALISTIC AF BUDGET ESTIMATE TO RECREATE EMTE, REDCAP & AFEWES IN WESTERN US
  - LIMITATIONS IMPOSED
    - » DATA REDUCTION - EDWARDS/NELLIS CAPABILITIES ARCHAIC
    - » OAR RANGE TIME - REDUCED BY 2/3 W/O TANKERS DUE TO DISTANCE FROM EDWARDS TO NELLIS RANGE
      - IF TANKERS USED COSTS GO UP
    - » COMPETITION BETWEEN TESTERS & TRAINERS FOR NELLIS RANGE TIME
  - BOTTOM LINE - HIGHER COST TO TAXPAYERS/CUSTOMERS

DOD ELECTRONIC COMBAT TEST & EVALUATION

- RECOMMENDATIONS TO BRAC
  - CIRCUMVENT WILL OF CONGRESS
    - » REPORTS & STUDIES CALLED FOR BY CONGRESS NOT DELIVERED
    - » CONGRESS LOSES OPPORTUNITY TO EVALUATE DOD PLAN BEFORE IRREVERSIBLE CHANGES MADE TO DOD EC TEST INFRASTRUCTURE
  - SHOULD BE DISAPPROVED AND CONGRESS GIVEN THE OPPORTUNITY TO STUDY DOD'S MASTER PLAN FOR EC

HASC

103D CONGRESS
2d Session

HOUSE OF REPRESENTATIVES

REPORT
103–499

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NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 1995

MAY 10, 1994.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. DELLUMS, from the Committee on Armed Services, submitted the following

REPORT

together with

ADDITIONAL AND DISSENTING VIEWS

[To accompany H.R. 4301]

[Including cost estimate of the Congressional Budget Office]

The Committee on Armed Services, to whom was referred the bill (H.R. 4301) to authorize appropriations for fiscal year 1995 for military activities of the Department of Defense, to prescribe military personnel strengths for fiscal year 1995, and for other purposes, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

The amendments are as follows:

The amendment to the text of the bill is a complete substitute therefor and appears in italic type in the reported bill.

The title of the bill is amended to reflect the amendment to the text of the bill.

EXPLANATION OF THE COMMITTEE AMENDMENT

The committee adopted an amendment in the nature of a substitute during the consideration of H.R. 4301. The remainder of the report discusses the bill, as amended.

PURPOSE

The bill would—

DEFENSE-WIDE PROGRAMS

SPECIAL CONSIDERATIONS

Chemical and biological warfare defense program

The reports on the chemical and biological warfare defense program, required by Title XVII of the National Defense Authorization Act for Fiscal Year 1994 (Public Law 103–160), have not been transmitted officially to the congressional defense committees. The committee has had the opportunity, however, to review advance copies of the reports and is pleased that the Department of Defense has taken a number of management, research and development, and training initiatives which should result in significant improvements in the chemical and biological warfare defense readiness of U.S. armed forces.

The committee also notes that the Department has created a biological warfare defense program and a general officer has been assigned as program manager. This indicates the seriousness with which the Department regards the potential threat posed by such weapons of mass destruction and the need for a viable medical and non-medical biological defense program.

The committee is disappointed that the Army budget request has decreased funding for the chemical and biological warfare defense program. These decrements appear to be contrary to specific directions to complete critical research, development, test, and evaluation and acquisition of improved chemical and biological detection systems, identification and warning systems, individual and collective protection measures, medical support, and decontamination systems. The committee notes that the Air Force has terminated its program for development of collective protection systems and that reductions have been made by the other military services as well.

The committee notes that these actions will seriously undermine long-term efforts to reduce battlefield vulnerability to chemical or biological warfare attacks. The committee believes that each service must allocate an appropriate amount of its budget to fund its share of the integrated defense program, and directs that the Secretary of Defense ensure that such allocation is accomplished in annual budget guidance.

Accordingly, the committee has recommended increased authorizations in several of the relevant chemical and biological defense program elements to restore critical program reductions in the fiscal year 1995 budget request.

Consolidation of electronic combat test and evaluation facilities

The committee recognizes the need for consolidating test and evaluation facilities, organizations, and resources in order to reduce infrastructure costs. The committee believes, however, that facilities should only be consolidated based on a master plan for future required electronic combat test capabilities.

Therefore, the committee directs the Secretary of Defense to develop a master plan for future consolidations of DOD-wide electronic combat test and evaluation assets. This master plan shall provide a statement of required electronic combat capabilities and a road map for consolidation of these activities. The committee fur-

Doug Roach
5-6527

ther directs that no fiscal year 1995 or prior year funds be used for transferring or consolidating electronic combat test and evaluation assets until 30 days after the submission of this master plan to the congressional defense committees.

Electronics

The committee recognizes that both the Department's and the Advanced Research Projects Agency's (ARPA) programs in electronics technology are the "seed corn" for high technology electronic research that will fuel military and commercial product development. Without it, the vision of American companies developing electronic products for the information super highways will not be achieved.

The committee also believes that the success of the SEMATECH consortium, which has enabled the United States to recapture the lead in integrated circuit development and sales, must be sustained. The committee further believes that advanced lithography should be a top priority of SEMATECH to ensure that the lead is maintained.

The committee is alarmed by the Department's request to reduce the advanced lithography program from over $71 million in 1992 to $10 million in 1995. This has caused industry to decry the budget request as one which is tantamount to an abandonment of the industry and as an acceptance of total reliance for this critical technology on foreign suppliers. This will eventually jeopardize U.S. dominance of electronics system innovation.

The committee notes that the Department has increased its budget request for electronics and that it is sufficient to fund the overall electronics investment. However, the committee believes that because the Department does not have an investment strategy for advanced lithography it has resulted in an investment portfolio imbalance. Therefore, the committee recommends the following action for a strengthened and continued program:

(1) Increase ARPA in request in PE 603739E for research in lithography from $10 million to $55 million;

(2) Redirect $20 million of the $90 million requested for SEMATECH to advanced lithography development;

(3) Provide $25 million to ARPA for the procurement of lithography tools (alignment tools, steppers, etc.) to be placed at government sponsored research institutions (Federal and national laboratories, FFRDCs, universities) currently supported advanced lithography development. This will accelerate and intensify research and stimulate U.S. tool manufacturing; and

(4) Direct the Secretary of Defense to implement section 263 of the National Defense Authorization Act for Fiscal Year 1994 (Public Law 103–160) to complete the staffing of the Semiconductor Technology Council and facilitate its operation to immediately address a strategy for lithography development and industrialization.

The committee understands that, when possible, these funds will be matched by private industrial research funding. Funding for the above research and development should be in accordance with the current lithography plan contained in the National Technology Roadmaps for Semiconductors.

PAUL S. SARBANES
MARYLAND

309 HART SENATE OFFICE BUILDING
WASHINGTON, DC 20510
202-224-4524

United States Senate

WASHINGTON, DC 20510-2002

Please refer to this number
950417-1

April 14, 1995

Commissioner Rebecca G. Cox
Defense Base Closure and Realignment Commission
1700 N. Moore Street
Arlington, Virginia 22209

Dear Commissioner Cox:

As you know, Mr. Philip E. Coyle, Director of Operational Test and Evaluation, Department of Defense is scheduled to testify before the BRAC on Monday on the Joint Cross Service Groups for Laboratories, Test and Evaluation.

It is our understanding that Mr. Coyle has visited NSWC White Oak twice in the past two weeks and has expressed serious concerns about the potential loss of the hypervelocity wind tunnel and other unique facilities at White Oak. We would appreciate it if you would ask Mr. Coyle his views on the DOD recommendation to close White Oak and have attached some suggested questions for your consideration.

Thank you for your attention in this matter.

With best regards,

Sincerely,

Barbara A. Mikulski
United States Senator

Paul S. Sarbanes
United States Senator

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During testimony before the Commission on March 1, General Shalikashvili expressed concerns about how the proposed closure of the Naval Surface Warfare Center at White Oak, Maryland, would affect the hypervelocity wind tunnel located there. Do you have similar concerns?

Were the hypervelocity wind tunnel and the nuclear weapons effects simulation facility at NSWC White Oak considered by the Test and Evaluation or Laboratory Joint Cross Service Groups?

(To the extent not stated in previous response) Is it your view that this wind tunnel must continue to stay in operation, either by the Navy or some other agency, at White Oak or some other location?

(To the extent not stated in previous responses) The certified data call responses indicate that the U.S. government has no other wind tunnel with the capabilities of the one at White Oak. Is this the case?

SAM FARR
17TH DISTRICT, CALIFORNIA

COMMITTEE ON AGRICULTURE
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DEPARTMENT OPERATIONS, NUTRITION AND FOREIGN AGRICULTURE
RISK MANAGEMENT AND SPECIALTY CROPS

COMMITTEE ON RESOURCES
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WATER AND POWER RESOURCES

Congress of the United States
House of Representatives
Washington, DC 20515–0517

1117 LONGWORTH BUILDING
WASHINGTON, DC 20515–0517
(202) 225–2861

DISTRICT OFFICES
380 ALVARADO STREET
MONTEREY, CA 93940
(408) 649–3555

100 WEST ALISAL
SALINAS, CA 93901
(408) 424–2229

701 OCEAN STREET
ROOM 318
SANTA CRUZ, CA 95060
(408) 429–1976

April 14, 1995

The Honorable Alan Dixon
Chairman
Base Closure And Realignment
Commission
1700 N. Moore St., Suite 1425
Arlington, Virginia 22209

Please refer to this number
when responding 950414-11

Dear Mr. Chairman:

I am writing at this time to request the Base Closure and Realignment Commission to ask the following questions to Mr. Phil Coyle, Director of DoD Operational Test and Evaluation during the April 17, 1995 investigative hearing. I believe all of these questions are critical to developing an understanding of the potential impacts realigning the Test and Experimentation Center at Fort Hunter Liggett to Fort Bliss may have on DoD's ability to carry out the operational phase of testing.

1. As the person responsible for operational testing in DoD, you state in your February 10, 1995 memorandum to the Assistant Secretary of Defense for Economic Security (Economic Reinvestment & BRAC) that the recommendation to realign Fort Hunter Liggett is a "showstopper." Please explain.

2. We understand that there are conditions at Fort Hunter Liggett which enhance it as a site for performing operational testing. These include: a varied terrain, isolation, no artificial light contamination and no radio frequency interference. Do these conditions exist at Fort Bliss? If not, could they be created?

3. From a military value standpoint is the "laser-safe bowl" (which allows for non-eye safe laser testing in an instrumented valley) at Fort Hunter Liggett a critical component of operational testing?

4. Do you think the instrumentation suite (used to monitor and record every player's activity during a test) could be duplicated at Fort Bliss? If so, would it be as effective?

5. From a military value standpoint, is Fort Hunter Liggett essential to operational testing to DoD?

Thank you for your consideration of this request. I look forward to learning about the responses to the above referenced questions.

Sincerely,

SAM FARR
Member of Congress

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OFFICE OF THE SECRETARY OF DEFENSE

1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

CLOSE HOLD - FOR OFFICIAL USE ONLY - BRAC SENSITIVE

10 February 1995

MEMORANDUM FOR ASSISTANT SECRETARY OF DEFENSE FOR ECONOMIC SECURITY (ECONOMIC REINVESTMENT AND BRAC)

SUBJECT: Functional Assessment of Proposed Military Department Base Realignment and Closure Actions

Proposed BRAC actions by the MILDEPs as available on 9 Febrary 1995, have been reviewed, and except as identified in the attachments, determined to be acceptable from the perspective of the DoD test and evalution mission. Of those in the attachments, two are considered to be major showstoppers (regarding Dugway Proving Grounds and Fort Hunter-Liggett), and another a minor showstopper (Tunnel 9 inclusion in the White Oak closure). The remainder are considered incomplete requiring additonal alternatives to be analyzed before we can agree to them.

Philip E. Coyle
Director, Operational Test and Evaluation

John A. Burt
Director, Test Systems Engineering and Evaluation

Attachments: a/s

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JAMES V. HANSEN
1ST DISTRICT, UTAH

COMMITTEES
ARMED SERVICES
INTERIOR AND
INSULAR AFFAIRS
STANDARDS OF OFFICIAL
CONDUCT

WASHINGTON OFFICE
ROOM 2421
RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-4401
(202) 226-3463

Congress of the United States
House of Representatives
Washington, DC 20515-4401

DISTRICT OFFICES
1017 FEDERAL BUILDING
324 25TH STREET
OGDEN, UT 84401
(801) 393-8382
(801) 625-5677
(801) 45[illegible]-[illegible]

[illegible] LAST TABERNACLE
[illegible] SPRINGS, UT [illegible]
(801) [illegible]

April 14, 1995

The Honorable Alan J. Dixon
Chairman - Defense Base Closure
and Realignment Commission
1700 North Moore Street, Suite 1425
Arlington, VA 22209

RE: HEARING ON APRIL 17, 1995

Dear Chairman Dixon:

I am writing to ask your assistance in having the following questions regarding U.S. Army Dugway Proving Grounds asked of a witness from the Office of the Secretary of Defense, Dr. Phillip E. Coyle, the Director of Operational Test and Evaluation, who will be before your panel on Monday, April 17, 1995.

QUESTIONS FOR DR. PHILLIP E. COYLE

1- Can you explain to the commission your position on the Army's recommendation to realign biological and chemical test and evaluation missions from Dugway Proving Grounds as outlined in the memorandum you signed dated February 10, 1995? (See enclosure).

2- From a military value standpoint, do you feel it is essential to keep chemical, biological, and smoke/obscurant testing at Dugway Proving Grounds rather than moving these missions to Yuma Proving Ground or Aberdeen Maryland?

3- Can you outline for the commission the unique features of Dugway Proving Ground which cannot be replicated elsewhere?

4- In your memo dated February 10, 1995, (see above), you indicated that since Dugway conducted chem/bio testing for all of the services, that each of the services would have to sign-off and agree that their services' testing needs could still be met under the Army's recommendation for Dugway. To your knowledge, did the Department of Defense or the Army check with the other services prior to the final recommendation coming forward from the Army?

Thank you, Mr. Chairman, for your assistance and attention to this important matter.

Sincerely yours,

James V. Hansen
Member of Congress

cc: Honorable S. Lee Kling
Honorable Wendi Steele

Enclosure

OFFICE OF THE SECRETARY OF DEFENSE

1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

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10 February 1995

MEMORANDUM FOR ASSISTANT SECRETARY OF DEFENSE FOR ECONOMIC SECURITY (ECONOMIC REINVESTMENT AND BRAC)

SUBJECT: Functional Assessment of Proposed Military Department Base Realignment and Closure Actions

Proposed BRAC actions by the MILDEPs as available on 9 Febrary 1995, have been reviewed, and except as identified in the attachments, determined to be acceptable from the perspective of the DoD test and evalution mission. Of those in the attachments, two are considered to be major showstoppers (regarding Dugway Proving Grounds and Fort Hunter-Liggett), and another a minor showstopper (Tunnel 9 inclusion in the White Oak closure). The remainder are considered incomplete requiring additonal alternatives to be analyzed before we can agree to them.

Philip E. Coyle
Director, Operational Test and Evaluation

John A. Burt
Director, Test Systems Engineering and Evaluation

Attachments: a/s

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ISSUE

The Army's proposal to realign Dugway Proving Grounds to relocate the "chemical-biological research" mission to Aberdeen/Edgewood should be challenged, and the alternative of relocating the chem-bio mission from Aberdeen/Edgewood to Dugway investigated. And rationale for relocating the smoke-obscurant mission to Yuma Proving Grounds is not clear.

RATIONALE

1. Dugway occupies valuable land and airspace to the test and evaluation mission that can't be conducted elsewhere without high risks of environmental and security compromise, and needs to be preserved as a national asset for such purposes. Test missions ranging from electronic combat, cruise missiles, high performance aircraft, munitions and armament delivery, and artillery, as well as chemical-biological testing, are typically conducted at this location because of its unique geographic features.

2. Moving levels 2 and 3 chemical-biological agent "research" to Aberdeen\Edgewood is high risk. Edgewood is in and near highly populated areas (including Baltimore), as well as near major bodies of water (Chesapeake Bay), where accidents or miscalculations can result in environmental impact with little chance for timely control.

3. Costs to duplicate at Edgewood the recently constructed new facilities and capabilities that are at Dugway will be an unnecessary tax burden. Other facilities at Edgewood would likewise have to undergo major repairs at additional costs.

4. Differentiation between "research" and testing is not identified in the write-up. By Memorandum of Agreement between all three Military Departments under T&E Reliance, Dugway is the site where all DoD testing of chem-bio programs will be tested - Agreement by the other Military Departments would be required along with agreement that all of their requirements can be satisfied at Edgewood.

RECOMMENDATION

Army withdraw proposal to change status of Dugway, and instead develop proposal to relocate and consolidate all chem-bio testing and research activities to Dugway.

ALBERT R. WYNN
4TH DISTRICT, MARYLAND

COMMITTEE ON BANKING
AND FINANCIAL SERVICES

COMMITTEE ON
INTERNATIONAL RELATIONS

WASHINGTON OFFICE
418 CANNON HOUSE OFFICE BLDG
WASHINGTON, D.C. 20515-2004
(202) 225-8699

DISTRICT OFFICES
9200 BASIL COURT, #316
LANDOVER, MD 20785
(301) 773-4004

8601 GEORGIA AVENUE, #201
SILVER SPRING, MD 20910
(301) 588-7328

5009 OXON HILL ROAD, #208
OXON HILL, MD 20745
(301) 839-5570

CONGRESS OF THE UNITED STATES
HOUSE OF REPRESENTATIVES
WASHINGTON, D.C. 20515-2004

April 13, 1995

Honorable Alan Dixon
Chairman
Defense Base Closure and Realignment Commission
1700 N. Moore Street
Suite 1425
Arlington, VA 22209

Please refer to this number when responding 950414--

Dear Mr. Chairman:

As you are well aware I, along with the rest of the Maryland Congressional delegation, am very concerned about the Department of Defense's recent recommendations to overturn the 1993 BRAC decisions with respect to the Naval Surface Warfare Center - White Oak as part of the 1995 BRAC process.

It is my understanding that some officials at the Pentagon are concerned about losing the unique facilities that currently exist at White Oak. I have attached some questions which I would appreciate your asking Philip Coyle, Director of Operational Test and Evaluation at the Pentagon, during the Commission's hearing on Monday, April 17.

Thank you for your time and attention on this important matter.

Sincerely,

Albert R. Wynn
Member of Congress

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Questions submitted for the record by Congressman Albert Wynn.

NSWC-White Oak

Q. During testimony before the Commission on March 1, General Shalikashvili expressed concerns about how the proposed closure of the Naval Surface Warfare Center at White Oak, Maryland, would affect the hypervelocity wind tunnel located there. Do you have similar concerns?

Q. Is it your view that this wind tunnel must continue to stay in operation, either by the Navy or some other agency, at White Oak or some other location?

Q. Just to clarify, the certified data call responses indicate that the US government has no other wind tunnel with the capabilities of the one at White Oak. Is this the case?

JOE SCARBOROUGH
1ST DISTRICT, FLORIDA
NATIONAL SECURITY COMMITTEE
GOVERNMENT REFORM AND OVERSIGHT COMMITTEE

Congress of the United States
House of Representatives
Washington, DC 20515–0901

WASHINGTON OFFICE:
1523 LONGWORTH HOUSE OFFICE BUILDING
WASHINGTON, DC 20515
(202) 225-4136

DISTRICT OFFICES:
3400 BAYOU BOULEVARD
SUITE 37
PENSACOLA, FL 32503
(904) 479-1183
348 S.W. MIRACLE STRIP PARKWAY
UNIT 21
FORT WALTON BEACH, FL 32548
(904) 664-1286

April 7, 1995

The Honorable Alan Dixon
Chairman, Base Realignment and Closure Commission
1700 North Moore St
Suite 1425
Arlington, VA 22209

FOR:
Dr. Phil Coyle

Dear Chairman Dixon:

I understand the Defense Base Closure and Realignment Commission will hold a hearing on April 17, 1995 concerning Joint Cross Service Group recommendations to the Secretary of Defense..

As part of this review, I would like to submit the attached questions to be answered by the witnesses representing the Joint Cross Service Group for Labs, Test and Evaluation. If these questions can not be asked at the hearing, I would like to submit them for the record.

I appreciate your assistance on this issue.

Sincerely,

Joe Scarborough
Member of Congress

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DEFENSE BASE REALIGNMENT AND CLOSURE COMMISSION
Questions for Test & Evaluation Joint Cross Service Group Witnesses
on 17 April 1995

1. The Board of Directors Report of February 1994 addressed the question of consolidating DoD Electronic Combat (EC) Open Air Ranges from three (Eglin, China Lake, and the Nellis complex) to two. The report cited clear financial and capability reasons for closing China Lake's EC open air range and leaving Eglin to complement the Nellis complex. In November 1994, T&E Joint Cross Service Group (JCSG) optimization model output results based upon JCSG-developed functional values, projected workload, and capacities identified closing China Lake as the DoD alternative to analyze. Similar opportunities appear to exist in Armament/Weapons T&E. These JCSG results were developed by the most knowlegeable individuals in DoD on the T&E issue. It appears that cross-servicing alternatives involving these "core" T&E activities were ground ruled out. Why didn't DoD analyze these cross-service opportunities?

2. The 1995 Defense Authorization bill prohibited DoD from spending any money to move Electronic Combat equipment from the Eglin range until DoD delivered an Electronic Combat Master Plan to the Congress. Considering this direction and the JCSG-cited superiority of the Eglin Electromagnetic Test Environment (EMTE) to all other DoD ranges evaluated, why has the Air Force chosen to dismantle the Eglin EMTE and replicate it in the Nellis complex, essentially eliminating forever the opportunity to consolidate DoD EC testing and realize the significant savings the JCSG identified?

WHAT CERCLA/SARA AND THE NCP SAY ABOUT LAND USE (continued)

- "The assumption of residential land use is not a requirement of the program but rather is an assumption that may be made, based on conservative but realistic exposures, to ensure that the remedies that are ultimately selected for the site will be protective. An assumption of future residential land use may not be justifiable if the probability that the site will support residential land use in the future is small" (preamble, p. 8710).

WHAT CERCLA/SARA AND THE NCP SAY ABOUT LAND USE

CERCLA/SARA

- No specific land use policy beyond what is inherent in protecting human health or welfare or the environment by considering actual and potential threats and by complying with other environmental laws.

NCP

- "...(T)he lead agency shall conduct a site-specific baseline risk assessment to characterize the current and potential threats to human health and environment" (section 300.430, p. 8848). (The baseline risk assessment would consider current and future land use in making this determination.)

- "The exposure analysis for current land use conditions is used to determine whether a human health or environmental threat may be posed by existing site conditions. The analysis for potential exposures under future land use conditions is used to provide decisionmakers with an understanding of exposures that may potentially occur in the future. This analysis should include a qualitative assessment of the likelihood that the assumed future land use will occur" (preamble, p. 8710).

- "In general, the baseline risk assessment will look at a future land use that is both reasonable, from land use development patterns, and may be associated with the highest (most significant) risk, in order to be protective." (preamble, p. 8710).

Document Separator

CBO PAPERS

ENVIRONMENTAL CLEANUP ISSUES
ASSOCIATED WITH CLOSING
MILITARY BASES

August 1992

CONGRESSIONAL BUDGET OFFICE
SECOND AND D STREETS, S.W.
WASHINGTON, D.C. 20515

PREFACE

In December 1988, the Commission on Base Realignment and Closure recommended that a number of military installations be closed as a result of changes to national security requirements. In the fall of 1989, the Congress endorsed the Commission's recommendations, and the Department of Defense began the process of closing those bases. At the time of its deliberations, the Commission had limited information concerning the extent of environmental contamination and the potential costs of cleanup at the bases. Since that time, however, the Department of Defense has located and identified significant contamination. This Congressional Budget Office (CBO) paper analyzes the costs and policy issues concerning the environmental cleanup associated with the initial round of base closings. This information may be of assistance to the Congress as it debates the additional base closings that will be considered during the next several years.

The paper was requested by Congressman Bill Hefner, the Chairman of the Subcommittee on Military Construction of the House Committee on Appropriations, and by Congressman Vic Fazio, a member of the Subcommittee. In keeping with CBO's mandate to provide objective and nonpartisan analyses, the paper makes no recommendations.

The paper was prepared by Wayne Glass under the general supervision of Robert Hale and Neil Singer. Mary Helen Petrus of CBO's Budget Analysis Division provided support with budget information. The author gratefully acknowledges the assistance of Jan Acton, Perry Beider, and Deborah Clay-Mendez. Roger M. Williams edited the paper, and Cindy Cleveland typed the paper.

Robert D. Reischauer
Director

August 1992

INTRODUCTION AND SUMMARY

As a result of reduced international tensions and increased budgetary constraints, real reductions in defense spending have led to fewer military forces and correspondingly lower levels of operations and support. In 1988, the Department of Defense (DoD) began to examine ways to achieve savings by realigning and closing military bases that were costly to operate and no longer needed to meet changing requirements. In December of that year, the Commission on Base Realignment and Closure (BRAC 88) recommended that 86 military installations be closed and that 59 others be partially closed, expanded, or reduced by the relocation of military units. The Secretary of Defense accepted the commission's findings in January 1989, and, with Congressional consent, the process began.

Because the commission was concerned primarily with ensuring that military requirements be met, such factors as the environmental impact of closing bases received less emphasis in its deliberations. The commission concluded, for instance, that it did not need to consider the cost of cleaning up hazardous wastes because, under current law, the government would have to clean up the properties in any event. Consequently, in considering which bases to close, the commission had only preliminary estimates of the extent and nature of environmental contamination.

This paper examines issues related to cleaning up the 86 military installations scheduled to be closed under the Base Closure and Realignment Act (BCRA) of October 1988. The first part of the paper examines issues relating to those specific installations. What is the extent and nature of known contamination? How much progress has been made in cleaning it up? How much time might the cleanup effort ultimately require, and how much might it cost? How do current environmental statutes and regulations limit civilian reuse of bases during the cleanup period?

The paper also identifies and discusses policy choices that will confront DoD and the Congress. Are there Congressional actions that could accelerate the reuse of the bases without undercutting efforts to restore the environment? Are there ways to hold down costs? What priorities should be considered in allocating limited funds? Does BRAC 88 hold lessons for future base closure commissions?

Key Conclusions

DoD has determined that an extensive hazardous waste problem exists at the bases to be closed under the BCRA. As of September 1991, 543 contaminated sites have been identified on the bases scheduled to be closed,

including some that have environmental problems (such as buried ammunition and groundwater contamination) that are very difficult to clean up.

Total cleanup expenses have already grown beyond DoD's early estimates. DoD currently calculates that cleanup will cost about $900 million during the 1990-1995 period--an increase of about 50 percent in real terms over the budget estimate submitted in February 1991. Costs at some BRAC 88 bases have already increased substantially above initial estimates. Based on experience with civilian cleanup projects, and unless plans and requirements change, it would be prudent to assume that there will also be increases in the total funding required.

The cleanup process is also likely to extend beyond 1995, the date by which BRAC 88 bases must be closed. As of September 1991, about two years after the Congress approved the initial round of base closings, only about 3 percent of the contaminated sites identified on the bases had been completely cleaned up. Much cleanup work remains to be done, and some of it, such as decontaminating groundwater, could take as long as 20 years.

Does that mean that former military bases cannot be reused for civilian purposes until the cleanup of contaminated sites is completed? In some cases, the answer is no. It is possible, for example, that uncontaminated properties,

including those that have been cleaned up, can be reused without significant delay. Under certain circumstances, contaminated property may also be reused.

It may sometimes be difficult, however, to identify the boundaries of "uncontaminated" property. Under such circumstances, reuse could be delayed. Although DoD recently issued guidelines establishing criteria for defining such property, additional direction may be needed in consultation with state environmental agencies and the Environmental Protection Agency (EPA).

Nor is it always easy to define what "cleaned up" means. The Comprehensive Environmental Response, Compensation, and Liability Act requires that "all remedial action necessary to protect human health and the environment with respect to any such (contaminated) substance remaining on the property has been taken" before the property can be deeded to a new owner. "Necessary" actions may take a long time. Moreover, disagreements about whether all of them have been taken could delay the transfer of property. If the property cannot be used in the interim, local economies could suffer serious adverse effects.

The problems associated with cleaning up military bases suggest that future base closure commissions, including those now scheduled to meet in 1993 and 1995, should have more information about environmental issues (including the costs and benefits of cleanup) than was available to BRAC 88. Indeed, the Congress may wish to instruct those future commissions to consider alternative approaches to environmental cleanup in deciding which bases to close and which to retain.

CLEANUP PROBLEMS

A number of problems are associated with cleaning up the bases to be closed under BRAC 88. They include extensive contamination, delays that could extend beyond the currently planned closing dates, and escalating costs.

Extensive Contamination Exists

Until legislation governing the handling and disposal of hazardous waste took effect during the past decade, requirements for managing the disposal of waste on military bases were not nearly as stringent as they are today. Consequently, environmental contamination is widespread, in some cases

constituting a significant potential threat to public health and safety. Of course, many bases or parts of bases are not contaminated or could be easily cleaned up to permit their reuse without significant delay.

On the bases scheduled for BRAC 88 closings, a wide variety of sources of pollution exists: landfills, fuel and paint dumps, buried munitions, polychlorinated biphenyl (PCB) transformers, asbestos, radon, groundwater contamination, and underground storage tanks that have developed leaks. Cleaning up buried munitions and groundwater contamination are among the most difficult, time consuming, and costly of these problems. Among the BRAC 88 bases, DoD has identified seven with buried munitions and at least 10 instances of groundwater contamination. The latter may also exist at numerous additional sites--for example, landfills and underground storage tanks--but final determinations have not yet been made. Other types of cleanup, such as removing PCB transformers, can be relatively simple and require only a short time to complete.

Five of the 86 military installations scheduled to be closed under BRAC 88 are included on the National Priorities List (NPL) of contaminated sites maintained by the EPA.[1] NPL sites are those contaminated areas

1. George, Mather, Norton, and Pease Air Force bases and the Alabama Army Ammunition Plant are currently on the National Priorities List. To date, Pease is the only one of the five to be closed.

determined to be the most hazardous to public health and the environment. They will require the most extensive cleanup effort and, under DoD's "worst-first" policy, are given highest funding priority.

Despite the extensive contamination already uncovered, it is not certain that all contaminated sites have been found. As investigators examine one site, they often come upon additional sites or types of contamination. Thus, although DoD knows more about environmental contamination on military bases than it did in 1988, the full scope of pollution may not yet be known. At Pease Air Force Base, for example, 14 additional sites were identified after the initial assessment was made in 1986. Especially when groundwater is polluted, the full extent of pollution is difficult to detect. According to DoD officials, however, investigators have completed the first phase of their review at all of the BRAC 88 bases and the department is confident that virtually all contaminated sites have been identified.

Cleanup Could Extend Beyond Closing Date

Completing environmental cleanup before a base is closed facilitates its reuse and so minimizes local economic dislocation. If cleanup activities extend beyond the closing date, reuse of the property may be delayed. DoD hopes

to put all necessary cleanup measures into place during the next few years. Empirical data suggest, however, that in some cases it could take a long time to meet the required cleanup standards.

According to the enabling legislation, the designated bases must be closed by September 30, 1995. (See the appendix for the current schedule of closings.) DoD expects to have necessary remedial actions in place for the five bases on the NPL in 1995. The department has not identified dates for taking action at the less contaminated sites. It anticipates, however, that much of the investigative work at those sites will be completed no later than 1993.

Notwithstanding DoD's estimates, it is highly likely that cleaning up some of the contaminated sites will extend beyond the closing dates set for the BRAC 88 bases. Using current technology, for example, it can take more than 20 years to clean up polluted groundwater to meet EPA's standards for safe drinking water.

Other evidence exists that suggests that DoD will be hard pressed to clean up the BRAC 88 NPL sites by the fall of 1995. A RAND study concluded that it has taken the average NPL site--also known as a "Superfund" site--about 12 years to progress from identification to completed

remediation.[2] Recent EPA data suggest an even longer process: an average of 15 years from discovery to completion of construction of remediation measures--and much longer in some cases to reach cleanup standards.[3]

It may be possible, of course, to complete cleanup in less time, perhaps even enabling DoD to meet the deadline for closing BRAC 88 bases. But that would require that all interested parties reach an agreement accepting less stringent standards. Such agreements would be difficult to achieve and could conflict with existing policies and legislation governing cleanup standards.

Cleanup Still in Early Stages

The current state of cleanup activities at BRAC 88 bases also suggests that DoD will have trouble completing the task by 1995. More than three years after approval of the closings, DoD remains in the early stages of the cleanup process at most of the 86 bases. The typical cleanup sites are still being investigated and analyzed to determine the nature and extent of

2. Jan Acton, *Understanding Superfund: A Progress Report* (Santa Monica, Cal.: RAND, 1989), p. 16.

3. Testimony of Jan Paul Acton, Assistant Director of the Congressional Budget Office, before the Subcommittee on Investigations and Oversight, House Committee on Public Works and Transportation, October 29, 1991.

contamination. According to DoD data as of September 1991, few sites--about 3 percent of the total number--have actually been completed.

DoD applies EPA guidelines in investigating and remediating contaminated sites. According to the guidelines, the cleanup process is conducted in eight phases (see Box 1).

As of September 1991, almost 60 percent of the contaminated sites were still in the early phases (I and II) of the cleanup process. Only about 15 percent of the sites had entered the last two phases. The status of DoD's cleanup effort for BRAC 88 bases is shown in Table 1.

Cost to Complete the Cleanup Could Grow

Even though BRAC 88 chose to disregard environmental cleanup in calculating the costs and benefits of closing bases, actual cleanup costs create real strains on the diminishing defense budget. Costs have increased since initial estimates were made in 1988, and there is reason to believe that they will continue to grow as more is learned about the nature and scope of contamination and the remediation techniques needed to meet environmental

Box 1.
Phases of EPA's Environmental Cleanup Process

I. Preliminary Assessment--The agency conducts an installationwide study to determine if contaminated sites are present.

II. Site Inspection--Investigators analyze samples to determine the nature and level of contamination. The information is fed into the Hazardous Ranking System to determine the relative risks to public health and safety and the environment. Sites with an HRS score of 28.5 or higher are listed on the National Priorities List.

III. Interagency Agreement--DoD, EPA, and appropriate state regulatory authorities negotiate an agreement that contains a scheduled work plan and provides for oversight of phase IV.

IV. Remedial Investigation/Feasibility Study (RI/FS)--Further investigations are conducted to determine the risk of contamination to the general population. Alternative remedial actions are evaluated.

V. Record of Decision--Based on the results of the RI/FS, the chosen remedy and its implementation plan are incorporated into a record of decision. Proposed RODs are published for public review and comment.

VI. Remedial Design (RD)--Detailed plans for the cleanup are formulated.

VII. Remedial Action--The RD plans are implemented.

VIII. Final Disposition--A determination is made that cleanup is complete.

standards. Costs could also increase if cleanup activities are accelerated to meet closure deadlines or to permit early reuse of property.

DoD currently estimates that the cost of cleaning up BRAC 88 installations during the 1990-1995 period will total almost $900 million--an increase of about 50 percent in real terms over DoD's budget estimate submitted in February 1991. Potential for further cost growth exists because most of the cleanup work accomplished thus far consists of investigations and

TABLE 1. STATUS OF CLEANUP OF BRAC 88 BASES

Phase	Number of Sites	Percentage of Total Sites
Preliminary Assessment	105	19
Site Investigation	220	41
Remedial Investigation/ Feasibility Study	119	22
Remedial Design	12	2
Remedial Action	71	13
Final Disposition	17	3

SOURCE: Department of Defense data of September 1991.

NOTE: BRAC 88 = the Commission on Base Realignment and Closure of 1988.

assessments. Little actual cleanup has occurred. Nevertheless, DoD anticipates lower budgetary requirements during the 1993-1995 period, when major cleanup activities are planned to begin. In any event, the costs of cleanup will extend beyond 1995 as DoD works to achieve required standards for those projects not completed by the time an installation is closed.

As the experience at Pease Air Force Base shows, the number of contaminated sites may increase during the course of investigating and evaluating contamination. If the extent of contamination was initially underestimated--as already appears to have been true with many of the BRAC 88 bases--more far-reaching options for remediation will be required, probably at higher cost. In addition, if cleanup standards are stiffened, it will probably cost more to meet them.

If the experience of remediation at Superfund sites is a reliable guide, costs could grow significantly above the initial baseline estimates. At the lower end of the range of estimates, a General Accounting Office study of Superfund sites calculated a modest growth in costs--about 12 percent--over baseline estimates.[4] GAO's estimates, however, were based only on the costs

4. General Accounting Office, *Superfund: Cost Growth on Remedial Construction Activities* (February 1988), p. 3.

of construction of remediation techniques and did not consider the full range of costs from investigation to completion of the remediation phase.

Other studies have shown considerably greater growth in costs for cleaning up Superfund sites. The Oak Ridge National Laboratory concluded that costs approached 80 percent over estimates made at the record of decision phase--because of serious underestimates of groundwater problems and the volume of contaminated soil.[5] Another study, which surveyed 40 Superfund sites, estimated that costs for remedial design and construction grew by about 53 percent during the remediation process.[6]

Only a small percentage of the BRAC 88 sites have qualified to date as Superfund sites. Nevertheless, the experience there, coupled with the apparent underestimation of the number and extent of contaminated BRAC 88 sites, suggests that the full cost of cleaning up the DoD bases is likely to be substantially greater than the department has estimated.

The growth in cleanup costs could cause budgetary problems in the future. In 1991, the Congress mandated that environmental cleanup costs for

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5. Amelia Crotwell, Caroline Doty, and Curtis Travis, *Cost Growth for Treatment Technologies at NPL Sites* (Oak Ridge, Tenn: Oak Ridge National Laboratory, 1991), p. 2.

6. Brett Schroeder and Ralph Shangraw, "Parametric Tools for Hazardous Waste Cleanup Projects" (paper presented at the 34th annual meeting of the American Association of Cost Engineers, Boston, June 24-27, 1990), p. j-2-2.

DoD bases that are scheduled to close be paid from a Base Closure Account established in 1988 to cover all of the costs of closing and realigning BRAC 88 bases. (Prior to 1991, environmental cleanup of those bases was funded through DoD's Defense Environmental Restoration Account.) If costs of environmental cleanup grow sharply, the Base Closure Account may need additional funds--a difficult prospect in an era of declining defense budgets.

ENVIRONMENTAL CLEANUP AND REUSE OF DEFENSE BASES

Under provisions of the Federal Property and Administrative Services Act of 1949 and the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), the requirement to clean up sites will not necessarily impede the reuse of former military bases. According to the statutes, DoD may transfer property among its components or to other federal agencies without requiring that environmental cleanup be completed beforehand. Leasing contaminated property is also permissible, providing that a lease recognizes the government's liability to complete the cleanup and permits operations to that end.

However, CERCLA contains ambiguities with respect to transferring deeds to private individuals or nonfederal entities that could delay the reuse

of property.[7] Section 120(h)(3), for example, requires that before a deed of transfer may take effect, the government must confirm that "all remedial action necessary to protect human health and the environment...has been taken...." The law does not define "all remedial action necessary," and experts may disagree on the meaning of the phrase. The law also fails to specify cleanup standards "necessary to protect human health and the environment"--standards that are set for individual sites on an ad hoc basis in a record of decision.

Finally, Section 120(h)(3) does not define what it means to have "taken" remedial action. EPA recently determined that action has been taken when construction of a remedy is complete, including a demonstration that the remedy is operating properly. Under that interpretation, it could be possible to transfer contaminated property without having completed any significant remediation. Some have argued, however, that the section requires that all health, safety, and environmental standards be met before the transfer of a deed can take place.

Even under the most stringent interpretation of Section 120(h)(3), not all of the BRAC 88 bases would be barred from reuse. It is legal to transfer

7. CERCLA governs the transfer of federal property on which any hazardous material has been stored for one year or more or is known to have been released or disposed of.

uncontaminated property not governed by CERCLA to nonfederal jurisdictions or private parties, and it is permissible to break such property into parcels in order to transfer it. Much of the property governed by BRAC 88 is wholly or partly uncontaminated and could--at least in theory--be transferred legally and perhaps promptly.

Problems may occur, however, in ensuring that a property or parcel is uncontaminated. DoD recently issued initial guidelines on transferring uncontaminated parcels of land, but criteria for federal regulations have not yet defined "uncontaminated." Developing such criteria under the normal procedures of the regulatory process could take a long time. Defining uncontaminated could be particularly difficult for bases on the National Priorities List and for those bases where significant levels of contamination exist side by side with uncontaminated property.

As indicated above, it is legal to lease contaminated property to nonfederal jurisdictions or private purchasers and thereby avoid the constraints of CERCLA, which only applies to transfers of ownership. Thus, leasing permits base property to be reused quickly. For example, the Air Force has leased a portion of Norton Air Force Base to Lockheed as a rework facility.

Leasing may not be a simple solution to the reuse problem, however, because neither regulation nor law defines the distinction between a long-term lease and de facto ownership and because other relevant regulations sometimes conflict. The practice of the General Services Administration (GSA) has been to require that a lease not exceed a five-year limit before the property must be transferred. In contrast, DoD is discussing long-term leases--for example, 50 years--with potential lessees. That difference in approach could lead to litigation if interested parties feel that a leasing arrangement is being used as a mechanism to avoid cleaning up property. For NPL sites, parties generally sign a Federal Facilities Agreement containing a cleanup plan and schedule that govern the remediation process that would take place under a lease agreement. No similar requirement committing the government to a cleanup plan and timetable exists for non-NPL sites, which comprise the great majority of BRAC 88 bases.

POLICY CHOICES

Over the next several years, DoD and the Congress will need to make important policy choices concerning the cleanup and reuse of BRAC 88 bases and other military installations that are to be closed. The choices involve

ways to facilitate the reuse of property, ensure adequate funding, and establish cleanup priorities.

Ways to Facilitate Reuse

It is possible to reuse former military bases while avoiding the delays generated by the laws governing the cleanup of hazardous wastes. For example, DoD could seek ways to transfer property within the department or to other agencies in the federal government. Such a transfer could take place before cleanup is completed, and it might offset the loss of military income to the community.

Leasing is another method that could permit near-term reuse of former military installations. It is important that leasing arrangements acknowledge DoD's liability to clean up the property and that such activities be permitted to proceed unimpeded. Facility agreements among DoD, EPA, and other jurisdictions that accompany leasing arrangements should incorporate a comprehensive detailed plan and schedule to accomplish an environmental cleanup. To facilitate use of the leasing approach, DoD, EPA, and the GSA may wish to review the policy guidelines to specify the longest lease that would be permissible without requiring actual transfer of the land. The

review would help to avoid the de facto transfer of property through leasing without cleaning it up.

If base property were divided into parcels that allow the transfer of uncontaminated property, the reuse of large portions of former military installations could be accelerated considerably. It may be difficult, however, to determine that property is not contaminated because no federal regulatory criteria on the matter exist. DoD and EPA are reviewing the issue and working on guidelines that would facilitate transfer.

In the future, DoD and EPA could avoid difficulties in transferring uncontaminated property on NPL sites by revising the procedures that permit entire military bases to be listed on the NPL. If listings were limited instead to contaminated areas on bases, uncontaminated property located on NPL installations could be transferred with less difficulty than is now the case. To achieve that objective, DoD and EPA may wish to review policies and procedures governing NPL listing.

Legislation currently before the Congress addresses many of the relevant policy issues. For example, H.R. 4024 would amend certain provisions of CERCLA concerning parceling, leasing, and transferring of deeds.

Meeting Funding Requirements

The Congress has provided funding that meets BRAC 88 cleanup requirements to date. As noted, however, the cleanup effort for BRAC 88 bases remains largely in its early phases, and for most sites the more uncertain and expensive remediation phase lies ahead. Since available evidence indicates that costs are likely to grow considerably during the remediation phase, additional funding beyond current estimates probably will be required. Moreover, since some remediation will require efforts lasting many years, funds will be needed beyond 1995--the year that the Base Closure Account funding the BRAC 88 cleanup is scheduled to expire. The Congress could authorize any balance of the Base Closure Account to be applied to remaining cleanup activities. It could establish a trust account specifically for cleanup, using proceeds from the leasing or sale of property.

DoD may be more likely to meet funding requirements for cleanup if it manages the process in ways to minimize cost growth. Total program costs can be minimized by avoiding unnecessary stretchouts and keeping cleanup projects moving at a productive pace. If experience with purchasing weapon systems applies, such contracting techniques as competition and multiyear

contracts can provide significant savings.[8] Cost growth can also be minimized, and planning improved, if initial estimates use empirical costs for the same or similar types of work. Some believe that long-range costs could be reduced through investment in the research and development of new, less costly technologies. For example, techniques of bioremediation--using microbes to clean up contamination--promise to be considerably less expensive than current methods of incineration.

If costs escalate sharply and the cleanup program becomes unaffordable within budget limits, DoD and the Congress will have to consider more drastic policy changes. In some cases, the cleanup of a particular site could be postponed indefinitely in order to hold down costs. The site could be fenced off and guarded to insure against inappropriate use. Periodic checks could be required to verify that contamination was not spreading. Such a choice would be reasonable only if contamination was not endangering human life and if there was little or no risk that the contamination would spread (for example, into groundwater).

A decision to postpone cleanup indefinitely would also prevent transfer of the property to nonfederal agencies and could hurt the local economy.

8. Possible savings through multiyear contracting are discussed in Congressional Budget Office, "Alternative Strategies for Increasing Multiyear Procurement," CBO Paper (July 1986).

Indefinite postponements would require exemptions from existing cleanup agreements that specify required completion dates. Moreover, postponements of RI/FS or remedial action beyond six months for NPL sites would require a change to CERCLA.

Altering Funding Priorities

As more cleanup projects approach the remediation phase, priorities will determine which projects are funded in the future. Like the EPA, DoD currently follows a policy of worst-first funding. Sites that are relatively less hazardous may therefore lack the funding necessary for cleanup even though they may have greater potential for economic reuse. As an example, the Air Force recently had to shift funds in order to accelerate the cleanup of a hangar at Pease Air Force Base to meet the demands of a potential purchaser. A higher funding priority for such a project would have obviated the need for reprogramming.

The Congress and DoD might want to review funding priorities for cleanup projects to take into account the economic importance of former military bases. It may be wiser to clean up a site that can quickly be put to a new civilian use than to remediate one that is contaminated more seriously

but does not pose an immediate threat to human life and safety. If policies regarding priorities are changed, the revisions could be incorporated into the Defense Priority Model that guides funding priorities within DoD. (The department would have to coordinate with EPA to ensure that any changes in prioritization comply with existing law.) In addition, the Congress could consider requesting DoD to provide, as part of the budget submission, information concerning the potential economic reuse of properties or parcels and the funding required to clean up any contamination that exists on them.

Environmental Cleanup and Future Base Closings

Because BRAC 88 was primarily concerned with military requirements, it paid little attention to the problems of cleaning up the bases it was reviewing. The commission did not require extensive information on the environment, and only limited initial assessments were provided for BRAC to consider.

Under current law, commissions will meet in 1993 and 1995 to consider closing or realigning additional military bases. Those commissions may recommend sweeping changes in the DoD base structure, and their members would be better equipped to decide which bases to close if they had comprehensive information about environmental contamination and ways to

remediate it. If future BRACs are to be able to consider environmental issues more fully, the information gathering should begin now.

Decisions on the difficult matter of which bases to close must depend primarily on defense requirements. Especially in cases where several bases can meet the needs of the military, however, it may be desirable to consider the costs of environmental cleanup in choosing which ones to keep open.

APPENDIX: CLOSING DATES FOR BRAC 88 BASES

Installation	Date (Quarter/Fiscal Year)
ARMY	
Alabama Ammunition Plant, Ala.	2/92*
Army Material Technology Laboratory, Mass.	4/95
Bennett Army National Guard, Colo.	4/95
Cameron Station, Va.	3/95
Cape St. George, Fla.	4/92
Coosa River Annex, Ala.	2/92*
Defense Mapping Agency, Va.	4/93
Fort Douglas, Utah	1991*
Fort Sheridan, Ill.	4/93
Fort Wingate, N.M.	1991*
Hamilton Army Airfield, Calif.	4/93
Jefferson Proving Ground, Ind.	4/95
Kapalama Military Reservation, Hawaii	4/93
Lexington Army Depot, Ky.	4/95
Navajo Depot Activity, Ariz.	4/94
New Orleans Military Ocean Terminal, La.	2/94
Nike Site, Md. (Aberdeen Proving Ground)	1991*
Nike Site, Mo. (Kansas City)	1991*
Pontiac Storage Facility, Mich.	1991*
Presidio of San Francisco, Calif.	4/94
Stand Alone Family Housing Areas	1992-1993
Tacony Warehouse, Penn.	4/93
US Army Reserve Center, Md. (Gaithersburg)	4/95
NAVY	
Naval Hospital, Philadelphia, Penn.	4/94
Naval Station, Brooklyn, N.Y.	1/94
Naval Station, Puget Sound, Wash.	1/96
AIR FORCE	
Chanute Air Force Base, Ill.	4/93
George Air Force Base, Calif.	1/93
Mather Air Force Base, Calif.	4/93
Norton Air Force Base, Calif.	2/94
Pease Air Force Base, N.H.	1991*

* Closed.

Document Separator

4/13/95

GAO EXIT DISCUSSION

1995 BRAC PROCESS AND RECOMMENDATIONS

Exec Summary Testimony.

RESULTS IN BRIEF

Although the Department of Defense (DOD) has in recent years undergone substantial downsizing in funding, personnel, and force structure, commensurate infrastructure reductions have not been achieved. Despite some progress in reducing excess infrastructure, it is generally recognized that much excess capacity likely will remain after the 1995 BRAC round. This view is supported by the military components' and cross-service groups' analyses which showed far greater excess capacity than will be eliminated by the Secretary's recommendations. Currently, DOD projects that its fiscal year 1996 budget represents, in real terms, a 39 percent reduction below its fiscal year 1985 peak of recent times. By way of comparison, its 1995 BRAC recommendations would produce cumulative BRAC reductions of 21 percent in major domestic base closures since 1988.

DOD's 1995 BRAC process was generally sound, and well documented and should result in substantial savings. However, the recommendations and selection process were not without problems and, in some cases, there are questions about the reasonableness of specific recommendations. At the same time, we also noted that improvements were made to the process from prior rounds,

including more precise categorization of bases and activities; this resulted in more accurate comparisons between like facilities and functions, and better analytical capabilities.

We raise a number of issues that we believe warrant the Commission's attention in considering DOD's recommendations. Key among those issues are the following:

-- DOD's attempt at reducing excess capacity in common support functions facilitated some important results. However, agreements for consolidating similar work done by two or more of the services were limited, and opportunities to achieve additional reductions in excess capacity and infrastructure were missed. In particular, this is the case at depot maintenance activities and laboratory facilities.

-- Although the services have improved their processes with each succeeding BRAC round, some process problems continued to be identified. In particular, the Air Force's process remained largely subjective and not well documented; also, it was influenced by preliminary estimates of base closure costs that changed when more focused analyses were made. For these and other reasons GAO questions a number of the Air Force's recommendations. To a lesser extent, some of the services' decisions affecting specific closures and realignments also raise questions. For example, the Secretary of the Navy's

decision to exclude certain facilities from closure for economic impact reasons was not consistently applied.

-- Because the legislation authorizing BRAC expires this year, some process will be needed to handle changes and problems that arise during implementation of this and earlier rounds. In addition, if future BRAC actions are needed to achieve reductions of remaining excess capacity, new legislation will be required.

BRAC Savings Are Expected to Be Substantial, but Estimates Are Preliminary

We estimate that the 20-year net present value of savings from DOD's recommendations will be $17.3 billion, with annual recurring savings of almost $1.8 billion. We note that these estimates are not based on budget quality data and are subject to some fluctuations and uncertainties inherent in the process. However, we believe the savings will still be substantial. At the same time, it should be noted that environmental restoration was not a factor in the DOD base closure decision-making process; however, it can represent a significant cost following a base closure.

DOD and its components improved their cost and savings estimates for BRAC 1995 recommendations. In developing cost estimates, they took steps to develop more current and reliable sources of

information and placed greater reliance, where practicable, on standardized data. Some components sought to minimize the costs of base closures by avoiding unnecessary military construction. For example, the Navy proposed a number of changes to prior BRAC decisions that will further reduce infrastructure and avoid some previously planned closure costs.

We identified a number of instances where projected savings from base closures and realignments may fluctuate or be uncertain for a variety of reasons. They include uncertainties over future locations of activities that must move from installations being closed or realigned and errors in standard cost factors used in the services' analyses. We completed a number of sensitivity tests to assess the potential impact of these various factors on projected costs and savings and found that they had a rather limited impact.

It should be noted that shortly after the Secretary of Defense announced his list of proposed closures and realignments, most DOD components began undertaking more rigorous assessments of expected costs of implementing the recommendations and developing budget quality data for doing so. Such efforts are currently underway primarily in the Army and Air Force, and to less extent in the Navy. We suggest that the Commission obtain updated cost and savings data, to the extent it is available, and include it in summary form in its report for the recommendations it forwards

to the President for his consideration.

Service Recommendations Will Reduce Infrastructure, but With Little Gain in Cross-Servicing

The BRAC 1995 process reduced some infrastructure in common support areas such as hospitals and pilot training facilities. However, the lack of progress in consolidating similar work done by two or more of the services limited the extent of infrastructure reductions that could have been achieved.

DOD tried to strengthen the 1995 BRAC process by establishing cross-service groups to provide the services with proposals for consolidating similar work in the areas of depot maintenance, laboratories, test and evaluation facilities, undergraduate pilot training, and medical treatment facilities. However, in the laboratories and test and evaluation areas, the cross-service groups were narrowly focused, and their initial proposals represented minor work load shifts that offered little or no opportunity for a complete base closure or cost-effective realignment. While the depot maintenance group identified excess capacity of 40.1 million direct labor hours, the services' recommendations would eliminate only half that amount. DOD received the services' recommendations too late in the process for meaningful give-and-take discussions to achieve greater consolidations. More time for such interactions and stronger DOD leadership will be required should there be future BRAC rounds.

DOD Components' Processes Were Sound, With Some Exceptions

While we found the components' processes for making their recommendations were generally sound and well supported, we do have some concerns, particularly related to the Air Force. Specifically, key aspects of the Air Force's process remained largely subjective and not well documented. Documentation of the Air Force's process was too limited for us to fully substantiate the extent of Air Force deliberations and analyses. However, we determined that initial analytical phases of the Air Force's process were significantly influenced by preliminary estimates of base closure costs. And, some bases were removed from initial consideration based on these estimates. Also, in some instances, closure costs appeared to materially affect how the bases were valued. For example, Rome Laboratory, in Rome, New York, was ranked high for retention purposes largely because of projected high closure costs. When the Air Force later looked at the laboratory at the suggestion of a cross-service group, it found that the closing costs were much lower. Consequently, the Air Force recommended closure of the laboratory. Without the cross-service group's suggestion, the Air Force might have missed this opportunity to reduce excess capacity and produce savings. For the current round, however, the impact of considering preliminary closing costs in conjunction with military value criteria was minimized, since the Air Force recommended the closure of few

active duty bases. The more numerous recommendations on Guard and Reserve activities were developed outside its process for grouping or tiering bases for retention purposes, and were based largely on cost-effectiveness.

Regarding the Navy, the Secretary of the Navy's actions excluded four activities in California from consideration for closure because of concerns over the loss of civilian positions. For the activities in California, he based his decision on cumulative economic impact of closures from all three BRAC rounds. But the economic impact of the four California activities, as defined by Office of the Secretary of Defense (OSD) criteria, is less on a locality basis than that for similar activities recommended for closure either by the Navy or by other DOD components. However, OSD did not take exception to this inconsistency.

Regarding the Army, it did not fully adhere to its regular process for installations in assessing military value when recommending minor and leased facilities for closure. In selecting 15 minor sites for closure, the Army based its decision on the judgment of its major commands that the sites were excess and of low military value. In considering leased facilities, the Army relied on its stationing strategy and its guidance to reduce leases but did not assess the facilities separately as it did for other installations. The decisions were arrived at through some departure from the process used for installations.

Some Service Recommendations Raise Issues that Should Be Considered by the BRAC Commission

We generally agree with the Secretary's recommendations. However, we have unresolved questions about a number of Air Force recommendations and to a much lesser extent the other components' recommendations. The following are some examples.

Even though the Air Force recognized that it had excess capacity at its five maintenance depots and was considering closing two, it opted late in the process to realign the work load rather than close any depots. However, the Air Force based its decision on preliminary data from incomplete internal studies on the potential for consolidating and realigning work load and reducing personnel levels at the depots. Some of these studies were completed after DOD's BRAC report was published and do not fully support the BRAC-recommended consolidations. These recommended consolidations appear to expand the work load at some depots that are in the process of downsizing. Thus, the Air Force's recommendation may not be cost-effective and does not solve the problem of excess depot capacity.

The Air Force also proposed the realignment of Kirtland Air Force Base, New Mexico, because it rated low relative to the other five bases in the same category. Again, closure costs appeared to heavily influence this base's rating. However, in the military value criterion most important to this group of bases, mission

requirements, Kirtland rated among the highest of the six bases. Kirtland's realignment would reduce the Air Force's operational overhead, including support previously provided to the Department of Energy (DOE) and its Sandia National Laboratory located on Kirtland. However, the Air Force's savings could mean an increase in base operational support costs borne by DOE. As GAO has recommended in the past, it believes DOD should consider the impact of significant government-wide costs in making its recommendations.

The Army's proposed realignment of the Letterkenny Army Depot has not only generated some concerns about the completeness of closure cost data, but also concern regarding the extent to which the current BRAC recommendation represents a change from a 1993 BRAC decision. BRAC 1993 produced a decision to consolidate all tactical missile maintenance at one location--Letterkenny. The Army's 1995 BRAC recommendation would split up some of the work by transferring the missile guidance system work load to Tobyhanna while preserving the tactical missile disassembly and storage at Letterkenny. Maintenance of the associated ground support equipment, such as trucks and trailers, would be done at Anniston Army Depot. There are differences of opinion concerning the impact of separating these functions on the concept of consolidated maintenance.

We also noted that the services considered closing a number of bases, but ultimately rejected them for operational and cost considerations.

Future BRAC Legislation May Be Needed to Reduce Remaining Excess Activities

According to DOD, its major domestic bases will be reduced by 21 percent after implementation of all BRAC recommendations from the current and prior rounds; however, DOD fell short of meeting the goal it established for BRAC 1995. To bring DOD's base infrastructure in line with the reductions in force structure, DOD's goal for the 1995 round was to reduce the overall DOD plant replacement value by at least 15 percent--an amount at least equal to the three previous base closure rounds. However, DOD's 1995 recommended list of base closures and realignments is projected to reduce the infrastructure by only 7 percent.

The Secretary of Defense recently stated that excess infrastructure will remain after BRAC 1995, and he suggested the need for additional BRAC rounds in 3 to 4 years, after DOD has absorbed the effects of recommended closures and realignments. However, the current authority for the BRAC Commission expires with the 1995 round. Should the Congress seek further reductions, some process will be needed. The current BRAC process, while not without certain weaknesses, has proven to be effective in reducing defense infrastructure. Also, without new BRAC legislation, there is no process to approve modifications of

BRAC decisions if implementation problems arise. BRAC Commissions in 1991 and 1993 ruled on changes to prior BRAC round decisions, and we see nothing to indicate that changes may not occur in the future.

Frank,

Thanks, You're right, Bob & I have talked about it some too. The Calif air quality issue is going to be a big deal, what is your impression of how DOD is dealing with this?

Thanks
MRC

Memo from
FRANK A. CIRILLO, JR., P.E.

(1/19)

Marlyn

I do not know if you have see this or similar correspondence regarding Edwards AFB/China Lake. I understand the Mayor of San Diego expressed concerns in this area to David today. It will be a high attention area in 95 – Please return

Frank

THE DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION

EXECUTIVE CORRESPONDENCE TRACKING SYSTEM (ECTS) # 941228-4

FROM: BENATAR, JOE	TO: LYLES
TITLE: CHAIRMAN	TITLE: STAFF DIRECTOR
ORGANIZATION: SUTTER COUNTY BOARD OF SUPERVISORS	ORGANIZATION: DBCRC
INSTALLATION (s) DISCUSSED:	

OFFICE OF THE CHAIRMAN	INFO COPY	ACTION COPY	INIT	COMMISSION MEMBERS	INFO COPY	ACTION COPY	INIT
SENATOR DIXON				COMMISSIONER			
STAFF DIRECTOR	✓			COMMISSIONER			
EXECUTIVE DIRECTOR	✓			COMMISSIONER			
GENERAL COUNSEL				COMMISSIONER			
MILITARY EXECUTIVE				COMMISSIONER			
				COMMISSIONER			
DIR./CONGRESSIONAL LIAISON		✓		COMMISSIONER			
DIR./COMMUNICATIONS				REVIEW AND ANALYSIS			
				DIRECTOR OF R & A	✓		
EXECUTIVE SECRETARIAT				ARMY TEAM LEADER			
				NAVY TEAM LEADER			
DIRECTOR OF ADMINISTRATION				AIR FORCE TEAM LEADER	✓		
CHIEF FINANCIAL OFFICER				INTERAGENCY TEAM LEADER	✓		
DIRECTOR OF TRAVEL				CROSS SERVICE TEAM LEADER	✓		
DIR./INFO SERVICES DIVISION							

TYPE OF ACTION REQUIRED

	Prepare Reply for Chairman's Signature		Prepare Reply for Commissioner's Signature
✓	Prepare Reply for Staff Director's Signature		Prepare Direct Response (coordinate w/ Exec.Sec.)
	Offer Comments and/or Suggestions		FYI

Subject/Remarks:

IN SUPPORT OF BEALE AFB; LETTER FROM KENNETH CORBIN TO MR. BENATAR CONCERNING AIR POLLUTION CONTROL.

Due Date: 950104	Routing Date: 941228	Date Originated: 941215	Mail Date:

BOARD OF SUPERVISORS
COUNTY OF SUTTER

1160 CIVIC CENTER BLVD.
YUBA CITY, CALIFORNIA 95993

(916) 741-7106

December 15, 1994

Mr. David S. Lyles, Staff Director
Defense Base Closure and Realignment Commission
1700 N. Moore Street, Suite 1425
Arlington, VA 22209

Dear Mr. Lyles:

I am the Chairman of the Feather River Air Quality Management District which includes Yuba and Sutter Counties, also the Chairman of the Sutter County Board of Supervisors and one of many local supporters of the effort to save Beale Air Force Base.

I would like to address the concerns that have recently been expressed regarding the impact that expansion of Beale Air Force Base would have on our local air quality.

I have enclosed a letter from Kenneth L. Corbin, the local air pollution officer, prepared at my request, that describes in detail local air quality conditions and how they might affect the expansion of Beale Air Force Base.

If you have any further questions please do not hesitate to contact me.

Very truly yours,

Joe Benatar
Chairman

JB/smj
Attachment

MEMBERS OF THE BOARD

CASEY KROON	DISTRICT 1	COUNTY ADMINISTRATOR
JOE BENATAR	DISTRICT 2	LARRY T. COMBS
PETER LICARI	DISTRICT 3	
JOAN BECHTEL	DISTRICT 4	CLERK OF THE BOARD
DICK AKIN	DISTRICT 5	LONNA SMITH

FEATHER RIVER AIR QUALITY MANAGEMENT DISTRICT

Serving the Counties of Yuba and Sutter
463 Palora Avenue, Yuba City, CA 95991-4711
916/634-7659 FAX 916/634-7660 Burn Information 916/741-6299

Kenneth L. Corbin
Air Pollution Control Officer

December 15, 1994

Mr. Joseph Benatar
Chairman, Sutter County Board of Supervisors
1160 Civic Center Boulevard
Yuba City, California 95993

Dear Mr. Benatar;

This letter is with reference to local air quality as it may concern the mission at Beale Air Force Base and the impact, if any, that expansion of Beale Air Force Base may have on local air quality.

The California Air Resources Board has several air monitoring stations located in the Sacramento Valley which measure wind speed, wind direction, and ozone concentration. The monitoring station in Yuba City is located approximately 10 miles west of Beale Air Force Base. That monitoring station is the closest monitoring station to Beale Air Force Base. The California Air Resources Board supplies air quality information from all of its stations to the United States Environmental Protection Agency (EPA) San Francisco office. This information is used in determining the attainment status for each air quality district.

In California there are two ambient air quality standards. The federal standard is twelve (12) parts of ozone per one hundred (100) million and is attained when it is not exceeded more than one day per year, averaged over a three year period. The California standard is nine (9) parts of ozone per one hundred (100) million and it may not be exceeded.

Typical ozone measurements at the Yuba City station show that the highest concentrations are four (4) to five (5) parts ozone per one hundred (100) million in the winter months (November through May) and as high as ten (10) to eleven (11) parts ozone per hundred million in the summer months (June through October).

The California standard of nine (9) parts per one hundred (100) million was exceeded an average of fourteen (14) days per year for calendar years 1991 thorough 1993. Therefore, the local area is designated as a moderate nonattainment area by the state. The federal standard of twelve (12) parts per hundred million has not been exceeded in the last five years. Therefore, the area including Beale Air Force Base is designated as a transitional non-attainment area by the EPA and could be redesignated to an attainment area by the EPA upon application and submittal of supporting data.

A substantial part of the air pollutants measured locally are a result of prevailing southerly winds which carry air pollution from the Sacramento metropolitan area. As the Sacramento area continues implementation of measures contained in the State Implementation Plan (SIP) and/or the Federal Implementation Plan (FIP) for the Sacramento area, our local air quality should show substantial improvement.

The Feather River Air Quality Management District and Beale Air Force Base staffs have worked together cooperatively to resolve any air quality issues and to insure that air quality requirements are met. Because of the continued improvement we have experienced locally, I believe that expansion of Beale air Force Base can be accomplished without a significant impact on our air quality.

Very truly yours,

Kenneth L. Corbin
Air Pollution Control Officer
Feather River Air Quality Management District

KC/lac

c: Jay Palmquist, Chairman
Yuba County Board of Supervisors

Document Separator

THE DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION

EXECUTIVE CORRESPONDENCE TRACKING SYSTEM (ECTS) # 950214-2

FROM: PARSON, THOMAS	TO: GENERAL
TITLE: DIRECTOR	TITLE:
ORGANIZATION: AIR POLLUTION CONTROL DISTRICT	ORGANIZATION: DBCRC
INSTALLATION (s) DISCUSSED:	

OFFICE OF THE CHAIRMAN	FYI	ACTION	INIT	COMMISSION MEMBERS	FYI	ACTION	INIT
CHAIRMAN DIXON				COMMISSIONER			
STAFF DIRECTOR	✓			COMMISSIONER			
EXECUTIVE DIRECTOR	✓			COMMISSIONER			
GENERAL COUNSEL				COMMISSIONER			
MILITARY EXECUTIVE				COMMISSIONER			
				COMMISSIONER			
DIR./CONGRESSIONAL LIAISON		✓		COMMISSIONER			
DIR./COMMUNICATIONS				REVIEW AND ANALYSIS			
				DIRECTOR OF R & A	✓		
EXECUTIVE SECRETARIAT				ARMY TEAM LEADER			
				NAVY TEAM LEADER			
DIRECTOR OF ADMINISTRATION				AIR FORCE TEAM LEADER	✓		
CHIEF FINANCIAL OFFICER				INTERAGENCY TEAM LEADER	✓		
DIRECTOR OF TRAVEL				CROSS SERVICE TEAM LEADER			
DIR./INFORMATION SERVICES							

TYPE OF ACTION REQUIRED

	Prepare Reply for Chairman's Signature		Prepare Reply for Commissioner's Signature
✓	Prepare Reply for Staff Director's Signature		Prepare Direct Response
	ACTION: Offer Comments and/or Suggestions		FYI

Subject/Remarks:

LETTER DISCUSSING EAFB AS PART OF KERN COUNTY AIR POLLUTION CONTROL DISTRICT; CONCLUSION: BASE POSES NO THREAT TO OZONE POLLUTION GROWTH.

Due Date: 950216	Routing Date: 950214	Date Originated: 950213	Mail Date:

AIR POLLUTION CONTROL DISTRICT

THOMAS PAXSON, P.E., Director

2700 "M" STREET, SUITE 290
BAKERSFIELD, CA 93301
Phone: (805) 861-2503
FAX: (805) 861-2295

RESOURCE MANAGEMENT AGENCY

JOEL HEINRICHS, AGENCY DIRECTOR

Air Pollution Control District
Engineering & Survey Services Department
Planning & Development Services Department
Transportation Management Department
Waste Management Department

January 13, 1995

Please refer to this number when responding 950214-2

Base Realignment and Closure Commission
1700 North Moore Street
Arlington, VA 22209

SUBJECT: Air Quality as a Criterion to Determine if Edwards Air Force Base, California, Should be Considered for Growth

Honorable Commission:

It has come to my attention your commission may be planning to use National Ambient Air Quality Standards attainment/non-attainment designations as a criterion for determining if Edwards Air Force Base, California (EAFB) should be considered for growth. If this is the case, it is not appropriate.

EAFB is located within the Kern County Air Pollution Control District (KCAPCD) and in an area designated in 1990 by the U.S. EPA as "non-attainment" for ozone ("smog"). During 1994 no ozone exceedances were recorded. This area is, and U.S. EPA agrees, well on its way to attainment for ozone.

Furthermore, KCAPCD has prepared an "attainment demonstration" as required by the 1990 Federal Clean Air Act Amendments for ozone. The ozone Attainment Demonstration projects attainment by 1999. (This may occur by 1997.) The ozone demonstration provides for 15% growth in EAFB ozone-forming emissions by 1999.

In summary, while it is true EAFB is located in an ozone non-attainment area, KCAPCD is able to project ozone attainment for this area even with 15% growth assigned to EAFB. (Necessary reductions come from other sources.)

Hopefully, the preceding information will allow your commission to base its decisions on appropriate facts pertinent to EAFB. Please call me at (805) 861-2593 if you have any questions.

Sincerely,

Thomas Parson, P.E., APCO
Air Pollution Control District

TP:bjm
TP1578

cc: General Ronald R. Fogleman
Governor Pete Wilson
Senator Barbara Boxer
Senator Dianne Feinstein
Representative Bill Thomas