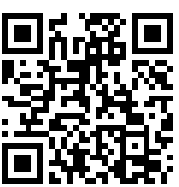

GENERAL ACCOUNTING OFFICE

DECISIONS OF THE COMPTROLLER GENERAL OF THE UNITED STATES

VOLUME 4

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J. R. McCARL
Comptroller General

LURTIN R. GINN
Assistant Comptroller General

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DECISIONS

OF THE

COMPTROLLER GENERAL OF THE UNITED STATES

(A–290)

UNITED STATES COMMISSIONERS—PER DIEM FEES FOR HEARING AND DECIDING SUBSEQUENT TO INDICTMENTS

Where a prisoner is arraigned before a United States commissioner and his case continued until a subsequent date, prior to which date an indictment is returned by the grand jury, or an information is filed in the district court and the defendant arraigned before said court, the commissioner's jurisdiction is terminated in so far as subsequent hearings that would entitle him to a per diem fee are concerned, and any per diem fees charged in such cases after the return of the indictment or filing of information must be disallowed.

Comptroller General McCarl to J. B. Waterworth, United States Commissioner, July 1, 1924:

There have been received your letters of December 10, 1923, and January 26, 1924, requesting review of settlements Nos. 14232 and 14233, dated October 2, 1923, disallowing the per diem fees charged for hearing and deciding on criminal charges on dates subsequent to dates indictments were returned by the grand jury or information filed in the cases of *United States* v. *Weir*, December quarter, 1919; *United States* v. *Petrus*, March quarter, 1920; and *United States* v. *Barker*, September quarter, 1920.

December quarter, 1919

Item 1. Page 18. *U. S.* v. *Kenneth D. Weir*, charge for hearing and deciding on criminal charges December 20, 1919 ..... $5.00

The item was disallowed for the reason defendant was indicted by the grand jury December 5, 1919, and citing 24 Comp. Dec. 647.

An examination of the voucher shows that defendant was arraigned before you December 1, 1919, and the hearing continued until December 20, 1919, upon the request of the United States attorney to enable him to obtain evidence, and a per diem was charged for each of said days.

In your letter of December 10, 1923, it is explained that when the defendant appeared before you on December 20, 1919, instead of discharging him you continued the case until February 2, 1920, upon request of the United States district attorney and in accordance with the order of the district court, as shown by the docket in said court in criminal case No. 4445. Under date of April 10, 1924, you were requested by letter to furnish copy of the court's order in each case which directed you to continue the cases and to perform further service after an indictment had been returned by the grand jury, and further to state in detail what service you performed in each case, and to furnish any other instructions you may have received from the court or district attorney concerning the matter. To date, no response has been received from you regarding the matter and the case will be considered upon the evidence now appearing.

Paragraph 1029 of current instructions provides as follows:

A commissioner is not entitled to a per diem fee for hearing and deciding on criminal charges in the following instances:

(*a*) When the only action taken is to admit the defendant to bail for appearance before another commissioner for hearing. (See 2 Comp. [Dec.] 281.)

(*b*) Merely for services renderd under section 1019, R. S. U. S., preliminary to taking new bonds of defendants who had previously given bonds for appearance in court. (See 4 Comp. [Dec.] 465.)

(*c*) For deciding only, on the second day, a case in which the hearing had been fully completed on the first day. (See 4 Comp. [Dec.] 472.)

(*d*) Merely for taking bonds of defendants under indictment. (See 18 Comp. [Dec.] 444.)

(*e*) When the only service was the taking and certifying of depositions.

Section 21 of the act approved May 28, 1896, 29 Stat. 184, provides in part as follows:

for hearing and deciding on criminal charges and reducing the testimony to writing when required by law or order of court, five dollars a day for the time necessarily employed: *Provided*, That not more than one per diem shall be allowed in a case, unless the account shall show that the hearing could not be completed in one day, when one additional per diem may be specially approved and allowed by the Court: *Provided further*, That not more than one per diem shall be allowed for any one day: * * *.

This section has been construed in a decision by this office under date of May 5, 1924, 3 Comp. Gen. 831, as follows:

The allowance of the second per diem in any case may be made only after final hearing and deciding. Where a case is continued several times and the facts established justify the allowance of two per diems under the law, the per diem should be charged only for the day of arraignment and for the day the case is finally disposed of. No per diem is allowable for intervening days. In cases where the court assumes jurisdiction of the case prior to the date set for the final hearing before the commissioner, no second per diem is allowable. To entitle a commissioner to a per diem for a second hearing, there must be a final hearing and deciding on criminal charges, and the testimony reduced to writing when required by law or order of court.

The facts appearing are that on December 1 defendant was arraigned before you for a hearing, and the case continued to December 20, 1919. On December 5, 1919, an indictment was returned by the grand jury holding the defendant to answer to the court

and thereby terminating your jurisdiction in so far as subsequent hearings such as would entitle you to fees therefor were concerned. All that remained for you to do at the postponed date was to formally close your docket, noting the fact thereon that an indictment had been returned by the grand jury December 5, 1919, for which service you were not entitled to the per diem fee. The disallowance is sustained.

March quarter, 1920

Item 2. Page 2. *United States* v. *Prank Petrus.* Charge for a per diem for hearing and deciding on criminal charges February 12, 1920_____ $5.00

The item was disallowed for the reason defendant was indicted by the grand jury January 20, 1920.

An examination of the voucher shows defendant arrested and arraigned before you January 12. No per diem charged in this case for said day for the reason a per diem for January 12 was charged on page 1 of your account in the case of *United States* v. *Steve Skerda.* The case was continued to February 12, but as an indictment had been returned by the grand jury January 20, all that remained to be done on February 12 was to formally close your docket, for which service no per diem is allowable. The disallowance is sustained.

September quarter, 1920

Item 3. Page 3. *United States* v. *Paul Barber.* Charge for per diem for hearing and deciding on criminal charges September 3, 1920_____ $5.00

The item was disallowed for the reason information filed in the district court and defendant arraigned in court and pleaded guilty August 28, 1920.

The voucher shows that the defendant was arrested and arraigned before you August 3. No per diem was charged in this case for that date for the reason a per diem was charged on page 2 of your account for said date in the case of *United States* v. *Samuel Berger.* The case was continued to September 3, 1920, but as an information had been filed in the district court August 28, and the defendant appeared in said court and pleaded guilty to the charge and was held to answer to the court, there could have been no "hearing and deciding" by you on September 3, 1920. The disallowance is sustained.

(A–3508)

NAVAL RESERVE FORCE PAY—COMMISSIONED WARRANT OFFICERS

Section 3 of the act of June 10, 1922, 42 Stat. 627, fixes one base pay for each respective grade in the Naval Reserve Force and grants no right to pay of a higher period by reason of length of service; accordingly a com-

missioned warrant officer of the Naval Reserve Force with rank corresponding to that of second lieutenant in the Army is limited to the base pay of the first period and does not become entitled to the base pay of the second period by reason of six years' commissioned service with a creditable record.

Comptroller General McCarl to the Secretary of the Navy, July 1, 1924:

By your indorsement of June 11, 1924, I have for decision the question, presented by the Paymaster General, United States Navy, whether Chief Boatswain George R. Marks, United States Naval Reserve Force, is entitled to the pay of a commissioned warrant officer on the active list with a creditable record after six years' commissioned service as provided in section 1 of the act of June 10, 1922, 42 Stat. 627, he having received a certificate of creditability after having completed six years' commissioned service on April 6, 1923.

Section 1 of the act of June 10, 1922, 42 Stat. 627, provides:

* * * Commissioned warrant officers on the active list with creditable records shall, after six years' commissioned service, receive the pay of the second period, and after twelve years' commissioned service, receive the pay of the third period: * * *.

You refer to section G of Instructions for carrying into effect the joint service pay bill, as approved by this office, and state that said section contains no provision for crediting commissioned warrant officers of the Naval Reserve Force with the pay of the second period after six years' commissioned service.

Pay of all commissioned officers of the Naval Reserve Force is prescribed in section 3 of the act of June 10, 1922, 42 Stat. 627, which provides:

That when officers of the * * * reserve forces of any of the services mentioned in the title of this act are authorized by law to receive Federal pay, those serving in grades corresponding to those of colonel, lieutenant colonel, major, captain, first lieutenant, and second lieutenant of the Army shall receive the pay of the sixth, fifth, fourth, third, second, and first periods, respectively.

This provision specifically fixes the base pay of all commissioned officers of the Naval Reserve Force and supersedes the provision in the act of July 1, 1918, 40 Stat. 712, which provides that members of the Naval Reserve Force when employed in active service under the Navy Department shall receive the same pay and allowances as received by officers of the regular Navy of the same rank and length of service. It limits the pay of commissioned officers of the reserve forces to their corresponding grade in the Army and prescribes a definite pay period for each such grade. Under its provision Naval Reserve officers serving in a particular grade are entitled only to the pay of the period therein designated to correspond with their grades. It grants no right to pay of a higher period by reason of length of service. It therefore expressly fixes

one base-pay period for each respective grade, 2 Comp. Gen. 85, 88, 113, and 406.

Chief Boatswain George R. Marks has rank corresponding to second lieutenant in the Army and is entitled to the pay of the first period, only. The law having expressly limited his base pay to that period, the fact that he has received a certificate of creditability after six years' commissioned service, does not confer on him right to the pay of the second period as provided in section 1 of the act of June 10, 1922, for commissioned warrant officers of the regular service with creditable records after six years' commissioned service.

Accordingly, you are advised that Chief Boatswain George R. Marks, United States Naval Reserve Force, is not entitled to the pay of a commissioned warrant officer on the active list with creditable record after six years' commissioned service, as provided in section 1 of the act of June 10, 1922, 42 Stat. 627.

(A-3460)

LEAVE OF ABSENCE AT BEGINNING OF FISCAL YEAR—POSTAL EMPLOYEES

An employee of the Postal Service who has been absent without pay for less than one year due to illness may be granted, at the beginning of a new fiscal year, the full annual leave for the new fiscal year with pay, and also all sick leave accrued and unused for the three-year period as provided in the act of June 19, 1922, 42 Stat. 660, provided he is not in receipt of disability compensation at that time; an employee receiving disability compensation can not suspend or waive such compensation in order to receive his regular compensation for such annual and sick leave.

Comptroller General McCarl to the Postmaster General, July 1, 1924:

I have your letter of June 13, 1924, requesting decision of three questions as follows:

1. A regular employee is absent from duty because of illness in a nonpay status from April 1st of one year to January 1st of the next succeeding year: Is this employee entitled to the full 10 days sick leave of absence with pay accruing for the new fiscal year to be granted immediately on the commencement of the new fiscal year, or will the employee only be entitled to sick leave for that fiscal year upon his resumption of service, and will he be entitled to the full 10 days, or entitled to only a pro rata of 10 days from January 1st to June 30th next succeeding?

2. In the same circumstances of absence, as indicated in No. 1, would the employee be entitled to full 15 days annual leave of absence with pay commencing from July 1st, or would he be entitled to full 15 days leave of absence with pay on his resumption of service January 1st, or would he only be entitled to a pro rata of 1¼ days from January 1st to June 30th next succeeding?

3. In the case of a regular employee disabled in the performance of his duty and under compensation by the United States Employees' Compensation Commission, who is absent from duty because of such disability from July 1st to June 30th next suceeding, would he be entitled to receive the full 15 days annual leave of absence with pay and the 10 days sick leave of absence with pay that otherwise would have accrued and been allowable were he able to perform service and on duty during that period?

The act of July 28, 1916, 39 Stat. 413, provides in part as follows:

That the Postmaster General shall not approve or continue any rule or regulation which terminates the employment of any employee by reason of absence on account of illness for a period of less than one year. * * *.

The act of June 5, 1920, 41 Stat. 1052, as amended by the act of June 19, 1922, 42 Stat. 660, provides as follows:

Hereafter employees in the Postal Service shall be granted fifteen days' leave of absence with pay, exclusive of Sundays and holidays, each fiscal year, and sick leave with pay at the rate of ten days a year, exclusive of Sundays and holidays, to be cumulative for a period of three years, but no sick leave with pay in excess of thirty days shall be granted during any three consecutive years. Sick leave shall be granted only upon satisfactory evidence of illness and if more than two days the application therefor shall be accompanied by a physician's certificate.

The phrase " less than one year " used in the act of July 28, 1916, *supra*, fixes a period of time without reference to fiscal or calendar year, that is, the absence may begin and end at any time. During any absence of " less than one year " on account of illness persons in the Postal Service remain on the rolls and retain the status of " employees " as contemplated by the leave act of June 19, 1922, *supra*. Accordingly such authorized absence without pay of less than one year because of illness may be counted in computing the right to annual and sick leave, the status of " employee " not having been lost. The fact that during a portion of a fiscal year an employee is in a non-pay status because of personal illness does not defeat the right to leave granted by the statute for that fiscal year, nor require a prorating of the total leave to cover the portion of the year in a pay status.

In questions 1 and 2, assuming that the employee was not entitled to disability compensation, there would be available for the employee the full 10 days' sick leave of absence with pay and the full 15 days' annual leave of absence with pay from July 1 of the second fiscal year although absent until the following January 1 because of illness. 27 Comp. Dec. 583; 2 Comp. Gen. 701. Being already away from duty on account of illness, the employee would be entitled to pay for a period of 25 days, exclusive of Sundays and holidays, beginning July 1 of the second fiscal year. The employee, of course, would not be entitled to any further sick or annual leave with pay during that fiscal year after return to duty January 1. 1 Comp. Gen. 245; 3 *id.* 20.

Sections 7 and 8 of the Employees' Compensation Act of September 7, 1916, 39 Stat. 743, provide as follows:

SEC. 7. That as long as the employee is in receipt of compensation under this Act, or, if he has been paid a lump sum in commutation of installment payments, until the expiration of the period during which such installment payments would have continued, he shall not receive from the United States any salary, pay, or remuneration whatsoever except in return for services actually performed, and except pensions for service in the Army or Navy of the United States.

SEC. 8. That if at the time the disability begins the employee has annual or sick leave to his credit he may, subject to the approval of the head of the department, use such leave until it is exhausted, in which case his compensation shall begin on the fourth day of disability after the annual or sick leave has ceased.

In question three the employee would not be entitled to either annual or sick leave with pay for any period he is in receipt of, or entitled to, compensation under the employees' compensation act. But if not entitled to compensation under said act at the close of the fiscal year preceding the fiscal year in question, then, under section 8 of said act the employee, subject to the approval of the Postmaster General, could be paid from July 1 for all accrued sick leave cumulated and unused during the period of three years as provided in the act of June 19, 1922, including that fiscal year, 3 Comp. Gen. 20, and the 15 days' annual leave due him for that fiscal year. In such a case payments of disability compensation would begin four days subsequent to the expiration of such sick and annual leave. The law does not contemplate or authorize discontinuance of payment of disability compensation at beginning of fiscal year in order that payment may be made for leave of absence. Leave of absence, sick or annual, with pay, may be granted at the beginning only of a period of absence on account of a disability for which payment of disability compensation is authorized.

(A-3414)

RETIREMENT DEDUCTIONS FROM BASIC COMPENSATION OF CIVILIAN EMPLOYEES

The additional amount paid to the Chief Clerk, Army War College, in accordance with the acts of June 30, 1922, 42 Stat. 718, and March 2, 1923, 42 Stat. 1380, for superintendence of the Army War College Building, is an increase in the basic salary for the enlarged position of chief clerk and superintendent, and is subject to the 2½ per cent retirement deduction.

Decision by Comptroller General McCarl, July 2, 1924:

In connection with the settlement of the accounts of Capt. Carl Halla, Finance Department, United States Army, there is for consideration the question whether the $25 per month paid to the Chief Clerk of the Army War College for superintendence of the building is subject to the 2½ per cent retirement fund deduction.

The appropriation for the Army War College, 1923, act of June 30, 1922, 42 Stat. 718, provides "for pay of the following: Chief clerk, $2,000." It also provides "$25 per month additional to regular compensation to chief clerk for superintendence of the Army War College Building." See also 1924 appropriation, act of March 2, 1923, 42 Stat. 1380. The provision does not appear in the appropriation act for the fiscal year 1925. See act of June 7, 1924, 43 Stat. 480.

Section 8 of the civil service retirement act of May 22, 1920, 41 Stat. 618, provides that "there shall be deducted and withheld from the basic salary, pay, or compensation of each employee to whom this act applies a sum equal to 2½ per cent of such employee's basic salary, pay, or compensation." Section 2 of the same act provides as follows:

> The term "basic salary, pay, or compensation" wherever used in this act shall be so construed as to exclude from the operation of the act all bonuses, allowances, overtime pay, or salary, pay, or compensation given in addition to the base pay of the positions as fixed by law or regulation.

The appropriation acts for 1923 and 1924 added an additional duty to the office of chief clerk and prescribed an additional amount to be paid for that additional duty. Accordingly the position of chief clerk was enlarged by law to include the duties of superintendent of the Army War College Building, and as compensation for such additional duties there was added to the regular compensation otherwise fixed for the position of chief clerk the sum of $25 per month, which must be considered as an increase in the basic salary of the enlarged position; that is, the position of chief clerk and superintendent was fixed by law and a regular amount of compensation provided therefor, to wit, $2,300 per annum. Accordingly the additional allowance does not come within the exception in section 2 of the retirement act and therefore is subject to the 2½ per cent retirement deduction.

Refund of all amounts not deducted from the additional compensation provided for the service of superintendence of the Army War College Building should be made and the appropriations should be adjusted accordingly. See 2 Comp. Gen. 525.

(A–3137)

ARMY PAY—OFFICERS DISCHARGED AND RECOMMISSIONED

The commission given an Army officer when discharged and recommissioned under the Army reorganization act of June 30, 1922, 42 Stat. 722, is not his "first appointment in the permanent service" such as is made the basis for determining the pay periods of certain officers under the joint service pay act.

Decision by Comptroller General McCarl, July 2, 1924:

Oscar O. Kuentz, major, Corps of Engineers, requested April 21, 1924, review of settlement No. M–805877–W, dated March 26, 1924, disallowing his claim under the act of June 10, 1922, 42 Stat. 625, for the difference between the allowances of the fourth and third pay periods subsequent to October 14, 1923. The claim was disallowed on the ground that since claimant originally entered the

service as a second lieutenant and had not completed 14 years' service he was not entitled to the allowances of the fourth period.

The Adjutant General of the Army reported January 4, 1924, that claimant was probationally appointed on April 1, 1915, which appointment was accepted on April 17, 1915, as a second lieutenant in the Engineer Corps of the Army; that he served successively as first lieutenant and captain, Regular Army; that he was appointed major, temporary, on August 5, 1917, and promoted to major, permanent, on February 12, 1920; and it appears from the Army Register, 1924, page 334, that he was discharged under the provisions of the act of June 30, 1922, 42 Stat. 721, on November 4, 1922, recommissioned the same day as a captain; and it further appears that on October 14, 1923, he was again promoted to a majority in the Corps of Engineers. In other words, claimant entered the Regular Army on April 17, 1915, as a second lieutenant and has served therein continuously to the present time, except for a short period on November 4, 1922, when he was discharged as a major and recommissioned in the grade of captain.

The joint service pay act of June 10, 1922, 42 Stat. 625, provides, in section 1 thereof, that the pay of the fifth period, $3,500, should be paid to majors of the Army who have completed 23 years of service; that the pay of the fourth period, $3,000, should be paid to majors "who have completed 14 years' service, or whose first appointment in the permanent service was in a grade above that corresponding to second lieutenant in the Army," and that the pay of the third period, $2,400, should be paid to all other majors whose service, etc., does not bring them within any of the other pay periods.

It is obvious that claimant is not entitled to the pay or allowances of the fourth pay period. His original entry into the service on April 17, 1915, was not in a grade above that of second lieutenant, nor has he completed 14 years of service in the Army, either of which must be met as a condition precedent to the pay of the fourth period. It is contended, however, that the "discharge as major on November 4, 1922, and subsequent appointment as captain on the same day constitute an original appointment as captain as of November 4, 1922," reference being made to 2 Comp. Gen. 170. The decision referred to did not hold that a discharge and recommission in a lower grade constituted a "first appointment in the permanent service" but held that it effected a complete separation from the service in so far as was concerned the carrying forward to the lower grade the right to count certain service in the higher grade for longevity purposes. The right was subsequently given by statute to count such service. See 3 Comp. Gen. 675. The acceptance of a commission as captain

on November 4, 1922, was not a "first appointment in a permanent service." It was a reappointment in the permanent service. See 2 Comp. Gen. 234.

The disallowance of the claim was in accordance with the law and must be, and is, affirmed.

(A–2212)

SUBROGATION OF SURETY

Any sum in the possession of the United States accruing to a former employee whose embezzlement of Government funds has been made good by the surety on his official bond may be paid to the surety.

Decision by Comptroller General McCarl, July 2, 1924:

The Maryland Casualty Co. has submitted claim for $52.13 as the proceeds of sale of certain personal effects of Joseph A. Rose, former chief clerk and special disbursing agent, who embezzled funds of the Government in a sum in excess of $20,000.

It appears that claimant, as surety, has paid to the United States under bonds dated September 10, 1914, and August 9, 1918, the full amount of the defaulting disbursing officer's indebtedness to the Government and contends that by the payment of the amount embezzled it is subrogated to whatever rights the United States may have had to apply the proceeds of sale of the personal effects against said indebtedness.

The former disbursing clerk entered a plea of guilty to the charge of embezzlement of public funds and was sentenced on November 4, 1922, to serve two years in the United States penitentiary at Atlanta, Ga. Settlement was made by the Maryland Casualty Co., the surety on his bonds, and the accounts of the former disbursing clerk have been audited and balanced, with the aid of the payment made by the surety.

The sum of $52.13 in question represents the balance left from the sale of personal effects of the former disbursing clerk after deductions for shortages in his accounts for charts, war savings stamps, etc. It appears that the amount of $52.13 was held pending the outcome of a civil suit against the surety and that as a result of that suit it paid to the United States the amount embezzled, $22,487.65, with interest, making a total of $25,364.40. The $52.13 having been in possession of the United States at the time, the amount could properly have been allowed as a credit in the settlement with the surety for the amount of the judgment, it not being required to offset any other indebtedness to the United States, and as the accounts of the principal have been balanced and closed, the $52.13 is authorized to be paid to the surety. See in this connection *Prairie State Bank* v. *United States*, 164 U. S. 227.

(A-743)

CIVILIAN MILITARY TRAINING CAMPS—LOSS OF PRIVATE PROPERTY BY CIVILIAN ATTENDANTS

The attendance of civilians at the civilian military training camps does not deprive them of their civilian status, and the destruction of their personal property by fire while attending such camps is the loss of private property "incident to the training, practice, operation, or maintenance of the Army" and reimbursable under the annual appropriation acts for that purpose.

Decision by Comptroller General McCarl, July 2, 1924:

The Secretary of War, December 10, 1923, approved the claim of Alfred D. Foster for $13, Edwin H. McNamer for $45, Irving Kausen for $51, Charles F. Connor for $63.50, and Chester F. Reas for $68.50, as the value of personal property lost by them in a fire which destroyed the tent they were occupying August 9, 1923, while in attendance at the civilian military training camp held at Del Monte, Calif., and has transmitted the claims to this office recommending payment from funds provided by the act of March 2, 1923, 42 Stat. 1386, for the fiscal year current when the losses occurred, for the—

* * * payment of claims not to exceed $500 in amount for damages to and loss of private property incident to the training, practice, operation, or maintenance of the Army that have accrued, or may hereafter accrue, from time to time * * *: *Provided*, That settlement of such claims shall be made by the General Accounting Office, upon the approval and recommendation of the Secretary of War, where the amount of damages has been ascertained by the War Department, and payment thereof will be accepted by the owners of the property in full satisfaction of such damages.

While this annual appropriation in its present language is not applicable to Army personnel, 26 Comp. Dec. 826; 3 Comp. Gen. 22, nor to civilians employed by or attached to the Army, 27 Comp. Dec. 672; 3 Comp. Gen. 160, those decisions are not applicable to the facts of this case.

The act of June 4, 1920, 41 Stat. 779, authorized the Secretary of War "to maintain, upon military reservations or elsewhere, schools or camps for the military instruction and training, with a view to their appointment as reserve officers or noncommssioned officers, of such warrant officers, enlisted men, and civilians as may be selected upon their own application," and to pay from appropriations made from time to time for "water, fuel, light, temporary structures, not including quarters for officers nor barracks for men, screening, and damages resulting from field exercises, and other expenses incidental to the maintenance of said camps," and "to employ thereat officers, warrant officers, and enlisted men of the Regular Army in such numbers and upon such duties as he may designate." The act of March 2, 1923, 42 Stat. 1382, 1383, provided funds for the expenses of "civilian military training camps" during the fiscal year current when the losses in the instant case occurred.

These claimants were civilians in training without pay. They were not a part of the Army, but Army facilities and personnel were being utilized in their training. Such training was incident to the training and practice of the Army in the broadest sense and the damage resulted therefrom. The claims here in question are of the class of small claims, for which a prompt remedy was designed to be afforded by the annual appropriation acts. The claimants were entitled to relief under the statute for any loss or damage suffered by them incident to the training, practice, etc., of the Army before they entered the training camp, and their entry into the camp for training, without pay and without losing their civilian status, does not deprive them of the benefits of the statute. The claims may be paid accordingly.

(A-2869)

ARMY PAY—REAPPOINTMENTS UNDER JOINT SERVICE PAY ACT

An officer with less than seven years' service whose first appointment in the Regular Army was as second lieutenant, who was promoted to captain and thereafter resigned and after an interval of civilian life was reappointed first lieutenant, is not entitled to base pay and allowances of the third pay period under the joint service pay act of June 10, 1922, 42 Stat. 625, his "first appointment" not having been "above" that of second lieutenant.

Decision by Comptroller General McCarl, July 3, 1924:

There is before this office for consideration and decision the question whether an officer appointed second lieutenant, Regular Army, and promoted to first lieutenant and temporary captain, who resigned therefrom and after an interval of civilian life was reappointed first lieutenant in the same service under the provisions of section 24-e of the act of June 4, 1920, 41 Stat. 774, and was serving therein as captain on June 30, 1922, is entitled by reason of his grade and service to the pay and allowances of the third pay period as prescribed by section 1 of the act of June 10, 1922, 42 Stat. 625, or whether such grade and service entitled him to the pay and allowances prescribed for the second pay period by that act.

The question arises in connection with a payment made to First Lieut. J. W. Orcutt, Ordnance Department, in the accounts of Capt. R. L. Hubbell, finance officer at Watertown Arsenal, Mass., for the month of January, 1924, in the total amount of $327.20, consisting of base pay, $200; longevity, $10; subsistence allowance, $37.20; and rental allowance, $80.

The Official Army Register, at page 441, shows the services of this officer, all in the permanent establishment, as follows:

2 lt. C.A.C. 9 Aug. 17; accepted 24 Aug. 17; 1 lt. 9 Aug. 17; accepted 17 Oct. 17; capt. (temp.) 7 Mar. 18; resigned 26 Apr. 20, 1 lt. C.A.C. 1 July 20; accepted 28 Nov. 20; trfd. to Ord. Dept. 26 Mar. 21; capt. 27 July 20; (*a*) 1 lt. (Nov. 18, 22).

(Footnote)

(a) Discharged as captain and appointed first lieutenant Nov. 18, 22; acts June 30, 22, and Sept. 14, 22.

Report has been received by telephone from The Adjutant General that the date of rank as captain was July 27, 1920.

Section 1 of the joint service pay act of June 10, 1922, 42 Stat. 625, provides:

> That, beginning July 1, 1922, for the purpose of computing the annual pay of the commissioned officers of the Regular Army and Marine Corps below the grade of brigadier general * * * pay periods are prescribed, and the base pay of each is fixed as follows:
>
> The first period, $1,500; the second period, $2,000; the third period, $2,400; the fourth period, $3,000; the fifth period, $3,500; and the sixth period, $4,000.
>
> * * * * * * *
>
> The pay of the third period shall be paid to * * * captains of the Army, * * * who have completed seven years' service, or whose first appointment in the permanent service was in a grade above that corresponding to second lieutenant in the Army, or whose present rank dates from July 1, 1920, or earlier; * * *.
>
> The pay of the second period shall be paid to captains of the Army, * * * who are not entitled to the pay of the third or fourth period; * * *.

Lieutenant Orcutt was correctly paid base pay at the rate of $200 per month by reason of the provisions of section 16 of the above-cited act at page 632 and by being discharged as captain and appointed first lieutenant on November 18, 1922, under the provisions of the acts of June 30, 1922, 42 Stat. 722, and September 14, 1922, 42 Stat. 840, but he was not entitled to longevity increase of pay by reason of having completed five years' service on March 26, 1923. 3 Comp. Gen. 676.

Only the pay that an officer was entitled to receive by reason of his grade and length of service on June 30, 1922, was saved to the officer by section 16 of the act of June 10, 1922, cited, and the rental and subsistence allowances authorized by sections 5 and 6 of the same act are based on the pay that the officer was entitled to receive under the provisions of that act were it not for the saving clause, 2 Comp. Gen. 234. Lieutenant Orcutt not having completed seven years' service, it was necessary that his first appointment in the permanent service be in a grade above second lieutenant to entitle him to the allowances prescribed for officers entitled to the base pay of the third period. It appears from the record as shown by the Army Register that all services performed by him were in the permanent establishment and that his "first appointment" therein was to the grade of second lieutenant, which was accepted August 24, 1917. His grade and service accordingly did not entitle him to the base pay of the third pay period and as a captain not entitled to the pay of the third or fourth period, he was entitled to base pay of the second

pay period, with the resultant effect that he is entitled to the allowances incident to the base pay of that pay period.

It is unnecessary to invoke the saving clause contained in the act of September 14, 1922, as to allowances for the reason that his present grade and service entitle him to the allowances incident to the second pay period.

Lieutenant Orcutt was entitled to pay for the month of January, 1924, as follows:

Base pay	$200.00
Subsistence allowance	37.20
Rental allowance	60.00
Total	297.20

Having been paid $327.20 for pay and allowances during such period, there will accordingly be disallowed in the disbursing account of Captain Hubbell on account of this payment $30.

(A-2853)

INTERIOR DEPARTMENT—FORMAL EXECUTION OF CONTRACTS

An officer of the Department of the Interior appointed or designated as a contracting officer can not ignore the mandatory requirements of section 3744, Revised Statutes, on the ground of expedition and dispatch of the public business or that it would serve no useful purposes or work a hardship in a particular case.

A claim for the rental of an automobile hired by an officer or employee of the Interior Department without a formal written contract is payable, if at all, only on a *quantum meruit* basis and consequently involves doubtful questions of law and fact constituting a claim which a disbursing officer is not authorized to pay but should be forwarded to the General Accounting Office for direct settlement.

Comptroller General McCarl to the Secretary of the Interior, July 5, 1924:

There has been received your letter dated May 15, 1924, with inclosures requesting decision as to whether you are authorized to direct payment of $132 to the Magruder Motor Car Co. (Inc.), Glasgow, Mont., for 11 days' hire in April, 1924, of an automobile at $12 a day for the use of an agent of the General Land Office and which automobile is stated to have been secured after personal solicitation of bids at various garages in Glasgow and in Williston, N. Dak., but in the absence of a written contract for the use of the machine. It appears to be contended that the hire of the automobile is within an exception to section 3744, Revised Statutes, requiring all contracts of the Department of the Interior to be reduced to writing and signed by the parties with their names at the end.

So much of the act of June 2, 1862, 12 Stat. 411, entitled "An act to prevent and punish fraud on the part of officers intrusted with making of contracts for the Government," as was carried into the

Revised Statutes as section 3744 provides, so far as is here material, that:

> It shall be the duty of the Secretary of War, of the Secretary of the Navy, and of the Secretary of the Interior, to cause and require every contract made by them severally on behalf of the Government, or by their officers under them appointed to make such contracts to be reduced to writing, and signed by the contracting parties with their names at the end thereof; * * *.

The requirement of said section has been held to be mandatory and imperative, *Clarke* v. *United States*, 98 U. S. 539; Monroe v. *United States*, 184 *id.* 524. Section 3709, Revised Statutes, requires advertising for supplies or services when the public exigency does not require immediate delivery of the articles or performance of the service, but even where advertising may be dispensed with on account of an exigency, the requirement that a contract therefor be signed by the parties with their names at the end must be complied with in the absence of specific statutory exception to such requirement. The mandatory and imperative requirement of the law obtains whether the purchase be an emergency one or not, and delivery of supplies or performance of services under an agreement which fails to comply therewith imposes no contractual obligation on the United States. See *Export Oil Corporation* v. *United States*, 57 Ct. Cls. 519. As to the Department of the Interior, the act of May 18, 1916, 39 Stat. 126, waived advertising for small purchases not exceeding $50 each for the Indian Field Service; the act of June 12, 1917, 40 Stat. 144, for the Geological Survey, the act of July 1, 1918, 40 Stat. 672, for the Bureau of Mines, and the act of July 1, 1918, 40 Stat. 675, for the Reclamation Service, waived advertising for the respective field services for purchases not exceeding $50 each and authorized them to be made "in the manner common among business men." Both the requirement of advertising and execution of contracts as to transactions not to exceed $100 in any instance in any bureau or office in the Department of the Interior are waived by an express statutory provision in the act of June 5, 1924, 43 Stat. 392, but prior to said enactment there appears no waiver applicable to the Department of the Interior field service generally, or to the General Land Office specifically. By recognized canons of statutory construction that which is not excepted is within the requirement; and contracts for the General Land Office field service entered into for any amount prior to June 5, 1924, or in excess of $100 on or after said date are required by law to be reduced to writing and signed by the contracting parties with their names at the end whether the purchase or service be an emergency one or not, unless the delivery of the purchase or performance of the service and payment therefor were simultaneous transactions which have been held to be not within the requirement. 3 Comp. Gen. 314.

The only officers or employees in the Department of the Interior, other than the Secretary of the Interior, authorized to contract on behalf of the United States, are the officers under the Secretary of the Interior "appointed to make such contracts." In other words, an officer of the Department of the Interior, except the head of the department, can not bind the United States by contract, unless appointed or designated by the Secretary of the Interior for that purpose. See *Baltimore & Ohio Railroad Co.* v. *United States*, 261 U. S. 592, as to the effect of the absence of authority to contract on behalf of the United States. Where the officer has been appointed or designated as a contracting officer he can not ignore the mandatory and imperative requirements of section 3744, Revised Statutes, on the ground of "expedition and dispatch of the public's business," or that it could "serve no further useful purpose whatever for the economical administration and expeditious execution of Government affairs," as appears to be urged in this case. The Congress, with the approval of the President of the United States, had deemed it necessary, with the exceptions hereinbefore cited, for the prevention of fraud on the part of officers intrusted with the making of all contracts for the Department of the Interior, to require certain formalities to be observed in the acquisition of supplies or services, including the reduction of the contract to writing and the signing by the parties with their names at the end. As was succinctly stated by Chief Justice Marshal in *Dixon* v. *United States*, 1 Brockenbrough, 177, the contracting officer—

> * * * is a ministerial officer, whose business it is to pursue the statute, and if he fails to do so, the statute will not sanction his act * * *. That in this particular case, the condition inserted may not be in hostility to the general views of the legislature, can not materially vary the question, for it is not warranted by the statute; and if the officer be at liberty, under the color of office, to introduce such conditions as his own judgment may approve then his judgment and not the statute becomes the director of his conduct.

The fact that the requirements of a statute may work a hardship in a particular case does not justify excepting said case therefrom. *Corona Coal Co.* v. *United States*, 263 U. S. 537.

It is not understood how it could be seriously contended at this late day and in view of the decisions of the courts and of the accounting officers of the United States as to the mandatory and imperative requirements of section 3744, Revised Statutes, that there is any discretion whatever in any officer of the Department of the Interior as to whether contracts for the purchase of supplies or services other than personal, with the exceptions noted, should be reduced to writing and signed by the parties with their names at the end.

The question of whether contracts involving more than $100 for the hire of automobiles for the use of employees of the field service of the various bureaus of the Department of the Interior should be excepted from the requirements of section 3744, Revised Statutes, is for the consideration of the Congress, and unless and until such an exception is made the requirement exists and should be complied with, and where such requirements are not observed this office must refuse disbursing officers credit for payments of such hire and report the matter to the Congress as an expenditure made in violation of law.

If contracts are not executed for the hire of automobiles for the field service of the Department of the Interior for the reason that the field service employee concerned has not been designated as a contracting officer, the rental vouchers bearing the written approval of the chief of the bureau concerned, together with written statements from one or more persons engaged in the same vicinity in the hire of automobiles as to what they consider a reasonable rental for the machine used should be forwarded to this office for direct settlement as claims. The reason why such claims for rental in the absence of a properly executed contract should not be paid by disbursing officers is that they involve doubtful questions of law and fact, especially fact as to what is a reasonable rental on a *quantum meruit* basis for the automobile. See in this connection letter to you dated April 16, 1924, in the matter of payment by disbursing officers of claims for liquidated damages.

Payment by a disbursing officer of the voucher herewith returned is unauthorized. When it has been administratively acted upon by the Commissioner of the General Land Office, or the Secretary of the Interior, it should be forwarded to this office for direct settlement as a claim, together with evidence as to reasonable rentals in the vicinity of Glasgow, Mont., for an automobile such as was used.

(A-2804)

LEAVE OF ABSENCE—TEMPORARY EMPLOYEES OF NAVY YARDS AND NAVAL STATIONS

The leave of absence authorized to employees of navy yards and naval stations by the act of August 29, 1916, 39 Stat. 617, may be granted only such employees as hold permanent appointments of indefinite duration at the time the leave is taken; such employees may be given credit in computing their accrued leave for the time served under a prior temporary appointment immediately preceding or separating permanent appointments if the employment has been continuous.

Employees of navy yards and naval stations serving under a temporary appointment of twelve months or more duration, or a number of temporary appointments of less duration aggregating twelve months or more are not

entitled to the leave of absence authorized to employees of navy yards and naval stations by the act of August 29, 1916, 39 Stat. 617, irrespective of whether their employment is or is not to be continued after such leave would have expired. 3 Comp. Gen. 382, affirmed.

Comptroller General McCarl to the Secretary of the Navy, July 5, 1924:

I have your letter of May 13, 1924, requesting decision of a number of questions relative to leave of absence of employees of navy yards and naval stations, as follows:

Are employees serving under temporary appointments for a period of twelve consecutive months or more entitled to accrued leave with pay if they are continued in employment after expiration of such leave?

Are employees serving under temporary appointments for a period of twelve consecutive months or more entitled to accrued leave with pay if they are not continued in employment after expiration of such leave?

Are employees serving under a number of temporary appointments aggregating twelve consecutive months or more entitled to accrued leave with pay?

Are employees serving under temporary appointments, who are subsequently permanently appointed without break in the continuity of service, entitled to accrued leave with pay from the date of their temporary appointment after twelve consecutive months of service in both temporary and permanent status?

Are shop employees serving under permanent appointments who are given temporary appointments in office ratings and later permanent appointments as such or, after termination of temporary appointments as office employees, returned to their shops in a permanent status, entitled to accrued leave with pay at the expiration of twelve consecutive months' service?

What is the meaning of the words "permanent" and "temporary" as used in the decision of the comptroller of December 19, 1923? The word "permanent" above quoted is construed by the department in accordance with the rules of the Civil Service Commission to mean "probational" or absolute. Probational appointments are made as a result of certification of eligibles from registers established as a result of examination. Such appointments become absolute upon completion of the established probationary period, provided the incumbent is not separated on or before the expiration of the probationary period on account of being unsatisfactory.

The word "temporary" is understood to refer to those employees who have not yet attained a probational status—who have not established qualifications for eligibility in accordance with the regulations governing the employment of labor at navy yards, or who have filed applications which have not been graded and have been appointed temporarily in the absence of qualified eligibles or in the case of employees of the clerical, drafting, and technical forces, etc., those employees appointed under Sections 1, 2, 3, and 4 of Rule VIII of the civil service rules.

The act of August 29, 1916, 39 Stat. 617, provides for leave of absence of employees of navy yards and naval stations as follows:

* * * That each and every employee of the navy yards, gun factories, naval stations, and arsenals of the United States Government is hereby granted thirty days' leave of absence each year, without forfeiture of pay during such leave: *Provided further*, That it shall be lawful to allow pro rata leave only to those serving twelve consecutive months or more: *And provided further*, That in all cases the heads of divisions shall have discretion as to the time when the leave can best be allowed: *And provided further*, That not more than thirty days' leave with pay shall be allowed any such employee in one year: * * *.

In decision of December 19, 1923, 3 Comp. Gen. 382, it was said:

The context of the enactment limits its application to those who are in service over one year and thus contemplates permanent appointments of indefinite duration, so that they can accumulate the leave as provided by the act. It negatives application thereof to one temporarily employed. It is apparently inconsistent with temporary employment to grant prolonged leave.

The original appointment of the employee in this case was temporary for not to exceed ninety days. The fact that by successive temporary appointments employment lasted for a year does not itself entitle to leave.

The statute makes the condition that pro rata leave may be granted only to those serving twelve consecutive months or more, the effect of which is to prohibit granting of any leave during the first service year.

The first four questions submitted relate to leave of absence of temporary employees. As stated in the decision cited, 3 Comp. Gen. 382, a prolonged leave of absence with pay is inconsistent with temporary employment. The granting of leave after 12 months' service stipulated by the statute shows it had relation to employees having some permanency of tenure. A temporary employment implies a certainty of ending the employment and it is assumed that in the temporary employments referred to, the appointments designate the period of employment and are renewed from time to time, so that the employment has a fixed time for ending although it may be renewed. This then must be the condition of employment when a question of leave arises—that under the current appointment the employment will end at a certain date unless renewed. There appears under such conditions no right to grant leave of absence with pay. It is understood that the temporary employment is either because the employee can not qualify as a regular employee or the work conditions are such that employment as a regular employee would not be authorized.

Questions 1, 2, and 3 are answered in the negative.

Questions 4 and 5 are answered in the affirmative. See 27 Comp. Dec. 1031.

The definition in question 6 is affirmed.

(A-3424)

TELEPHONES IN PRIVATE RESIDENCES—ALASKA RAILROAD OFFICIALS

The prohibition in section 7 of the act of August 23, 1912, 37 Stat. 414, against the use of appropriated moneys for telephone service installed in private residences, is applicable to telephones in the residences of officials of the Alaska Railroad; such telephones can not be classed as operating expenses of the road and paid for from the earnings of the road in order to overcome the statutory prohibition.

Comptroller General McCarl to the Secretary of the Interior, July 5, 1924:

I have your letter of June 10, 1924, inclosing vouchers for rental of telephones installed in houses occupied by officials of the Alaska Railroad, and requesting decision whether payment for such service is authorized.

It is reported that the officilas in question are directly in charge of the operation of the Alaska Railroad; that the telephones in their private residences are deemed essential in order that the officials may be reached promptly in case of necessity; and that it is usual to provide such facilities for the proper and efficient operation of a railroad.

Section 7 of the act of August 23, 1912, 37 Stat. 414, provides as follows:

> That no money appropriated by this or any other act shall be expended for telephone service installed in any private residence or private apartment or for tolls or other charges for telephone service from private residences or private apartments, except for long-distance telephone tolls required strictly for public business, and so shown by vouchers duly sworn to and approved by the head of the department, division, bureau, or office in which the official using such telephone or incurring the expense of such tolls shall be employed.

The language of the section quoted is plain and comprehensive and has been uniformly construed in a long line of decisions to prohibit the furnishing at public expense of personal telephone service to a Government officer or employee in his private home or quarters. See 19 Comp. Dec. 198, 202, 212, and 350; 21 *id.* 248; 22 *id.* 602.

The act of March 12, 1914, 38 Stat. 305, was an act authorizing the President to locate, construct, and operate railroads in the Territory of Alaska. It is provided in said act, page 307:

> The authority herein granted shall include the power to construct, maintain, and operate telegraph and telephone lines so far as they may be necessary or convenient in the construction and operation of the railroad or railroads as herein authorized and they shall perform generally all the usual duties of telegraph and telephone lines for hire.
>
> That it is the intent and purpose of Congress through this Act to authorize and empower the President of the United States, and he is hereby fully authorized and empowered through such officers, agents, or agencies as he may appoint or employ, to do all necessary acts and things in addition to those specially authorized in this Act to enable him to accomplish the purposes and objects of this Act.

The paragraph last quoted has been construed in a number of decisions of the Comptroller of the Treasury and has been held to confer broad powers upon the President. See 22 Comp. Dec. 463; 23 *id.* 269; 70 MS. Comp. Dec. 154; 74 *id.* 189. The broad powers conferred by the act of March 12, 1914, are, however, subject to statutory limitations in the same manner as in other instances in which administrative or executive discretion is vested. The discretion is a legal discretion and not an unlimited discretion. You are advised, therefore, that the appropriation, "Maintenance and operation of the Alaska railroads" is not available to pay for the service in question.

Section 3 of the act of March 12, 1914, 38 Stat. 307, provides:

> That all moneys derived from * * * the earnings of said railroad or railroads * * * above maintenance charges and operating expenses, shall be paid into the Treasury of the United States as other miscellaneous receipts are paid, * * *.

The statutory prohibition upon the use of appropriated moneys for telephones in private residences applies likewise to the use of the revenues from operation of the railroad—such telephones can not be classed as operating expenses to overcome the statutory prohibition upon private residence telephones at Government expense.

(A–2796)

PURCHASE OF REAL ESTATE

A contract for the sale of a tract or tracts of real estate for a specified lump sum followed by a formal deed naming a like lump sum, the boundaries of the tracts being clearly defined or identified in both sale agreement and deed, constitutes the price so specified the entire consideration for the sale, notwithstanding the stated acreage differs in both instruments and the contract of sale contained a statement that the lump-sum price named was "at the rate of twenty dollars per acre for each acre that the survey to be made * * * may disclose."

Decision by Comptroller General McCarl, July 7, 1924:

Alex Bremer has requested review of settlement No. M–19808, this office, dated December 12, 1923, disallowing his claim for $700 representing $20 per acre for 35 acres in excess of the acreage stated in an agreement to sell to the United States a tract of land adjacent to the Leon Springs Military Reservation, Tex., authorized to be purchased by the appropriation act of July 9, 1918, 40 Stat. 877.

Under date of September 14, 1917, the United States entered into a lease for the fiscal year 1918, with Alex Bremer, covering a tract of land adjacent to the Leon Springs Military Reservation in Texas, described by naming the owners of the land by which the tract was bounded and stated as containing 1,753 acres, more or less. A similar lease was executed April 22, 1918, for the fiscal year 1919, with a right of renewal. Each of these leases contained an option to purchase by the United States. Renewal agreement was entered into July 1, 1919, for the fiscal year 1920, and again on June 8, 1920, for the fiscal year 1921. June 30, 1919, there was entered into the following agreement of sale and purchase between the United States and the lessor of the land:

That said party of the first part, for and in consideration of the sum of one dollar ($1.00) and other good and valuable consideration, to him in hand paid by said party of the second part as part of the purchase price, the receipt whereof is hereby acknowledged, hereby agrees to sell to said party of the second part, and said party of the second part hereby agrees to purchase from said party of the first part, for the sum or price of thirty-five thousand and sixty ($35,060.00) dollars, which is at the rate of twenty ($20.00) dollars per acre for each acre that the survey to be made of the said property hereinafter described may disclose, all of the following real property, to wit:

All that certain tract or parcel of land lying and being situated in the county of Bexar, State of Texas, adjacent to the Leon Springs Reservation of the United States Government, and bounded on the north by the lands of Otto Scheel and Max Toepperwein; on the east by Stowers Ranch; on the south by the Stowers Ranch; on the west by the John B. Muesser lands. Said land above described containing 1,753 acres, more or less.

The deed was executed December 21, 1920, and the purchase price specified in the agreement, $35,060, was paid by check dated December 20, 1920. The voucher on which this payment was made was executed more than a year after the survey had been made. Said voucher stated the purchase price for the land as $35,060 without any reference to a price per acre and was certified by claimant as correct. The same description of the land appearing in the agreement to sell appeared in both leases, both renewal agreements, and the voucher on which payment was made. The acreage in each instance was given as 1,753 acres, more or less.

Between the date of the execution of the agreement to sell and the execution of the deed a survey was made of the tract by the Government and it was found that it contained 1,768 acres, or 35 acres in excess of that stated in all of the mentioned instruments. Claimant is contending that because of the use of the words in the agreement of sale "which is at the rate of twenty ($20.00) dollars per acre for each acre that the survey to be made of the said property hereinafter described may disclose" he is entitled to an additional $700, representing $20 per acre for the excess of 35 acres over and above the acreage stated in the agreement and other instruments.

An examination of the deed which conveyed the property to the United States, on file in the office of the Judge Advocate General of the Army and approved by the Attorney General, discloses that the consideration is given specifically as $35,060, without any rate per acre having been mentioned, receipt of which is acknowledged. The land conveyed is not described by the description appearing in the agreement of sale, leases, and renewals, nor in accordance with the Government survey which had been made since the execution of the agreement to sell, but in accordance with the descriptions appearing in deeds by which five smaller tracts of land had been conveyed to Alex Bremer and which comprised the tract of land conveyed to the United States. This same description and acreage appear in the title papers approved by the Department of Justice. The acres of the five smaller tracts are given as follows:

First tract	239 acres.
Second tract	580.2 acres.
Third tract	239.2 acres.
Fourth tract	54.4 acres.
Fifth tract	646.4 acres.
Total	1,759.2 acres.

Thus there are three different acreages given for the same tract of land, viz, 1,753 acres, more or less, appearing in the leases, renewals, and contract of sale, 1,759.2 acres appearing in the deed, and 1,768 acres appearing in the Government survey.

Considering all the instruments affecting this property and the transactions involved with relation to each other, it seems reasonably clear that both the seller and the purchaser had in mind a specific price for a specific piece of property. The seller had leased the property to the United States for a number of years, and there could have been no doubt in the minds of either as to the extent of the tract intended to be conveyed. In the contract of sale a specific lump-sum price is stated and a specific tract of land is described and the acreage is given "more or less." These are the controlling elements in determining the price of the land. While the basis on which the price was fixed therein was stated to be $20 per acre "for each acre that the survey to be made of the said property hereinafter described may disclose," that basis of description and rate per acre were not adopted in the deed conveying the property, although the survey had been made prior to the execution of the deed, and therefore such a basis of payment can not be held to prevail over the specific lump-sum price given, and does not constitute a basis for a legal claim for an additional amount for the excess acreage shown by the Government survey.

The contention that the reason only $35,060 was paid at the time the deed was executed was because that was the amount of money appropriated for the acquisition, and that there was an understanding that an additional payment would be made when funds were appropriated therefor does not appear to be supported by the facts, as the appropriation from which the payment was made was an appropriation of $88,880, made in the act of June 5, 1920, 41 Stat. 965, and no additional appropriation for said purpose has since been made.

Upon review the settlement is sustained.

(A-3250)

PUBLIC BUILDINGS—IMPROVEMENTS BY EXCHANGE OF EQUIPMENT

The appropriation in the act of July 1, 1918, 40 Stat. 723, for the "improvement of central power plant," at the Boston Navy Yard, is available for the cost of installing in the submarine base at New London, Conn., a 500-kilowatt turbo-alternator in order to procure from that submarine base for installation in the Boston Navy Yard a 1,500-kilowatt machine resulting in the improvement of the Boston plant at a considerable saving to the Government.

Comptroller General McCarl to the Secretary of the Navy, July 7, 1924:

There has been received your letter of June 3, 1924, requesting decision as to whether you are authorized to use the appropriation made for improvements to the central power plant, navy yard,

Boston, Mass., for the purpose of paying expenses rendered necessary in installing a 500-kilowatt turbo-alternator at the submarine base, New London, Conn., to take the place of a 1,500-kilowatt alternator removed from that place for use at the Boston Navy Yard in furtherance of the purpose for which the appropriation in question was made.

The appropriation involved appears to have been made by the act of July 1, 1918, 40 Stat. 723, making appropriations for public works, Bureau of Yards and Docks, naval service, for the fiscal year 1919, and reads:

> NAVY YARD, BOSTON, MASSACHUSETTS: Improvement of central power plant, $425,000; water front improvements, $400,000; machine shop and foundry, $900,000; in all, $1,725,000.
>
> * * * * * * *
>
> Total public works, $46,694,375, and the amounts herein appropriated therefor, except for repairs and preservation at navy yards and stations, shall be available until expended.

It appears from the report from the Bureau of Yards and Docks, Navy Department, that the Boston Navy Yard required for its power plant a 1,500-kilowatt turbo-alternator, but funds were not sufficient for the purchase of a new machine; that during the war three turbo-alternators of the desired type had been installed at the submarine base, New London, Conn., but after the war, owing to the light load being carried, were being operated uneconomically; that the submarine base agreed to permit the transfer of one of the 1,500-kilowatt machines there installed to the navy yard, Boston, provided there could be installed in its place one 500-kilowatt machine, and that a machine of that capacity was available for transfer and was transferred to the submarine base from the naval air station, Pensacola, Fla., for installation. It is stated in this report that by reason of these transfers funds of considerable amounts were saved to the Government and that the benefit derived from the transfers and the installations are for the benefit of the navy yard, Boston, resulting in an improvement of the power plant at that place and could not have been accomplished without the use of funds available for the improvement of the power plant at the Boston Navy Yard.

The question then for decision is whether the funds made available for improvements to the central power plant of the Boston Navy Yard may be used for the purpose of installing the 500-kilowatt alternator at the submarine base at New London, Conn., to take the place of the 1,500-kilowatt machine transferred to the Boston Navy Yard. The use of such funds for the indicated purpose is authorized only in the event the purpose for which the appropriation was made was thereby accomplished. There can be no question but what the money appropriated for improvements to the central power plant,

had the balance remaining been sufficient for the purpose, would have been available not only for the purchase of a new alternator but for all expenses connected with its installation. Had a new machine been purchased instead of utilizing a like machine available for the purpose, which was installed at another station where a smaller machine would suffice for the present and future needs of that station, an economic waste would have resulted from that procedure, whereas by adopting the method of transferring the machines to the places where their greatest utility could be secured and taken advantage of, needed improvements to the central power plant at the Boston Navy Yard were accomplished and at the same time a considerable amount of Government funds is shown to have been saved in the operation.

The law requires and the accounting officers have uniformly held that where funds are appropriated for a particular object they can only be used for the specific object for which the appropriation is made, but under the circumstances in this case, it appearing that the expense of installing the smaller alternator to take the place of the one removed to the Boston Navy Yard being in furtherance of the object for which funds were appropriated, and of no benefit to the submarine base at New London, it may be held that the appropriation in question is available for the purpose of meeting the expenses rendered necessary in installing the smaller alternator at the submarine base, as such installation is but a means of accomplishing the object or purpose for which said appropriation was made, and you are advised accordingly.

(A–3874)

MILEAGE FROM ATLANTIC TO PACIFIC PORT—ARMY OFFICER

Travel by an officer of the Army performed prior to June 10, 1922, on a Government transport, under competent orders without troops, from a Pacific port to an Atlantic port via the Panama Canal, is travel in "home waters" within the purview of the act of June 12, 1906, 34 Stat. 246, and entitles the officer to mileage at 4 cents per mile (7 cents less 3 cents per mile) for the distance computed by the shortest usually traveled route between the two ports.

Decision by Comptroller General McCarl, July 8, 1924:

First Lieut. Vance W. Batchelor, Third Cavalry, United States Army, applied July 17, 1923, for review of settlement W–550085, dated May 5, 1923, disallowing his claim for mileage from Monterey, Calif., to Fort Ethan Allen, Vt., and finding him indebted to the United States in the sum of $28.06. His request for review is based on decision of the Court of Claims, decided July 2, 1923, 58 Ct. Cls. 475, case of Capt. George A. Moore.

Travel was performed pursuant to paragraph 6 of Special Orders, No. 260–O, War Department, dated November 8, 1921, which provides:

Each of the following-named officers of the Cavalry arm is relieved from assignment to the 17th Cavalry and is assigned as hereinafter indicated:

* * * * * * *

Captain *Vance W. Batchelor*—1st Training Center Squadron, Fort Ethan Allen, Vermont.

* * * * * * *

Each of the officers named will proceed from the Presidio of Monterey, California, to Mare Island Navy Yard, Calif., at such time as will enable him to proceed on the United States naval transport *Henderson* scheduled to leave that station on December 2, 1921, for New York City. Upon arrival at New York City each officer will proceed to the station indicated and join the organization to which assigned. The travel directed is necessary in the military service and is chargeable to procurement authority FD 41 P 2451 A 2. (AG—210.313, Cav., 10–7–21.)

The act of June 12, 1906, 34 Stat. 246, so far as here material, provides:

* * * That hereafter officers, active and retired, when traveling under competent orders without troops * * * shall be paid seven cents per mile and no more; distances to be computed and mileage to be paid over the shortest usually traveled routes, with deductions as hereinafter provided; * * * *And provided further*, That for all sea travel actual expenses only shall be paid to officers, * * * when traveling on duty under competent orders, with or without troops, and the amounts so paid shall not include any shore expenses at port of embarkation or debarkation; but for the purpose of determining allowances for all travel under orders, or for officers and enlisted men on discharge, travel in the Philippine Archipelago, the Hawaiian Archipelago, the home waters of the United States, and between the United States and Alaska shall not be regarded as sea travel and shall be paid for at the rates established by law for land travel within the boundries of the United States.

In construing the above provision of the act of June 12, 1906, it was held by the Court of Claims in the case of *George A. Moore* v. *United States*, decided July 2, 1923, 58 Ct. Cls. 475, that where an Army officer is ordered to proceed from a station on the Pacific coast to a station on the Atlantic coast, via the Panama Canal, it is travel in "home waters" and not "sea travel," and he is entitled to his mileage by the shortest usually traveled route between the two stations.

This office in decision of June 2, 1922, 1 Comp. Gen. 717, determined that such travel was not in the "home waters" of the United States. Section 12 of the act of June 10, 1922, 42 Stat. 631, repealed the sea travel portion of the act of June 12, 1906, upon which the decision was based. It also appears the Moore case in the Court of Claims was not appealed; no reason appears for now enforcing the decision, 1 Comp. Gen. 717, and it will not hereafter be followed.

As claimant performed travel on a Government transport, under competent orders without troops, from a Pacific port to an Atlantic port via Panama Canal, he is entitled to mileage at 4 cents per mile (7 cents less 3 cents per mile) for the distance computed by

the shortest usually traveled route, from Monterey, Calif., to Fort Ethan Allen, Vt.

Claimant's account is stated as follows:

CREDITS

By mileage from Monterey, Calif., to Fort Ethan Allen, Vt., 3,393 miles @ 4¢ per mile	$135.72
By amount refunded by claimant as overpayment on voucher 16	58.99

DEBITS

To amount paid claimant on voucher 4	$26.67	
To amount paid claimant on voucher 16	136.69	
Difference (balance due claimant)	32.35	
	194.71	194.71

Upon this review of the settlement $32.35 is certified due claimant.

(A–3643)

CLASSIFICATION OF CIVILIAN EMPLOYEES—TEMPORARY PROMOTIONS

The "existing compensation" to be used as a basis for computing the initial salary under the classification act of March 4, 1923, is the compensation of the position actually held by the employee on June 30, 1924, whether temporarily or permanently.

Comptroller General McCarl to the Librarian, Library of Congress, July 8, 1924:

I have your letter of June 30, 1924, requesting decision whether "existing compensation" within the meaning of rule 1, section 6, of the classification act of 1923, establishing rules for fixing the initial compensation of civilian employees July 1, 1924, should be as of June 30, 1924, and if so, whether under the practice in force in your office of granting "temporary promotions" during the absence of employees, the controlling salary would be the position held under such temporary promotion or the permanent position of the employee.

Section 2 of the classification act of March 4, 1923, 42 Stat. 1488, expressly includes the Library of Congress within its provisions.

The decision of June 26, 1924, 3 Comp. Gen. 1001, held, in answer to question submitted by the Civil Service Commission, that in proceeding under rule 1 of section 6 of the classification act the "existing compensation" is to be construed as of June 30, 1924.

No "temporary promotions" may be excepted under this rule. The existing compensation as of June 30, 1924, has relation to the position actually held on that date, whether temporarily or permanently. See definition of term "employee" in section 2 of the classification act.

(A-2624)

MILEAGE—TRAVEL ALLOWANCE—UNIFORM GRATUITY—MARINE CORPS RESERVE

The discharge of an officer of the Marine Corps Reserve granted at the request of the officer and for his own convenience before the expiration of his term of enrollment does not entitle him to travel allowance under the act of March 2, 1901, 31 Stat. 902, nor is he entitled to mileage under the act of March 3, 1901, 31 Stat. 1029, for travel performed after discharge.

The discharge of an officer of the Marine Corps Reserve prior to the expiration of his enrollment and pursuant to his request or resignation is a severance "without compulsion on part of the Government" and requires the refund of the uniform gratuity credited to his account at date of enrollment.

Decision by Comptroller General McCarl, July 8, 1924:

Theophilus P. McClory, former second lieutenant, United States Marine Corps Reserve, applied April 17, 1924, for review of settlement No. 014315-N, dated March 6, 1924, wherein was disallowed his claim for travel pay from Marine Barracks, Parris Island, S. C., to Chicago, Ill., upon his discharge January 13, 1919.

The adjutant and inspector, United States Marine Corps, reports to this office that claimant enrolled for four years in the United States Marine Corps Reserve, class 4, on December 16, 1918, as a second lieutenant; reported for active duty the same day; and was disenrolled at his own request on January 13, 1919.

Claimant's letter of January 3, 1919, addressed to the Major General Commandant, recited:

1. I hereby tender my resignation as a second lieutenant, provisional, class 4, in the United States Marine Corps Reserve.
2. My reasons are as follows:
Prior to my enlistment in the United States Marine Corps I was attending the Kent College of Law, of Chicago, Ill. If released, I will return at once to complete my course.
3. If approved, I wish my resignation to take effect on or before January 31st, 1919, in order that I may enroll in the special course in law offered to men released from the service. This course will commence February 4th, 1919.

Under date of January 9, 1919, the Major General Commandant addressed the following to claimant:

1. In compliance with the request contained in reference * * * [your letter dated January 3, 1919] you are hereby discharged from the Marine Corps Reserve.
2. Your home address is on record at these headquarters as Riverside, Illinois.

Indorsement upon this letter shows its receipt by claimant January 13, 1919.

The act of March 3, 1901, 31 Stat. 1029, provided:

* * * That in lieu of traveling expenses and all allowances whatsoever connected therewith, including transportation of baggage, officers of the Navy traveling from point to point within the United States under orders shall hereafter receive mileage at the rate of eight cents per mile, distance to be computed by the shortest usually traveled route.

Under section 1612, Revised Statutes, officers of the Marine Corps received all pay and allowances at the same rates and under the same conditions as officers of the Army. By the act of June 10, 1896, 29 Stat. 376, they were placed on the same footing as officers of the Navy with respect to mileage, when "traveling under orders without troops," and section 1612 was, by implication, repealed so far as it related to mileage computed upon the Army law. 8 Comp. Dec. 123.

The provisions of the act of March 3, 1901, could not, however, apply to claimant, primarily because he was not an officer of the Marine Corps Reserve at the time he made the travel, and secondarily no orders were issued for travel.

As the act of March 3, 1901, referred, however, only to mileage when officers were traveling "under orders," the act of June 10, 1896, repealed section 1612 of the Revised Statutes only in so far as it affected officers of the Marine Corps when traveling "under orders," but did not deprive officers of the Marine Corps of "the same pay and allowances * * * as are or may be provided by or in pursuance of law for the officers * * * of the Army" when the matter of orders is not controlling. 25 Comp. Dec. 630.

The act of March 2, 1901, 31 Stat. 902, provides for the Army:

> * * * That hereafter when an officer shall be discharged from the service, except by way of punishment for an offense, he shall receive for travel allowances from the place of his discharge to the place of his residence at the time of his appointment or to the place of his original muster into the service four cents per mile; * * *.

It has long been a holding under laws authorizing travel allowance upon discharge "except by way of punishment for an offense," that the allowance is not payable where the discharge is granted at the request of and solely for the convenience of the person concerned. 7 Comp. Dec. 740; *United States* v. *Sweet*, 189 U. S. 471.

There is accordingly no law under which claimant can be paid mileage or travel allowance upon his discharge as an officer of the U. S. Marine Corps Reserve, and that part of settlement No. 014315–N, disallowing claim therefor is affirmed.

By settlement No. 014315–N, claimant was allowed $150 as uniform gratuity due at date of reporting for active duty as an officer in the United States Marine Corps Reserve. Claimant was not paid this gratuity at the time of his reporting for active duty by reason of the fact that he had executed a waiver thereof. The waiver in question has been held to be nonenforceable, in consequence of which the allowance was made. 3 Comp. Gen. 544.

The act of August 29, 1916, 39 Stat. 589, which authorized a uniform gratuity of $150 for officers of the Naval Reserve Force upon reporting for active service in time of war and made applicable to

the Marine Corps Reserve by the provisions creating the Marine Corps Reserve (p. 593 of the same act) contained this proviso:

> * * * That should any member of the Naval Reserve Force sever his connection with the service without compulsion on part of the Government before the expiration of his term of enrollment, the amount so credited shall be deducted from any money that may be or may become due him.

Claimant's connection with the Marine Corps Reserve was severed by the acceptance of a resignation tendered by him and was "without compulsion on part of the Government." The amount due at date of reporting was accordingly subject to refund to the Government at date of discharge, and as claim No. 014315–N was settled after discharge had occurred nothing was due claimant at that time, the amount required as a refund offsetting the amount which was due at date of reporting for active duty. Accordingly, the settlement is revised and $150 is certified due the United States.

Claimant is requested to make refund to this office of the $150 erroneously allowed, through check, draft, or postal money order payable to the Treasurer of the United States.

(A–1014)

TRAVELING EXPENSES—HIRE OF DOG TEAM FROM WIFE OF EMPLOYEE

Reimbursement to an employee of the Department of the Interior for use of a dog team, alleged to have been hired from his wife, is limited to an amount equal to the necessary cost of maintaining the dog team for the periods it was actually used for official travel.

Decision by Comptroller General McCarl, July 9, 1924:

C. C. Bester, special disbursing agent, Bureau of Education, Department of the Interior, has requested review of settlement C–4752–I, dated January, 23, 1924, in which was disallowed credit for payments made to Mrs. Jessie H. Mozee, Anchorage, Alaska, for rent of dog team to the superintendent for travel purposes, and for rent of building for use by the superintendent as an office and residence.

The reason given for the disallowance of these vouchers was that Mrs. Mozee is the wife of Superintendent B. B. Mozee, Bureau of Education, Anchorage, Alaska, who obtained the service.

In justification of the dog-team hire and payment therefor, the disbursing officer states:

> The dog team was used by the superintendent in the performance of his duties and as shown by the vouchers was the only team available. The reason given for disallowance of this claim, that Mrs. Mozee is the wife of Supt. Mozee, seems hardly sufficient in view of the fact that payment for exactly the same service and at the same rate has been made to Mrs. Mozee by the Treasury Department for the period Nov. 23, 1922 to January 17, 1923, in amount $448.00, * * * .

Attached to one of the vouchers is a statement by Superintendent Mozee, as follows:

1. The team was the only team available in the vicinity of my headquarters at the time.
2. Dogs were in great demand and purchase was impossible at any reasonable figure.
3. Any other team, had one been available, would have cost almost twice as much per day.
4. The Government did not purchase a pound of the feed used, but this was furnished by the owner of the team.
5. Feed was high in price all over the interior and many times cost as high as five dollars per day and at times more.
6. On the Kuskokwin River feed was somewhat cheaper and there a feed cost about $2.50 to $3.00 per day.
7. At Pioneer, dry fish cost 33⅓ cents per pound, making a feed cost about $1.00 per dog exclusive of tallow fed. * * *
8. To have hired teams from time to time during actual travel would have cost at least twice as much.
9. Taking into consideration the fact that the Government bought none of the feed, I believe this is the cheapest dog-team hire which I have known in the interior of Alaska.
10. At no time could we have dispensed with the team without serious consequences.
11. The following trips were made: * * *
12. To have attempted the trips in any other manner would have been an inexcusable blunder.

An act making appropriations for the Department of the Interior for the fiscal year ended June 30, 1923, Act of May 24, 1922, 42 Stat. 583, provides:

Education in Alaska: To enable the Secretary of the Interior, in his discretion and under his direction, to provide for the education and support of the Eskimos, Aleuts, Indians, and other natives of Alaska; erection, repair, and rental of school buildings; * * * pay and necessary traveling expenses of superintendents; * * * and all other necessary miscellaneous expenses which are not included under the above special heads, $360,000, to be available immediately; * * *

All expenditures of money appropriated herein for school purposes in Alaska for schools other than those for the education of white children under the jurisdiction of the Governor thereof shall be under the supervision and direction of the Commissioner of Education and in conformity with such conditions, rules, and regulations as to conduct and methods of instruction and expenditures of money as may from time to time be recommended by him and approved by the Secretary of the Interior.

The payments in question are evidenced by vouchers executed by Mrs. Mozee and certified administratively by her husband who received the service. Aside from any question as to such contractual relations between a Government employee and the United States, it has been repeatedly held that an employee may be reimbursed only the necessary expenses incident to the operation of his own conveyance used for official travel and, in such as the instant case, the payments to the wife were erroneous. The service having been rendered and the Government having benefited thereby the disbursing officer may be credited with an amount equal to the necessary cost of maintaining the dog team for the periods actually used for official travel, duly evidenced by such receipts and affidavits as may be obtainable and acceptable to this office in support of the expenses claimed.

Reimbursement of such traveling expenses is ordinarily payable only to the traveler but in this case payment to the wife is presumed to have been for their joint benefit and any adjustment on that account is not necessary. The difference between the amount of the actual necessary expenses and the amount paid should be promptly deposited in the Treasury.

Upon review the disallowance is removed and credit for the amount disallowed is suspended in the accounts of the disbursing officer for submission of the evidence indicated and deposit of the total amount overpaid, subsequent action to be taken thereon as in other cases.

With reference to the payments made to Mrs. Mozee for rent of building for use of the superintendent as an office and residence, attention is invited to the action taken in Review 6403, dated April 15, 1924, 32 MS. Comp. Gen. 617.

(A–3096)

PER DIEM IN LIEU OF SUBSISTENCE—TEMPORARY DUTY STATION

The status of an employee with respect to his right to per diem in lieu of subsistence when assigned to duty away from his regular duty station can not be determined solely from the length of stay at the place to which assigned. Orders authorizing an estimated absence from headquarters of 11 months but clearly indicating duty of a temporary character and directing return to headquarters upon completion of the duty assigned do not effect a change of permanent station or headquarters and entitle the employee to the allowance for subsistence attaching to an authorized travel status.

Decision by Comptroller General McCarl, July 10, 1924:

The Secretary of Commerce requested, May 6, 1924, review of settlement No. 628975, disallowing the claim of Dr. William C. Kendall of the Bureau of Fisheries for $116 per diem in lieu of subsistence for the month of February, 1924. The disallowance was for the reason that the extended length of Doctor Kendall's duty at Freeport constituted that place his headquarters rather than a temporary duty station. The orders under which Doctor Kendall performed this duty at Freeport were dated August 1, 1923, and read as follows:

Dr. WILLIAM C. KENDALL,
Freeport, Maine:

You are hereby directed to proceed by the shortest and most direct route from Washington, D. C., to Freeport, Maine, and such points in Maine as may be necessary for the purpose of investigation of Salmonidæ and on completion of this duty to return to Washington, D. C.

On the presentation of proper vouchers you will be reimbursed from the appropriation "Miscellaneous expenses, Bureau of Fisheries, 1924," subhead "Scientific inquiry," for your actual and necessary expenses while engaged as above.

You are also authorized to make such small purchases of articles of equipment and supplies and to employ such temporary help as emergency conditions may require for the efficient conduct of the above work.

Refer to the number of this order in your monthly account taking up expenses incurred and upon the face and coupon of Government requests for transportation issued for travel in connection therewith.

Estimated time: 11 months.

You will be allowed $4.00 per diem in lieu of subsistence, in accordance with the regulations governing travel.

The Commissioner of the Bureau of Fisheries explains Doctor Kendall's detail as follows:

Dr. Kendall has been an employee of the Bureau of Fisheries since 1889, except for about 2 years during 1921, '22, and '23, when he was with the Roosevelt Wild Life Forest Experiment Station, and during all of this time his home station has been Washington, D. C. In the summer of 1923 he was assigned to a study of salmon, trout, and smelt of the Northeast States and proceeded to Freeport, Maine, a point advantageously located for the studies he is engaged in. It has been necessary for him to remain for some time at this point in order to collect material and data essential to the proper prosecution of the investigation to which he has been assigned. During the winter his observations have been largely confined to the vicinity of Freeport, a locality where both smelt and salmon can be studied to the best advantage. With the coming of spring his duties will require field trips to the various streams and lakes of Maine. In the sort of work Dr. Kendall is doing it is absolutely necessary that a base be established from which these trips may be conducted with efficiency. Space for the care, storage, and study of specimens and data collected are essential. Freeport fulfills these requirements, and it would only be at considerable additional cost to the Government and with material loss in efficiency if Dr. Kendall was required to make Washington the base of his operations. It is impossible to state just how long the requirements of the investigation will demand that Dr. Kendall remain in the vicinity of Freeport, but on the completion of his present assignment he will return to Washington and make here his headquarters, as he has done for the past 30 years.

It is apparent from Doctor Kendall's travel orders and the nature of the assignment as explained by the commissioner that his detail was not a change of station but a mere detail to temporary duty away from his regular duty station. When an employee is assigned to duty away from his regular duty station his status with respect to traveling allowances can not be determined solely from the length of the stay at the place to which assigned.

Upon review, $116 is certified due the claimant.

(A-1750)

NAVAL RESERVE FORCE PAY—LONGEVITY—CADET SERVICE AT NAVAL ACADEMY—RETAINER PAY IN CONFIRMED STATUS

Service as a midshipman at the Naval Academy is not commissioned service and may not be counted for longevity pay purposes in computing the active duty pay of a member of the Naval Reserve Force under section 3 of the joint service pay act, 42 Stat. 627.

The issuance of a commission to a member of the Naval Reserve Force conferring confirmed rank from a date specified therein, such date being subsequent to the establishment of the officer's qualifications before the examining board entitles the officer to confirmed retainer pay only from the date fixed in the commission.

An officer of the Naval Reserve Force ordered to 15 days' active duty for training is entitled to pay for the actual number of days on duty, including travel time to and from his home.

Decision by Comptroller General McCarl, July 10, 1924:

Lieut. Horace A. Field, United States Naval Reserve Force, class 1, applied December 24, 1923, for review of settlement No. M–275619–N, dated November 24, 1923, wherein was disallowed his claim for three days' additional pay while on active duty for training in September, 1923. The claim was also for an additional amount for the entire period of the active duty based upon a rate of pay greater than that paid him by the disbursing officer.

On August 20, 1923, orders were issued to claimant directing him to report for physical examination to determine his fitness for duty. The orders further recite:

> 3. If found physically qualified you will proceed to Charleston, S. C., and at 9.00 a. m., 4 September, 1923, report to the commandant sixth naval district for fifteen days' temporary active duty on board the U. S. S. *North Dakota.*
> 4. At the termination of this duty you will regard yourself detached, will proceed, and report to such medical officer as may be designated by your commanding officer for physical examination. * * *
> 5. Upon the completion of this examination you will return immediately to the place to which these orders are addressed, and upon arrival regard yourself relieved from all active duty.

Indorsements on these orders state that claimant reported at the naval dispensary, navy yard, Charleston, September 4, 1923, and was examined and found qualified for duty; reported on the U. S. S. *North Dakota* September 5, 1923; detached from the U. S. S. *North Dakota* September 20, 1923; and arrived home September 21, 1923.

The Bureau of Navigation has furnished a statement of claimant's prior service, which shows service as a naval cadet from October 1, 1880, to June 29, 1886; appointed an ensign United States Naval Reserve Force, class 1, July 21, 1917, confirmed commission issued August 14, 1917, to rank as such from July 28, 1917; confirmed commission as lieutenant (j. g.) issued December 1, 1919, to rank as such from June 5, 1918; enrollment expired July 20, 1921; reenrolled as provisional lieutenant and confirmed lieutenant (j. g.) August 15, 1921.

The act of June 10, 1922, 42 Stat. 625–627, provides:

> That, beginning July 1, 1922, for the purpose of computing the annual pay of the commissioned officers of the * * * Navy below the grade of rear admiral * * * pay periods are prescribed, and the base pay for each is fixed as follows:
> The first period, $1,500; the second period, $2,000; the third period, $2,400; the fourth period, $3,000; the fifth period, $3,500; and the sixth period, $4,000.
> * * * * * * *
>
> Every officer paid under the provisions of this section shall receive an increase of 5 per centum of the base pay of his period for each three years of service up to thirty years: * * *.
> SEC. 3. That when officers * * * of the reserve forces of any of the services mentioned in the title of this act are authorized by law to receive Federal pay, those serving in grades corresponding to those of colonel, lieutenant colonel, major, captain, first lieutenant, and second lieutenant of the Army shall receive the pay of the sixth, fifth, fourth, third, second, and first periods, respectively. In computing the increase of pay for each period of three years' service, such officers shall be credited with full time for all periods

during which they have held commissions as officers of any of the services mentioned in the title of this Act, * * * or in the Naval Militia, or in the National Naval Volunteers, or in the Naval Reserve Force or Marine Corps Reserve Force, when confirmed in grade and qualified for all general service, with full time for all periods during which they have performed active duty under reserve commissions, and with one-half time for all other periods during which they have held reserve commissions.

Claimant's service as a cadet at the Naval Academy was not "commissioned" service and accordingly is specifically excluded by the provisions of section 3 from being counted for the increase of pay for each three years of service. Claimant had two days, July 21 and 22, 1917, of inactive service in provisional rank in the Naval Reserve Force, for which he is entitled to one-half credit or for one day; five days July 23 to 27, 1917, of active service in provisional rank for which he is entitled to full credit; and three years, eleven months, and twenty-three days, July 28, 1917, to July 20, 1921, of membership in the Naval Reserve Force, holding confirmed commission rank, for which he is entitled to full credit; and similarly he is entitled to full credit for the period from August 15, 1921. He was accordingly entitled on September 4, 1923, to credit for over six but less than nine years of service for increase of pay. 2 Comp. Gen. 768.

As a lieutenant on active duty he was entitled to base pay of the third period, $2,400 per annum, and by reason of length of service to a 10 per cent increase thereon, or $2,640 per annum. He was entitled to this rate for the period September 4 to 21, 1923, inclusive. 3 Comp. Gen. 349. He was paid by the supply officer of the U. S. S. *North Dakota* for the period September 5 to 19, 1923, inclusive, at $2,520 per annum ($2,400 plus 5 per cent). There is accordingly due claimant on this account $27.

It further appears from the pay rolls of the receiving ship at Charleston, S. C., that while on active duty from October 10 to 27, 1922, claimant was paid at the rate of $2,760 per annum ($2,400 plus 15 per cent). At that time he had over three but less than six years of service which could be counted for the longevity increase and was entitled only to $2,520 per annum ($2,400 plus 5 per cent). The difference represents an overcredit of $12.

Claimant's retainer pay account for the enrollment entered into on July 21, 1917, shows that he was paid from date of enrollment as a confirmed ensign.

The act of August 29, 1916, 39 Stat. 587, provides:

No person shall be appointed or commissioned as an officer in any rank in any class of the Naval Reserve Force, * * * unless he shall have been examined and recommended for such appointment, commission * * * by a board of three Naval officers not below the rank of lieutenant commander, nor until he shall have been found physically qualified by a board of medical officers to perform the duties required in time of war, except that former officers and midshipmen of the Navy, who shall have left the service under

honorable conditions and who shall have enrolled in the Naval Reserve Force, may be appointed in the grade and rank last held by them without examination other than the physical examination above prescribed.

It appears that by orders dated May 1, 1917, the Secretary of the Navy created an examining board which convened on July 25, 1917, and examined the previous naval record of claimant "preliminary to his confirmation as ensign in the Fleet Naval Reserve"; that on July 28, 1917, the board recommended confirmation; and on the same day the Secretary of the Navy approved the finding and recommendation. Had claimant been given confirmed rank from July 25, 1917, he would have been entitled to confirmed retainer pay as such from that date. 3 Comp. Gen. 120. The commission which issued, however, confirmed rank only from July 28, 1917, and it is only from that date that retainer pay as such was payable. Prior to that date claimant held only provisional rank. 3 Comp. Gen. 78.

Retainer pay credited July 21 to 27, 1917, at $70.83 per quarter, amounted to $5.51; at $12 per annum, the amount for this period is 53 cents. The difference is $5.28. The retainer pay account shows, however, an unpaid balance of $2.78 for the period July 21, 1917, to July 20, 1921. The net overpayment to claimant on this account is accordingly only $2.50.

From the $27 due claimant for the active duty in 1923, the $12 overpayment in 1922 and the $2.50 overpayment in retainer pay are deducted and $12.50 is certified due him.

(A-2865)

VETERANS' BUREAU—INSURANCE PREMIUMS

The fact that deductions were made from the pay of an enlisted man as premiums on war-risk insurance but were not paid to the Veterans' Bureau for a period during which no allotment of the enlisted man's pay for such premiums was in effect does not entitle the Veterans' Bureau to receive such deductions covering the period the policy had technically lapsed when the liability of the bureau to make payment on the policy has been canceled by the desertion of the soldier.

Decision by Comptroller General McCarl, July 10, 1924:

The United States Veterans' Bureau has requested review of settlement M-8819, dated November 24, 1923, disallowing its claim for amount of $29.25 deducted as insurance premiums from the pay of George Walter Carberry, seaman, second class, United States Navy, from October 21, 1921, to June 30, 1922.

George W. Carberry enlisted August 20, 1919, was discharged September 12, 1921, reenlisted September 16, 1921, and deserted January 7, 1923, and the records show him to be a deserter at large.

He executed an allotment authorizing deduction for insurance premiums from his pay effective from January 1, 1921, for a period of

nine months, which expired September 30, 1921. He did not execute an allotment authorizing deduction of premium payments from his pay covering the period October 1, 1921, to June 30, 1922. Notwithstanding that there was no allotment for this period, deductions of insurance premiums were made covering each month thereof, the total amount deducted being $29.25. He executed an insurance allotment effective from July 1, 1922, which was discontinued in January, 1923, when he deserted.

The Veterans' Bureau contends as follows:

2. As stated in the bureau's letter of November 12, 1923, this man was fully protected for the above period. The premiums in question were checked without protest from the insured, who expressed his desire to continue his insurance by registering another allotment, which bears his written signature effective July 1, 1922. Had this insurance become a claim while premiums were being checked, payment of the proceeds in accordance with the contract would not have been denied.

Section 400 of the war risk insurance act of October 6, 1917, 40 Stat. 409, provides for insurance "upon the payment of the premiums as hereinafter provided." Section 402 of the act provides that the director of the bureau shall fix the terms and conditions of contracts of insurance. Section 404 provides that regulations shall prescribe the time and method of payments of the premiums thereon.

Section 4065 of the regulations of the United States Veterans' Bureau, 1923, provides as follows:

When an insured provides for the payment of premiums by an allotment of his pay, any previous authorization for deduction from his pay or deposit for the payment of premiums shall be deemed to be revoked and his insurance shall lapse and terminate at the end of the grace period after the allotment of his pay expires, unless the insured registers a new allotment of his pay or executes an authorization for deductions from his pay or deposit, or otherwise makes payment of said premiums in order that each premium shall be paid upon the date it is due or within the grace period of 31 days, as provided by regulations and the terms of the United States Government life insurance policy. (T. D. 48 W. R., September 29, 1919, as modified by T. D. 66 W. R., June 2, 1921, which also modifies T. D. 49–A. This supersedes T. D. 44, which superseded parts of T. D. 32 and T. D. 33.)

This regulation was in force during the period here in question. Accordingly on September 30, 1921, the authorization for allotment of pay in this case expired and a new one was not in effect until July 1, 1922. The unauthorized deductions from the pay of the enlisted man and the execution of a new allotment covering a subsequent period were not a compliance with the regulations during the period here in question. There was at least a technical lapsing of the policy under the regulations during that period. What effect the execution of the new allotment would have had on the question of reinstatement need not now be decided in view of the desertion of the insured.

Under section 29 of the war risk insurance act, as amended by section 1 of the act of March 4, 1923, 42 Stat. 1521, all rights under

war-risk insurance policies are terminated upon desertion. 3 Comp. Gen. 465. Likewise a deserter forfeits all pay and allowances due him at the date of desertion. In view of the fact that the Veterans' Bureau would not, based on the present record of the insured, ever be required to make payments under the policy of insurance granted to this enlisted man, and that the unallotted pay of the deserter was forfeited, there is not sufficient basis for the claim of the Veterans' Bureau.

Upon review the settlement is sustained.

(A-3090)

CONTRACTS—AGRICULTURAL DEPARTMENT—AUTHORITY TO SIGN

Formal written contracts involving amounts in excess of $500 between the Department of Agriculture and corporations should be accompanied by a formal showing under the corporate seal of the authority of the signing officer to contract; in contracts involving less than $500 the authority of the signing officer of the corporation to contract may be established by the certificate of the contracting officer representing the Government to the effect that such officers are the same officers who are authorized to and do sign similar contracts on behalf of the corporation with the public generally. (Modified by 4 Comp. Gen. 885.)

Purchases by the various departments under General Supply Committee contracts need not be accompanied by evidence of the authority of the signing officer to contract, it being assumed that such evidence was contained in the General Supply Committee contract.

Comptroller General McCarl to the Secretary of Agriculture, July 10, 1924:

There has been received a letter dated May 24, 1924, from the Chief Clerk, Department of Agriculture, as follows:

Reference is made to * * * letters * * * addressed to me * * * all of which request me to furnish documentary evidence under seal showing the authority of contracting officers or agents to execute certain specific instruments (leases) listed, or in lieu thereof, certificates from the Government contracting officers showing that they have in each instance fully satisfied themselves as to the authority of the corporate officers or agents to execute the instrument. The statement is made that the authority of corporate officers to sign must be affirmatively established in each instance.

I have the honor to request information as to whether contracts with corporations for supplies and services on the basis of informal proposals must in each instance be supported by (1) evidence under seal of the authority of the corporate officers to sign, or (2) by a certificate from the Government contracting officer to the effect that he has satisfied himself of such authority. * * *.

In the Department of Agriculture purchases in amounts over $50.00 are made either on General Supply Committee Contract or upon informal proposals. These proposals are in writing and in many instances are from corporations. A proposal accepted by the department becomes a contract. In the course of a year scores of proposals are received from corporations. Delivery of the goods or completion of the work provided for in these proposals is usually accomplished within a short time. In an experience of ten years in handling such proposals this department has never known a case where the corporations have advanced, as a reason for not executing their contract, the alleged fact that the officer signing the proposal was not authorized to do so.

The submission in this particular instance will be regarded as coming from you and will be answered accordingly.

Generally, as to the form of leases, etc., see Circular No. 109, issued June 1, 1923, by the Director, Bureau of the Budget, "By direction of the President."

As to the authority of corporate officers to sign contracts with the Government for and on behalf of the corporations, it was said in 3 Comp. Gen. 436, quoting from the syllabus, that:

> The authority of officers of corporations generally to sign contracts with the Government on behalf of the corporation must be affirmatively established in each instance, usually by filing with the contract extracts from the articles of incorporation, by-laws, or minutes of the board of directors, duly certified by the custodian of such records under corporate seal.
>
> The authority of officers of public-service corporation, such as telegraph and telephone companies, to sign contracts on behalf of the corporation may be established by a certificate by the contracting officer representing the Government to the effect that such officers are the same officers who are authorized to and do sign regular service contracts on behalf of the corporation with the public generally; when so certified the absence of the seal of the corporation will not be objected to.

In 3 Comp. Gen. 467, quoting from the syllabus, it was said:

> The authority of officers of corporations to sign contracts with the Government on behalf of the corporation, in all cases where the amount is less than $500, may be established by a certificate by the contracting officer representing the Government to the effect that such officers are the same officers who are authorized to and do sign similar contracts on behalf of the corporation with the public generally.

The decisions of this office, cited, state the general rule to be followed—that formal written contracts involving in excess of $500 should be accompanied by a formal showing under corporate seal of the authority of the signing officers to contract; less formal contracts of the Department of Agriculture—which here may be classed as those involving expenditures not in excess of $500 such as usually are made by simple proposal and acceptance—should show the authority to contract by certificate of the contracting officer, unless the bidder sets forth such authority in the proposal. The requirement of a more formal showing of authority to contract in those minor matters, to wit, involving amounts under $500, may be considered as waived. It may be assumed that the General Supply Committee contracts contain a showing of the authority to contract, and purchases by the respective departments, etc., thereunder require no further showing of such authority.

There would appear to be no room for doubt that the interests of the United States require that the authority of officers of corporations to bind such corporations to Government contracts should "be affirmatively established in each instance," either by furnishing the certificate mentioned or by attaching to the agreement or contract the written evidence of authority to bind the corporation.

With respect to contracts heretofore filed, except as to those cases in which the information may be hereafter specifically requested, no further question need be raised as to the authority of the signing officers to bind their respective corporations.

(A–2102)

TRANSPORTATION OF DEPENDENTS OF ARMY OFFICER

Travel performed by a minor son of an Army officer from the officer's old station to a point other than the new station, necessitated by the change of station and performed after receipt of orders for the change, although before their effective date, the orders not being revoked before the change of station is actually accomplished, entitles the officer to reimbursement, under section 12 of the act of June 10, 1922, 42 Stat. 631, of an amount equal to the commercial cost of transportation for the travel performed, not exceeding the cost from the old to the new station.

Decision by Comptroller General McCarl, July 10, 1924:

Capt. Carl Halla, Finance Department, United States Army, applied March 31, 1924, for review of the disallowance of March 24, 1924, in his accounts for September, 1923, of $21.61 paid to Maj. Sidney G. Brown as reimbursement for the transportation of his minor son from Washington, D. C., to Asheville, N. C., for the reason that it did not appear that the transportation of the son was incident to the officer's change of station.

Paragraph 17, S. O. 91, dated War Department, Washington, April 18, 1923, provides:

17. By direction of the President, Major Sidney G. Brown, Infantry, is relieved from duty in the office of the Chief Coordinator, Bureau of the Budget, Washington, D. C., to take effect at such time as will enable him to comply with this order, and will proceed to Fort Benning, Georgia, and report in person on September 15, 1923, to the commandant the Infantry School for duty as a member of the advanced class. Major Brown's name is removed from the detached officers' list, to take effect September 15, 1923. The travel directed is necessary in the military service and is chargeable to procurement authority FD 40 P 2451 A 4. (A. G. 210.63, Inf. Sch., Ft. Benning, Ga.) (4–12–23.)

Section 12 of the act of May 18, 1920, 41 Stat. 604, provides:

That hereafter when any commissioned officer * * * having a wife or dependent child or children, is ordered to make a permanent change of station, the United States shall furnish transportation in kind from funds appropriated for the transportation of the Army, * * * to his new station for the wife and dependent child or children: * * * *Provided further*, That if the cost of such transportation exceeds that for transportation from the old to the new station the excess cost shall be paid to the United States by the officer concerned: * * *.

Section 12 of the act of June 10, 1922, 42 Stat. 631, contains the following:

In lieu of the transportation in kind authorized by section 12 of an Act * * * approved May 18, 1920, to be furnished by the United States for dependents, the President may authorize the payment in money of amounts equal to such commercial transportation costs when such travel shall have been completed * * *.

After his change of station orders became effective Major Brown filed his claim for payment of an amount equal to the commercial cost of transportation of his dependents, consisting of his wife and 3-year-old son, Washington to Fort Benning, and for a 15-year-old son from Washington to Asheville, N. C., the travel having been performed July 1 to 4, 1923, and voucher was paid by disbursing officer September 29, 1923. The item covering the transportation of the 15-year-old son, Washington to Asheville, N. C., was disallowed, as travel was not incident to change of station.

The act of May 18, 1920, contemplated that travel will not in all cases be between the old and new stations and specifically provides for the issue of transportation and payment by officer of the difference in cost. If transportation between other than the old and new stations and in excess of that permitted by the change of station order is authorized, there can be little question that transportation for a less distance is equally valid, the basic fact appearing that the dependents have in fact removed from the old station pursuant to the change of station order. See 2 Comp. Gen. 568; 27 Comp. Dec. 510.

The voucher in this case shows that the travel was performed July 1 to 4, before the orders became effective. It was, however, performed after the issuance of the orders and in anticipation of their becoming effective, and presents different questions than such as arise where the orders are revoked or otherwise become ineffective. See 2 Comp. Gen. 638, 641. The orders in the present case became effective, and the officer is entitled to payment of an amount equal to the commercial cost of the transportation for the travel performed.

On review of the settlement $21.61 is certified for credit in the accounts of claimant.

(A-2439)

TRANSPORTATION OF DEPENDENTS OF NAVAL OFFICER—PERMANENT CHANGE OF STATION

The transfer of a naval officer from duty on one vessel to duty on another vessel, both vessels having the same home yard, does not constitute a "permanent change of station" within the meaning of section 12 of the act of May 18, 1920, 41 Stat. 604, providing for the transportation of dependents of commissioned officers when changing station.

The detachment of a naval officer from duty at the navy yard at Mare Island, Calif., with orders to report for duty on a naval vessel whose home yard is the navy yard at Puget Sound, constitutes a permanent change of station and, under section 10 of the act of June 10, 1922, 42 Stat. 631, the officer is entitled to reimbursement for the commercial cost of transporting his dependents between the two places provided such transportation has taken place within a reasonable time after the change of station.

Decision by Comptroller General McCarl, July 10, 1924:

Lieut. Commander F. J. Wille, United States Navy, applied March 4, 1924, for review of settlement No. C–61693–N, dated December 8, 1923, wherein was disallowed his claim for reimbursement of the cost of transportation of his wife from the navy yard, Mare Island, Calif., to Bremerton, Wash., in July, 1923.

Under orders dated October 28, 1922, claimant was detached from duty at the navy yard, Mare Island, Calif., November 17, 1922, and reported for duty on board the U. S. S. *Pennsylvania*, at San Pedro, Calif., on November 20, 1922. Under orders dated May 24, 1923, he was detached from duty on the U. S. S. *Pennsylvania* at San Francisco, Calif., June 27, 1923, and reported for duty the next day on board the U. S. S. *California* at the same port.

Claimant states that his wife performed the travel on transportation purchased from personal funds, and that she left Mare Island July 11, 1923, and arrived at Bremerton, Wash., July 13, 1923.

Section 12 of the act of May 18, 1920, 41 Stat. 604, provided:

> That hereafter when any commissioned officer * * * having a wife or dependent child or children, is ordered to make a permanent change of station, the United States shall furnish transportation in kind * * * to his new station for the wife and dependent child or children: *Provided*, That for persons in the naval service the term "permanent station," as used in this section, shall be interpreted to mean a shore station or the home yard of the vessel to which the person concerned may be ordered; * * * *Provided further*, That if the cost of such transportation exceeds that for transportation from the old to the new station the excess cost shall be paid to the United States by the officer concerned; * * *.

The transportation furnished dependents on change of station should be within a reasonable time after the issuance of orders therefor, and what is a reasonable time within which such transportation in kind may be furnished is primarily for determination by the Secretary of the Navy. 1 Comp. Gen. 90.

On September 9, 1921, the President approved the following change in paragraph 4, Article 1818, U. S. Navy Regulations, 1920:

> Transportation for wife and dependent children, as authorized by law, will be furnished at Government expense at any time after receipt of orders involving a permanent change of station, but prior to receipt of subsequent orders involving another permanent change of station, by officers authorized to issue transportation, upon presentation of an application setting forth the transportation needed. * * * C. N. R. No. 2.

Section 12 of the act of June 10, 1922, 42 Stat. 631, provides, in part:

> In lieu of the transportation in kind authorized by section 12 of an Act * * * approved May 18, 1920, to be furnished by the United States for dependents, the President may authorize the payment in money of amounts equal to such commercial transportation costs when such travel shall have been completed.

Pursuant to this section the following Executive order dated August 25, 1922, was promulgated:

For the purpose of carrying into effect the provisions of the second paragraph of section 12 of an act * * * approved June 10, 1922, the Secretary of War, the Secretary of the Navy * * * are hereby authorized to make payments in money for the cost of travel of dependents of officers and enlisted men by commercial carrier in lieu of transportation in kind authorized by section 12 of an act * * * approved May 18, 1920, when such travel shall have been completed under such regulations as they may severally prescribe for the services under their charge.

The travel, for which reimbursement of the cost is claimed, was made in July, 1923, or in the month subsequent to Lieutenant Commander Wille's change from duty on the U. S. S. *Pennsylvania* to duty on the U. S. S. *California*. Under the orders to duty on the U. S. S. *Pennsylvania* he was entitled to transportation in kind for his wife from Vallejo, Calif., to Bremerton, Wash., or to reimbursement for a like cost thereof if paid for from personal funds. The change from duty on the U. S. S. *Pennsylvania* home yard, navy yard, Puget Sound) to duty on the U. S. S. *California* (home yard, navy yard, Puget Sound) did not, within the meaning of section 12 of the act of May 18, 1920, constitute a "permanent change of station," the law specifically providing that it is a change in the home yard which shall constitute a change in "permanent station" for officers on duty afloat. The mere changing of duty from one vessel to another does not constitute a permanent change of station when the vessel left and the vessel joined have the same home yard. In the instant case the change of duty from the navy yard, Mare Island, to the home port at Bremerton, Wash., constituted the "permanent change of station."

Claimant asks for reimbursement under section 12 of the act of June 10, 1922. The provision of that section authorizes payment "when such travel shall have been completed."

The commercial f[illegible] usually traveled route from Vallejo, [illegible], to Bremerton, Wash., in July, 1923, was: Railroad $33.37; Pullman $10.13; a total of $43.50, which amount is certified due claimant.

(A-3003)

REEMPLOYMENT OF CIVILIAN EMPLOYEE AFTER RETIR[illegible]

The making and acceptance of an appointment to a position, the retirement age for which is fixed at 70 years, of an employee who had been retired from a position for which the retirement age is fixed at 65 years, is unauthorized and can not form the basis for a legal claim against the Government, but where made and accepted in good faith in the belief of its legality the employee occupies a *de facto* status and may retain the compensation of the position already received by him if not in excess of the reasonable value of the services rendered; he may not, however, retain the annuity paid to him while holding the unauthorized position.

Comptroller General McCarl to the Secretary of the Interior, July 11, 1924:

I have your letter of May 22, 1924, requesting decision of a question presented as follows:

I am hereby submitting for your consideration and decision a statement relating to the case of Starkes W. Johnson, arising under the civil service retirement act.

Johnson was formerly employed as a mechanic in a classified position at the navy yard, Washington, D. C. Upon reaching retirement age, 65 years, he was retired October 23, 1923. Annuity certificate was issued November 26, 1923, effective October 24, 1923, at the rate of $502.92 per annum. The regular monthly annuity payments were made until and including February, 1924. Upon notice that the annuitant had been reemployed in the Bureau of Engraving and Printing as a laborer, December 18, 1923, at the rate of $540 per annum and bonus, the Commissioner of Pensions suspended payment on the annuity. Upon appeal from that action this department, by decision of May 17, 1924 (copy herewith), affirmed the suspension and directed cancellation of the annuity certificate unless the reemployment be discontinued. Adjustment of the erroneous payments was also required.

Heretofore it has been the practice of this department, in case of reemployment after retirement on account of age or where the employment has been continued after the retirement age has been reached, without certification for continuance, to treat such subsequent employment as illegal and to satisfy the erroneous salary payments out of the annuity. This practice originated under authority of decisions by the Comptroller of the Treasury (27 Comp. Dec. 524, 858) * * *.

This department would proceed in the Johnson case to hold the annuity as an offset against the erroneous salary payments under the reemployment, were it not for your recent decision of May 2, 1924, in the case of Joseph S. Harlan, which appears to have the effect of overruling the previous practice in this regard. In that case the department had, by decision of August 23, 1923 (copy herewith), affirmed the action of the Commissioner of Pensions suspending the annuity to offset erroneous salary payment in the amount of $463.16 from September 22, 1922, to January 20, 1923. In your decision referred to above it was held that the annuity could not be applied to recover the salary thus illegally paid. If this decision is to stand, then Johnson will be permitted to retain the salary paid him under the erroneous reemployment. But a further question arises as to recovery of the amount of the annuity paid him from December 18, 1923, to March 1, 1924, when he received both annuity and salary. [illegible] not appear proper to allow him to retain both. For your further information there [illegible] ner of Pensions in respect to the question [illegible] mmication from the Commissioner of Pensions in respect to the question [illegible] premises is respectfully requested.

decision in the p[illegible]

The decisions published in 27 Comp. Dec. 524 and 858, were to the effect that the appointment to, or continued employment in, a position subject to the provisions of the civil service retirement act of May 22, 1920, 41 Stat. 614, of a person who had attained the retirement age as fixed in said act, was unauthorized and illegal, but in neither of said decisions was it held that the salary erroneously paid to an employee under such circumstances for services actually performed under color of right to the position held could be recovered from the employee if not in excess of the reasonable value of the services actually rendered. There is no inconsistency between said decisions and my decision of May 2, 1924, 3 Comp. Gen. 823, in the case of Joseph S. Harlan, and said latter decision must be, and is, affirmed.

In the case which you now present the reemployment of the annuitant, Johnson, on December 18, 1923, was unauthorized and illegal

and service under such employment can not form the basis of any legal claim against the United States. Therefore, the action of the Commissioner of Pensions in suspending payment of the annuity upon receipt of notice of the annuitant's reemployment was justified and proper; and should the employee again become entitled to retirement annuity there should be withheld from the amount otherwise due on account of such annuity an amount sufficient to offset the amount of annuity heretofore paid to him for the period from December 18, 1923, to February 29, 1924, during which period the employee was also paid a salary for services rendered.

It appears that Johnson, prior to his retirement and before attaining retirement age, filed with the Civil Service Commission an application for a position as unskilled laborer and that at the time of his appointment to such position on December 18, 1923, the fact of his retirement was not known to the department in which the appointment was made. The position from which he was retired was a position as mechanic at a navy yard the retirement age of which was 65 years. As the retirement age of an unskilled laborer is 70 years, his appointment at the age of 65 years evidently was assumed to be legal and proper. While there was some justification for this assumption on the part of the appointing officer and the employee, I am constrained to hold that such employments are contrary to the spirit and intent of the retirement act and therefore are unauthorized and illegal. Accordingly, credit will not be allowed for any payments hereafter made for services rendered by said employee under such employment. But since the appointment appears to have been made and accepted in good faith under an erroneous assumption as to its legality the position was held under a color of right during the period for which service was actually rendered, and, in accordance with the rule announced in the decision of May 2, 1924, supra, following the principle applicable to de facto officers, it must be held that the amount heretofore paid for the services actually rendered, if not in excess of the reasonable value of said services, can not be recovered from the employee nor charged against the amount of annuity otherwise due for a prior or subsequent period.

The questions submitted are answered accordingly.

(A-2909)

PRINTING AND BINDING—FEDERAL TRADE COMMISSION—REPORTS

The cost of printing and binding reports of the Federal Trade Commission requested by the President and the Attorney General is chargeable to the printing and binding appropriation of the commission only when printed before their submission to the President and Attorney General, respectively.

Reports to Congress made by the Federal Trade Commission on its own initiative under subdivisions "f" and "h" of section 6 of the act of September 25, 1914, 38 Stat. 721, may be said to emanate from or originate in the commission, and under joint resolution of March 30, 1906, 34 Stat. 825, the entire cost of printing and binding is chargeable to the printing and binding appropriation of the commission.

Reports to Congress made by the Federal Trade Commission pursuant to special requests from Congress may be said to emanate from or originate in Congress, and in the printing and binding thereof the cost of illustrations, composition, stereotyping, and other work involved in the actual preparation for printing, apart from the creation of the manuscript, is chargeable to the printing and binding appropriations of Congress by virtue of joint resolution of March 30, 1906, 34 Stat. 825.

Acting Comptroller General Ginn to the Chairman, Federal Trade Commission, July 11, 1924:

I have your letter of June 24, 1924, as follows:

The reports and proceedings of the Federal Trade Commission are printed as the result of diverse action sometimes originating with the commission and in other instances lying wholly without the commission's control.

We understand by your letter of June 3, 1924 [A–2909] that whatever printing of reports or proceedings is directly ordered by this commission is properly charged to the appropriation made by Congress for "Salaries and expenses, Federal Trade Commission, 1924."

But if the commission makes an investigation under its statutory power at the instance of (*a*) the President, or (*b*) either or both Houses of Congress, or (*c*) the Attorney General and submits its report to the initiating authority which then upon its own responsibility and without action by the commission, causes the report to be printed, is the whole or any part of the printing and binding cost so incurred chargeable against the appropriation to this commission?

Your former submission was limited to the question of reports requested by the President and the Attorney General and printed by you before their submission. Decision of June 3, 1924, was therefore confined to that proposition and held that such printing was a proper charge against the printing and binding appropriation of the Federal Trade Commission.

Where reports to the President and to the Attorney General are not submitted in printed form and are subsequently printed at the instance of the President or the Attorney General, no reason appears why the cost of such printing should be charged to the appropriations of your commission.

The joint resolution of March 30, 1906, 34 Stat. 825, is as follows:

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That hereafter in the printing and binding of documents or reports emanating from the Executive Departments, bureaus, and independent offices of the Government, the cost of which is now charged to the allotment for printing and binding for Congress, or to appropriations or allotments of appropriations other than those made to the Executive Departments, bureaus, or independent offices of the Government, the cost of illustrations, composition, stereotyping, and other work involved in the actual preparation for printing, apart from the creation of manuscript, shall be charged to the appropriation or allotment of appropriation for the printing and binding of the Department, bureau, or independent office of the Government in which such documents or reports originate; the balance of cost shall be charged to the allotment for printing and binding for Congress, and to the appropriation or allotment of appropriation of the Executive Department, bureau, or independent office of the Government, in proportion to the number delivered to each; the cost of any copies of such documents or reports dis-

tributed otherwise than through Congress, or the Executive Departments, bureaus, and independent offices of the Government, if such there be, shall be charged as heretofore: *Provided*, That on or before the first day of December in each fiscal year each Executive Department, bureau or independent office of the Government to which an appropriation or allotment of appropriation for printing and binding is made shall obtain from the Public Printer an estimate of the probable cost of all publications of such Department, bureau, or independent office now required by law to be printed, and so much thereof as would, under the terms of this resolution, be charged to the appropriation or allotment of appropriation of the Department, bureau, or independent office of the Government in which such publications originate, shall thereupon be set aside to be applied only to the printing and binding of such documents and reports, and shall not be available for any other purpose until all of such allotment of cost on account of such documents and reports shall have been fully paid.

This resolution shall be effective on and after July first, nineteen hundred and six.

Approved, March 30, 1906.

This resolution was considered by the former Comptroller of the Treasury, and under date of April 22, 1907, 13 Comp. Dec. 718, it was held, quoting from the syllabus:

Where Congress for its information calls on executive departments, bureaus, or independent offices of the Government for documents or reports not otherwise required by law to be made, such documents or reports emanate from or originate in Congress, and in the printing and binding thereof the cost of illustrations, composition, stereotyping, and other work involved in the actual preparation for printing, apart from the creation of the manuscript, is chargeable to the allotment for printing and binding for Congress.

Where executive departments, bureaus, or independent offices of the Government are required by law to make reports to Congress, such reports and documents in connection therewith emanate from or originate in the department, bureau, or office by which made, and in the printing and binding thereof the cost of illustrations, composition, stereotyping, and other work involved in the actual preparation for printing, apart from the creation of the manuscript, is chargeable to the appropriation or allotment of appropriations for printing and binding for such department, bureau, or office.

See also decision of June 20, 1907, 13 Comp. Dec. 862. confirming this ruling.

Section 6 of the act of September 26, 1914, 38 Stat. 721, provides:

That the Commission shall also have power—

* * * * * * *

(f) To make public from time to time such portions of the information obtained by it hereunder except trade secrets and names of customers as it shall deem expedient in the public interest and to make annual and special reports to the Congress and to submit therewith recommendations for additional legislation, and to provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use.

* * * * * * *

(h) To investigate from time to time trade conditions in and with foreign countries where associations, combinations, or practices of manufacturers, merchants and traders or other conditions may affect the foreign trade of the United States, and to report to Congress thereon with such recommendations as it deems advisable.

Reports to Congress under subdivisions "f" and "h" of section 6 of the act of September 26, 1914, quoted above, made on the initiative of the commission, may be said to emanate from or originate in the

commission, and the total cost of printing such reports must be charged to the printing and binding appropriation of the commission. Reports specifically requested by Congress, however, may be said to emanate from or originate in Congress, and in the printing and binding thereof the cost of illustrations, composition, stereotyping, and other work involved in the actual preparation for printing, apart from the creation of the manuscript, is chargeable to the printing and binding appropriations of Congress.

(A-3563)

ACCOUNTING—PATIENTS OF OTHER DEPARTMENTS OR ESTABLISHMENTS TREATED IN ST. ELIZABETHS HOSPITAL

All sums paid to the superintendent of St. Elizabeths Hospital by the District of Columbia or other branches of the Federal Government under authority of the act of June 5, 1924, 43 Stat. 429, on account of bills rendered, whether as advance payment or for services actually rendered, are required by said act to be deposited for credit to the appropriation for said hospital current when such services are performed and provided.

The provision in the act of June 5, 1924, 43 Stat. 429, that the bills rendered by St. Elizabeths Hospital to other branches of the Federal Government or the District of Columbia shall not be subject to audit or certification in advance of payment, was intended to avoid delay in the payment and does not in any manner affect the audit required to be made by the General Accounting Office.

Acting Comptroller General Ginn to the Secretary of the Interior, July 11, 1924:

By indorsement of June 20, 1924, you request decision of a question presented by the administrative assistant to the Superintendent of St. Elizabeths Hospital, as follows:

In * * * an Act making appropriations for the Department of the Interior for the fiscal year ending June 30, 1925, and for other purposes, approved June 5, 1924, 43 Stat. 429, it states:

"Saint Elizabeths Hospital, * * * *Provided*, That during the fiscal year 1925 the District of Columbia, or any branch of the Government requiring Saint Elizabeths Hospital to care for patients for which they are responsible, shall pay by check to the superintendent, upon his written request, either in advance or at the end of each month, all or part of the estimated or actual cost for such maintenance as the case may be, and bills rendered by the Superintendent of Saint Elizabeths Hospital in accordance herewith shall not be subject to audit or certification in advance of payment; proper adjustments on the basis of the actual cost of the care of patients paid for in advance shall be made monthly or quarterly, as may be agreed upon between the Superintendent of Saint Elizabeths Hospital and the District of Columbia government, department, or establishments concerned. All sums paid to the Superintendent of Saint Elizabeths Hospital for the care of patients that he is authorized by law to receive, shall be deposited to the credit on the books of the Treasury Department, of the appropriation made for the care and maintenance of the patients at Saint Elizabeths Hospital for the year in which the support, clothing, and treatment is provided, and be subject to requisition by the disbursing agent of Saint Elizabeths Hospital, upon the approval of the Secretary of the Interior."

In reference to the foregoing this authorization would direct the Commissioners of the District of Columbia, the Director of the United States Veterans' Bureau, the Public Health Service, and all others who should make payments for the care of the beneficiaries of this hospital to make payment in advance

or prior to the auditing of their accounts. Payment in advance might be considered in the nature of an allotment, and inasmuch as it has previously been decided that allotments should be kept separately and specific payments made out for the purposes named the question arises in our minds as to just how these moneys should be held. The hospital's personnel would in some cases care for beneficiaries enumerated as well as other patients who are appropriated for directly to the hospital. The supplies purchased are bought in bulk, and it would be difficult to pay for the food for each class of patients.

We believe it was the intention of Congress that this money should be used to reimburse the hospital appropriation all receipts covered into the appropriation as made in the act cited. On account of the doubt existing I have the honor to request that you submit a copy of this letter to the Comptroller General of the United States and ask his opinion if this money, if paid in advance or after services are rendered, could be credited to the appropriation as carried in the Interior Department appropriation act and be accounted for in the same manner as all other money for which direct appropriation is made.

The provision in the act quoted in the submission that the "bills rendered by the superintendent of St. Elizabeths Hospital in accordance herewith shall not be subject to audit or certification in advance of payment" appears to have been intended to overcome the delays incident to the examination and audit of such bills prior to their payment or certification for payment by the administrative offices to which the bills were rendered such bills having been rendered after the performance of the services. The former practice required the preparation of such bills by the hospital and their examination by the administrative authorities prior to their payment or certification for payment and the delay incident to such examination, certification, etc., particularly toward the end of the fiscal year, resulted in a temporary depletion of the hospital appropriation so as to preclude prompt payment of its current obligations for services and supplies. See hearing before subcommittee of House Committee on Appropriations, Interior Department appropriation bill 1925, pages 698 and 699. The authority to make payment in advance without audit or certification does not, therefore, in any manner affect the audit required to be made by the General Accounting Office. Section 305 of the budget and accounting act of June 10, 1921, 42 Stat. 24.

The general procedure with respect to allotments has been to place the money allotted subject to requisition of the allottee organization, the amount thus allotted being set up on the books of this office and the Treasury under the appropriation heading of the allotted appropriation, but with an addition to such appropriation heading to indicate its segregation and application to the uses of the allottee organization; for instance, as in the case of allotments by the United States Veterans' Bureau during the fiscal year 1924, viz, "Medical and hospital services, Veterans' Bureau, 1924 (transfer to Interior Department, St. Elizabeth's Hospital, act of February 13, 1923)." However, the act quoted, supra, provides that all

sums paid to the superintendent of St. Elizabeth's Hospital for the care of patients that he is authorized by law to receive shall be deposited and credited on the books of the Treasury Department to the appropriation made for the hospital, etc.

In answer to the question of the submission, you are advised that the sums paid to the superintendent of the hospital, under authority of the provision here in question, on account of bills rendered, whether such bills are for advance payment or for payment on account of service, etc., actually rendered, are required to be deposited for credit of the appropriation for said hospital current when such services, etc., are performed and provided.

(A-3515)

MILEAGE—LEAVE OF ABSENCE—MARINE CORPS OFFICER

The fact that an officer of the Marine Corps was granted leave of absence to expire upon the effective date of his change of station orders and actually performed the travel to the new station during such leave does not defeat his right to mileage under section 12, act of June 10, 1922, 42 Stat. 631. Distinguished from change of station orders received while on leave.

Acting Comptroller General Ginn to Capt. H. W. Mitchell, assistant paymaster, United States Marine Corps, July 12, 1924:

I have your letter of May 2, 1924, requesting decision whether you are authorized to pay mileage to Capt. Arthur H. Page, United States Marine Corps, from Quantico, Va., to naval air station, Pensacola, Fla., under orders addressed to him under date of March 21, 1924, as follows and in the circumstances hereafter stated:

1. On April 10, 1924, you will stand detached from your present station and duties, will proceed, on aviation duty, to the naval air station, Pensacola, Fla., and report to the commandant for aviation duty at that station as the relief of First Lieutenant Harmon J. Norton, Marine Corps.
2. Your flight orders are continued in force for this duty.
3. The travel herein enjoined is necessary in the public service.

By letter dated March 31, 1924, Captain Page requested six days' leave of absence to take effect April 4, 1924, with a statement that if the leave applied for were granted it was his intention to commence the travel required by his orders of March 21, 1924, and that his address while on leave would be naval air station, Pensacola, Fla. The leave was granted with the statement "Your detachment from this post is effective April 10, 1924." Captain Page commenced travel on or about April 4, 1924, and his orders bear indorsement by the commandant at Pensacola, Fla., that he reported April 11, 1924.

You suggest as reason for doubt as to the propriety of payment that the officer performed the travel during the period of leave of absence while still attached to his old station. Section 12 of the act of June 10, 1922, 42 Stat. 631, so far as here material, provides;

That officers of any of the services mentioned in the title of this Act, when traveling under competent orders without troops, shall receive a mileage allowance at the rate of 8 cents per mile, distance to be computed by the shortest usually traveled route * * *.

Mileage is a reimbursement and a commutation of traveling expenses and the basis of the allowance is that the travel is on public business and pursuant to competent orders. *Perrimond* v. *United States*, 19 Ct. Cls. 509. The leave was asked for preliminary to change of station. The granting of leave does not affect the obligation of the Government to pay mileage for the transfer from the old to the new station. If change of station had been ordered while on leave, the question of mileage might have been affected as to no greater amount being allowable than between the two stations, and not exceeding the travel from place where orders were received to new station, but no such question appears from the facts stated in the present matter. The travel being under competent orders and without troops, the statute gives him mileage at 8 cents per mile. If otherwise correct, the mileage account may be paid.

(A–3943)

CLASSIFICATION OF CIVILIAN EMPLOYEES—CHARWOMEN

The pay of charwomen whose compensation is fixed under the classification act of March 4, 1923, 42 Stat. 1488, at a rate per hour, is to be computed on the number of hours actually employed during the period in question, and no pay for Sundays or holidays is authorized unless services are actually performed on such days.

Charwomen, if permanently employed, are entitled under section 7 of the act of March 15, 1898, 30 Stat. 316, as amended by the act of February 24, 1899, 30 Stat. 890, to annual and sick leave with pay subject, in so far as applicable, to conditions and regulations prescribed for per annum employees, the amount of pay to be allowed for the period of such absence to be the amount which the employee would have received if not on leave and working the number of hours usually required each workday during the period of absence.

Acting Comptroller General Ginn to the Secretary of the Treasury, July 14, 1924:

I have your letter of July 11, 1924, requesting decision of questions presented as follows:

The classification act of 1923—March 4, 1923 (42 Stat. 1488)—provides for only two classes of employees, namely, those who are paid on a per annum basis and those who are paid by the hour. Up to the time the classification act went into effect charwomen of this department in Washington were paid an annual compensation of $240 plus 60 per cent increase of compensation, or $384 per year.

In submitting estimates to Congress the pay of the charwomen was based upon an annual figure of $375.60 per person, this figure being arrived at by figuring pay on the basis of 40 cents an hour, three hours per day, for 365 days in the year, less 52 Sundays, making a net total of 313 working days, including legal holidays. The charwomen of this department are required to work three hours daily. They are not allowed to absent themselves for any part of this time, and tardiness in reporting for duty is not tolerated. They are, therefore, either present or absent. It is understood from your decision of

June 16, 1924, that there is no basis of law for converting per hour employees to a per annum basis. Such being the case, the question has arisen as to whether charwomen on the 40 cents per hour basis can receive pay for legal holidays; also whether they are entitled to the 30 days' annual and 30 days' sick leave which has been granted them prior to the date the classification act went into operation, namely, July first of the present year.

As above stated, the charwomen have heretofore received $384 per annum. They would receive on the hour basis converted to annual compensation $375.60, a difference of $8.40. If they are to lose legal holidays their compensation would be further reduced by $9.60; a total of $18. If they lose their annual and sick leave a still further hardship would be invoked against this class of employees.

In view of the foregoing, I have to request your decision of the following questions:

Computing the pay of a charwoman under the classification act for the first week in July, should such employee be allowed pay for 15 hours, 18 hours, or 21 hours? In other words, are they to be allowed pay for the legal holiday July 4, and the Sunday occurring in this week?

Are the part-hour employees entitled to the usual allowances of annual and sick leave, or both, according to the circumstances of the case, and pursuant to the custom heretofore prevailing since the leave privileges were allowed by Congress? (See sec. 7, act March 15, 1898 (30 Stat. 316), and the act of February 24, 1899 (30 Stat. 890).)

Are the part-hour employees entitled to pay for Sundays?

In reply, you are advised that in computing the pay of charwomen whose compensation is fixed under the classification act of March 4, 1923, 42 Stat. 1488, at a rate per hour, the number of hours actually employed during the period covered by the payment is to be the basis of computation. In such case payment for Sundays or holidays is not authorized unless services be actually performed on said days.

Under the provisions of section 7 of the act of March 15, 1898, 30 Stat. 316, as amended by the act of February 24, 1899, 30 Stat. 890, such employees, if permanently employed, are entitled to leave of absence—annual leave and sick leave—with pay subject, in so far as applicable, to conditions and regulations prescribed for per annum employees of your department, the amount of pay to be allowed for the period of such absence to be the amount which the employee would have received if not on leave and working the number of hours usually required each work day during the period of absence. Assuming for the purpose of illustration that these employees are not required to work on Sundays or holidays and that they are required to work three hours on each week day except Saturday, and one and one-half hours on Saturday, then one who was on leave with pay from July 1 to 15, inclusive, would be charged with 15 days' absence if on sick leave and 12 days' absence if on annual leave, and in either case would be entitled to (10 by 3 plus 2 by 1½) 33 hours' pay.

The questions submitted are answered accordingly.

(A-3941)

CLASSIFICATION OF CIVILIAN EMPLOYEES—CHARWOMEN

classification act to charwomen whose compensation is fixed by said The statement or certificate of service covering compensation paid under the

act at a rate per hour should show the number of days on which service was actually rendered during the period covered by the payment, the total number of hours of service actually rendered, and the number of days, if any, on annual or sick leave.

Acting Comptroller General Ginn to the Secretary of War, July 14, 1924:

I have your indorsement of July 10, 1924, requesting decision of the questions presented by the Surgeon General in a letter dated June 24, 1924, as follows:

1. For many years, including the current fiscal year expiring the 30th instant, appropriation has been made by law for the employment of charwomen in this office at the statutory pay of $240 a year each (plus "bonus" in recent years). These women have been in fact employed two or three hours a day only.

2. Under the classification law of 1923, act March 4, 1923, as confirmed for this office by the War Department appropriation for 1925, approved the 7th instant, charwomen working part time are to "be paid at the rate of 40 cents an hour and head charwomen at the rate of 45 cents an hour." No one of the 4 now on the rolls has been designated or can properly be regarded as "head" charwoman. They must, it is assumed, go on the pay rolls of this office from and after the first proximo on the basis of 40 cents an hour, as prescribed in the classification law. Several questions arise in that connection:

(*a*) What form of statement or certificate of service showing, for example, the dates and hours of service rendered by these women will be required?

(*b*) Can pay be allowed for any period of time when service is not actually performed, as, *first*, for Sundays or holidays; *second*, for annual leave, and if so, how many hours or days; *third*, for absence on account of sickness, and if so, for how many hours or days?

The questions presented are answered as follows:

(*a*) The statement or certificate of service should show the number of days on which service was actually rendered during the period covered by the payment, the total number of hours of service actually rendered during said period, and the number of days, if any, on annual or sick leave.

(*b*) Pay can not be allowed for Sundays or holidays except for service actually rendered on said days. If the employee is permanently employed, leave of absence with pay may be granted under the provisions of section 7 of the act of March 15, 1898, 30 Stat. 316, as amended by the act of February 24, 1899, 30 Stat. 890, and regulations made in pursuance thereof, the amount of pay to be allowed for the period of such absence to be the amount which the employee would have received if not on leave and working the number of hours usually required each working day during the period of absence, regardless of whether the leave be annual leave or sick leave. See decision of July 14, 1924, to the Secretary of the Treasury.

(A-3947)

CLASSIFICATION OF CIVILIAN EMPLOYEES—OFFICE OF RECORDER OF DEEDS OF THE DISTRICT OF COLUMBIA

The office of the recorder of deeds of the District of Columbia is a "department" within the meaning of that term as defined in section 2 of the

classification act of March 4, 1923, 42 Stat. 1488, and the rates of pay provided by the said act for the positions in that office as allocated by the classification board supersede the rates for such employees prescribed by the act of February 28, 1923, 42 Stat. 1335. Payment in accordance with such allocations is authorized from the fees and emoluments of that office. (Inapplicable, see 4 Comp. Gen. 914.)

Acting Comptroller General Ginn to the Recorder of Deeds, District of Columbia, July 14, 1924:

By letter of July 11, 1924, you state that the Attorney General has held that the employees of the office of the recorder of deeds of the District of Columbia were included in the classification act of March 4, 1923, 42 Stat. 1488, and that the Personnel Classification Board has submitted a list of all the employees of the office with their respective allocations in conformity with said act, and you request decision whether you are authorized "to pay these said employees the salaries as so fixed by said classification board out of the fees and emoluments of this office."

The office of the recorder of deeds is a "department" within the meaning of that term as defined in section 2 of the classification act of 1923, and therefore under the provisions of section 5 of said act the compensation schedules fixed in section 13 thereof are applicable to the employees of said office. Section 4 of the act provides that the allocations made in pursuance of said act "shall become final upon their approval by" the Personnel Classification Board. The rates of compensation as thus fixed under authority of and in accordance with the said act of March 4, 1923, supersede the rates as prescribed in the act of February 28, 1923, 42 Stat. 1335. Accordingly the question submitted is answered in the affirmative.

(A-3614)

CLASSIFICATION OF CIVILIAN EMPLOYEES—TEMPORARY EMPLOYEES—NEW APPOINTMENTS

Persons holding temporary appointments on July 1, 1924, will be entitled to compensation on and after that date at the rate authorized under the grade or class in which the position has been allocated in accordance with rules 2, 3, and 4 of section 6 of the classification act of March 4, 1923, 42 Stat. 1490, so long as they serve under the same appointment.

The requirement of the classification act of March 4, 1923, 42 Stat. 1490, that all new appointments be at the minimum rate of the appropriate grade or class thereof, is applicable to any new appointment, regardless of the temporary or permanent character of the new or of the old appointment.

Acting Comptroller General Ginn to the Secretary of the Interior, July 14, 1924:

I have your letter of June 25, 1924, requesting decision of two questions, as follows:

1. An employee serving under temporary appointment, pending establishment by the Civil Service Commission of a register of eligibles, has qualified through appropriate examination, and it is desired to give him a permanent

appointment effective July 1, 1924. His position has been allocated to grade 1, professional and scientific service, the minimum rate of which is $1,860 per annum. Under his temporary appointment the employee receives compensation of $1,980 per annum, including $240 bonus, which is not one of the rates of the grade. Should the employee on and after July 1, 1924, when he receives permanent appointment, be paid the next higher rate of $2,000 per annum, or must he be appointed at $1,860 per annum, the minimum rate of the grade?

2. Where an employee is to be continued in the service on and after July 1, 1924, under a temporary appointment made prior to that date, must the position be classified and will the rate of pay be governed by the rules of compensation contained in section 6 of the classification act of March 4, 1923?

Section 2 of the classification act of March 4, 1923, 42 Stat. 1488, defines the term "employee" as "any person temporarily or permanently in a position," and the term "position" as "a specific civilian office or employment, whether occupied or vacant, in a department other than the following: * * *."

Section 6 of the classification act, 42 Stat. 1490, provides six rules for determining the initial compensation to be established for the several "employees." Rules 4 and 6 are as follows:

4. If the employee is receiving compensation within the range of salary prescribed for the appropriate grade, but not at one of the rates fixed therein, the compensation shall be increased to the next higher rate.

* * * * * * *

6. All new appointments shall be made at the minimum rate of the appropriate grade or class thereof.

In question 1 it is understood the employee is serving under an emergency temporary appointment pending an establishment by the Civil Service Commission of a register of eligibles, under rule 8 of the civil service rules and regulations. Rule 6 does not mean that only the first appointment given an employee under civil service rules and regulations is required to be at the minimum rate, but that any new appointment, regardless of the temporary or permanent character thereof, must be at the minimum rate of the appropriate grade or class. No other construction is possible under the terms of the rule. The permanent appointment of an employee serving under a temporary appointment is a "new" appointment and must be at the minimum rate of the appropriate grade or class; also a second temporary appointment of an employee must be at the minimum rate of the appropriate grade or class. Accordingly in question 1 the salary of the employee on July 1, 1924, will be at the rate of $1,860 per annum.

The classification act expressly includes temporary employees. The employee in question 2 is holding a "position" within the meaning of that term as used in the classification act and is therefore subject to all the rules of section 6 thereof.

The salary of the employee on and after July 1, 1924, will be controlled by the rules of section 6 of the classification act, and as long as the employee continues to serve under the same temporary appointment held June 30, 1924, he will be entitled to the compensation at the

rate of pay authorized under the grade or class in which the position has been allocated; that is to say, he will not necessarily be required to serve at the minimum rate fixed for said grade but will be entitled to rate applicable in accordance with rules 2, 3, and 4 of section 6 of the act. Thereafter any new temporary or permanent appointment must be at the minimum rate of the appropriate grade or class.

(A–3967)

CLASSIFICATION OF CIVILIAN EMPLOYEES—COMPENSATION FOR ALLOCATED GRADES

The Librarian of Congress is authorized and required to pay compensation to the employees of the Library of Congress in the grade or class to which allocated in accordance with the rules prescribed in section 6 of the classification act of March 4, 1923, 42 Stat. 1488, and subject to the provisions of section 3 of the act of June 7, 1924, 43 Stat. 593.

Acting Comptroller General Ginn to the Librarian, Library of Congress, July 14, 1924:

I have your letter of July 14, 1924, as follows:

May I have your opinion in answer to the following questions:

1. Are we required to pay the salaries provided for in the revised allocations of the Personnel Classification Board where the grade has been advanced?

2. Are we authorized to pay them?

3. Are we authorized to approximate them by advancing the pay within the grade appropriated for?

The act of March 4, 1923, 42 Stat. 1488, provides for the classification of civilian positions in the Government service. Section 13 of said act fixed the compensation schedules for the positions classified in accordance with the provisions of the act. Section 5 provides that said schedules shall apply to civilian employees in the departments within the District of Columbia, and section 2 specifically provides that the term "department" shall include the Library of Congress. Section 4 provides for the allocation of the positions in each department in their appropriate grades in the compensation schedules and for fixing the rate of compensation of each employee therein, in accordance with the rules prescribed in section 6, and said section 4 further provides that "such allocations shall be reviewed and may be revised by the Personnel Classification Board and shall become final upon their approval by said board.

Questions 1 and 2 are answered in the affirmative and question 3 in the negative.

The rate of compensation to be paid to any employee within a grade to which allocated is to be determined in accordance with the rules prescribed in section 6 of the said act of March 4, 1923, and subject to the provisions of section 3 of the act of June 7, 1924, 43 Stat. 593.

(A–2719)

STALE CLAIMS—PAYMENT BY DISBURSING OFFICERS

As a general rule payments by a disbursing officer chargeable against annual appropriations should not be made after three months from the close of the fiscal year in which the obligation was incurred, unexpended disbursing balances of annual appropriations being required to be deposited within that time.

Payments against appropriations, other than annual appropriations, should be made by a disbursing officer only when for current obligations for fixed salaries, bills for supplies purchased and approved, and other similar demands which do not require the weighing of evidence or the determination of questions of law or fact for the ascertainment of their validity. Any doubt on the part of a disbursing officer as to his authority to pay a voucher should be resolved in favor of submitting it for direct settlement.

Acting Comptroller General Ginn to Leslie Cramer, special disbursing agent, Alaskan Engineering Commission, July 16, 1924:

Consideration has been given to your letter of January 24, 1924, requesting advice " as to the time limit in payment of vouchers and how old a voucher should be to be presented as a claim? "

Your inquiry is by reason of a suspension in your accounts for the quarter ended March 31, 1923, of the amount of voucher No. 33028, in favor of the port of Seattle, the voucher, paid by you on February 6, 1923, covering labor, supervision, and use of tractor during the month of August, 1917, in unloading steel rails shipped from Gary, Ind., to Seattle, Wash., as per Government bill of lading No. 2241, issued on July 28, 1917. The voucher as paid contained no explanation as to the delay in making payment and was suspended for that reason, and you were advised, in substance, that the item appeared such as should have been forwarded to this office for direct settlement as a claim, accompanied by a full and detailed explanation. The explanation and data submitted in reply to the statement of differences has enabled this office to connect the item paid with the item of freight on the rails previously paid to the Northern Pacific Railway Co. as per settlement No. 55510, of May 25, 1918; therefore, credit for the item amounting to $92.31 will be allowed in your accounts.

In answer to your inquiry as to the time limit in making payment of vouchers, you are advised that generally payments by a disbursing officer should not be made after three months from the close of a fiscal year in which the obligation was incurred, unexpended disbursing balances of annual appropriations being required to be deposited within that time. See Treasury Department Circular No. 133 of December 15, 1903. The requirements with respect to other appropriations, such, for instance, as the appropriation for the " Construction and equipment of railroads in Alaska," act of January 24, 1923, 42 Stat. 1217, are generally that a disbursing officer pay only current obligations for fixed salaries, bills for supplies purchased and approved, and other similar demands which do not require for the ascertainment of their validity the weighing of evidence or the determination of questions of law or fact. 4 Comp, Dec. 332.

It is not practicable to specify a definite period of time after the incurring of an obligation beyond which an obligation would not be regarded as current. It appears sufficient to say that the obligation here in question was such as should have been submitted to this office

for direct settlement as a claim accompanied by a full and detailed explanation, and in all cases where the delay is such as to raise a reasonable doubt in the mind of the disbursing officer as to whether he is authorized to make the payment such doubt should be resolved in favor of forwarding the voucher for direct settlement, as such procedure would appear to be to the best interests of both the disbursing officer and the United States.

(A–1908)

LIQUIDATED DAMAGES—PUBLIC BUILDING CONTRACTS

There is no law that requires the Secretary of the Treasury to contract for all repairs to public buildings, it being within his discretion to accomplish such repairs by the purchase of materials and hire of labor having due regard to the requirement of advertising under section 3709, Revised Statutes, but if he does contract for such repairs or for construction of public buildings the provisions of section 21 of the act of June 6, 1902, 32 Stat. 326, require that a stipulation for the payment of liquidated damages for delay be inserted therein.

Decision by Acting Comptroller General Ginn, July 16, 1924:

There has been presented for decision a question that has been raised in connection with two unpaid vouchers that were transmitted by the Secretary of the Treasury for settlement. Said vouchers are stated in favor of the Citizens Lumber Co. for $141.20 and Merrill T. Galliher for $215, both of Asheville, N. C., for the balance alleged to be due for certain building materials furnished the Government during the months of February, April, and May, 1923, for use in making repairs to the United States Veterans' Bureau Hospital at Oteen, N. C.

The Secretary of the Treasury on June 8, 1922, authorized the work to be done by the purchase of materials and hire of labor to accomplish the contemplated repairs to the hospital building, appropriation therefor being contained in the act of February 17, 1922, 42 Stat. 384. The question involved is as to whether this method of performing the work was legal in view of the provision in section 21 of the act of June 6, 1902, 32 Stat. 326, which provides:

> That in all contracts entered into with the United States, after the date of the approval of this Act, for the construction or repair of any public building or public work under the control of the Treasury Department, a stipulation shall be inserted for liquidated damages for delay; * * * and in all suits hereafter commenced on any such contracts or on any bond given in connection therewith it shall not be necessary for the United States, whether plaintiff or defendant, to prove actual or specific damages sustained by the Government by reason of delays, but such stipulation for liquidated damages shall be conclusive and binding upon all parties.

As a matter of practice contracts for the construction of or repairs to public buildings under the control of the Treasury Department are usually let to private concerns and there is no specific requirement in the above-quoted provision of law which directs

that such work shall be actually performed by contractors as distinguished from day laborers, etc., or that formal contracts therefor shall be entered into by the Secretary of the Treasury. However, said provision does require that when contracts, formal or less formal agreements, are entered into for such work a stipulation for liquidated damages for delay on completion shall be inserted therein.

While sections 3663, 3733, and 3734, Revised Statutes, as amended by the act of June 25, 1910, 36 Stat. 669, contain certain requirements and restrictions relative to the construction and repair of public buildings, there does not appear to be any law that specifically requires the Secretary of the Treasury to contract with private concerns for that purpose, and the act of June 6, 1902, *supra*, must be understood as relating to building and repairing involving magnitude as distinguished from minor repairs, the ordinary and practicable method of doing the former being by written contract after competitive bidding, and while not absolutely exclusive a departure from such a method should be exceptional and justifiable only under conditions necessitating or permitting no other course.

Under the authorization of June 8, 1922, the superintendent of the United States Veterans' Bureau Hospital at Oteen, N. C., was directed to proceed under an allotment of $61,200 by the purchase and hire method to obtain proposals for the materials required and employ the necessary labor to carry out the work provided for in the appropriation act referred to above. The superintendent was also authorized to incur emergency expenditures not to exceed $200 per week by obtaining the lowest prevailing market prices after securing quotations from several firms and placing orders with the lowest bidder, and when larger quantities of materials were required, written competitive proposals were to be obtained and bids submitted to the department for action thereon. The work of making repairs to the hospital was accomplished by this means and payments for all materials, except the items now claimed, and for the necessary labor appear to have already been made, and as the requirements of section 3709, Revised Statutes, relative to advertising appear to have been complied with in connection with the purchase of materials to be used in repairing the hospital, no objection will now be made to the payment of the outstanding accounts for materials if found to be otherwise correct.

While the law requires a stipulation of liquidated damages in such contracts, it is directory and the failure to so stipulate does not nullify agreements fully performed, any failure to so provide being for correction by the Secretary of the Treasury or action by the Congress.

(A–4030)

NAVAL RESERVE FORCE—RETIRED PAY—TRANSFERRED MEMBERS OF FLEET NAVAL RESERVE

Transferred members of the Fleet Naval Reserve and Fleet Marine Corps Reserve who on or prior to June 30, 1922, had been placed on the retired list are entitled to retired pay on and after July 1, 1922, made up of the retainer pay prescribed by the act of June 10, 1922, 42 Stat. 630, as amended by section 3 of the act of May 31, 1924, 43 Stat. 251, plus $15.75 allowances as provided by the act of March 2, 1907, 34 Stat. 1217. 2 Comp. Gen. 762, modified.

Decision by Acting Comptroller General Ginn, July 16, 1924:

Albin O. Snell, chief yeoman, United States Navy, retired, applied November 23, 1923, for review of settlement No. M–100248–N, dated November 17, 1923, disallowing his claim for arrears of retired pay since July 1, 1922.

Claimant was transferred to the Fleet Naval Reserve January 12, 1917, and retired January 7, 1921, after 30 years' service. His claim is for retired pay as provided under section 10 of the act of June 10, 1922, 42 Stat. 630, which provides that—

* * * On and after July 1, 1922, retired enlisted men of the Navy and Coast Guard shall have their retired pay computed as now authorized by law on the basis of pay provided by this act.

Claimant was retired under provisions of the act of August 29, 1916, 39 Stat. 591, which authorizes the retirement of transferred members of the Fleet Naval Reserve as follows:

* * * They may, upon their own request, upon completing thirty years' service, including naval and fleet naval reserve service, be placed on the retired list of the Navy with the pay they were then receiving plus the allowances to which enlisted men of the same rating are entitled on retirement after thirty years' naval service.

Under the provisions of section 10 of the act of June 10, 1922, enlisted men of the Navy placed on the retired list prior to July 1, 1922, shall from and after that date have their retired pay computed on the basis of the rates of pay prescribed in said section unless such retired pay is less than that to which they were entitled prior to July 1, 1922, in which case they shall retain the higher rate. 2 Comp. Gen. 153.

The law governing retirement of enlisted men of the Navy is the act of March 3, 1899, 30 Stat. 1008, as amended by the act of March 2, 1907, 34 Stat. 1217, which provides:

That when an enlisted man shall have served thirty years either in the Army, Navy, or Marine Corps, or in all, he shall upon making application to the President, be placed upon the retired list, with seventy-five per centum of the pay and allowances he may then be in receipt of, and that said allowances shall be as follows: Nine dollars twenty-five cents per month in lieu of quarters, fuel, and light: *Provided*, That in computing the necessary thirty years' time all service in the Army, Navy, and Marine Corps shall be credited.

Section 3 of the act of May 31, 1924, 43 Stat. 251, amending section 10 of the act of June 10, 1922, 42 Stat. 630, retroactively to July 1, 1922, provides:

> The retainer pay of all men who were on that day transferred members of the Fleet Naval Reserve or the Fleet Marine Corps Reserve shall be computed on the rate of pay authorized for enlisted men of the naval service by the Act approved June 10, 1922: *Provided*, That the retainer pay of such reservists shall be not less than that to which they were entitled on June 30, 1922, under decisions of the Comptroller of the Treasury in force on that date.

The language of this provision includes transferred members of the Fleet Naval Reserve or Fleet Marine Corps Reserve who prior to its enactment had been placed on the retired list pursuant to the act of August 29, 1916, and their pay accounts should be adjusted accordingly. The act of May 31, 1924, necessitates a modification of decision of May 21, 1923, 2 Comp. Gen. 762.

From date of retirement to June 30, 1922, claimant received retired pay at $80.90 per month, consisting of retainer pay at date of retirement, $65.15, and $15.75 allowances. Under the act of June 10, 1922, he is entitled to retired pay made up of retainer pay based on the ratings prescribed for enlisted men therein, plus $15.75 allowances, as provided in the act of March 2, 1907. The rate of base pay provided for chief yeomen in the act of June 10, 1922, is $126, and the permanent additions attaching thereto in case of a man with claimant's length of service is 25 per cent thereof, or $31.50. Accordingly, his retired pay under that act is one-half base pay (one-half of $126), $63, plus permanent additions, $31.50, plus allowances, $15.75, or $110.25 per month. For the period July 1, 1922, to September 30, 1923, one year and three months, he is entitled to difference between pay at $110.25 and pay received at $80.90 per month, amounting to $440.25.

Upon review the settlement is modified and $440.25 certified due claimant.

(A–3751)

MILEAGE—TRAVELING EXPENSES—MEMBERS OF OFFICERS' RESERVE CORPS ASSIGNED TO DUTY IN MILITIA BUREAU

Members of the Officers' Reserve Corps assigned to active duty in the Militia Bureau, in accordance with the provisions of the act of September 22, 1922, 42 Stat. 1034, are entitled to mileage at 8 cents per mile for travel performed in proceeding from their homes to their place of duty and travel performed in returning to their homes when relieved of duty in the Militia Bureau.

Members of the Officers' Reserve Corps performing travel in connection with the National Guard, during an assignment to active duty in the Militia Bureau, are entitled to actual expenses on the same basis and under the same limitations as officers of the Regular Army traveling on duty in connection with the National Guard.

Acting Comptroller General Ginn to the Secretary of War, July 16, 1924:

There has been received your letter of June 28, 1924, requesting decision as to the allowances to which a reserve officer is entitled for travel performed in proceeding from his home to his station under an assignment for active duty in the Militia Bureau, for travel performed in connection with his duties while so assigned, and for travel performed in returning to his home from the Militia Bureau when relieved from duty therein.

Section 81 of the national defense act, as amended by section 4 of the act of September 22, 1922, 42 Stat. 1034, contains a provision that the President—

> * * * may also assign for duty in the Militia Bureau three officers who hold or have held commissions in the National Guard and who at the time of assignment are reserve officers, and any such officer while so assigned shall receive out of the whole fund appropriated for the support of the National Guard the pay and allowances provided in the Pay Readjustment Act of June 10, 1922, for officers of the National Guard when authorized by law to receive Federal pay.

The "reserve officers" authorized to be assigned to duty in the Militia Bureau are officers of the "Officers' Reserve Corps," and such bureau being a division of the War Department, the assignment to duty therein is an assignment to active duty and to station in the War Department.

The pay and allowances provided by the pay readjustment act of June 10, 1922, for officers of the National Guard when authorized by law to receive Federal pay is the pay of their grade and length of service as prescribed by section 3, 42 Stat. 627, and the subsistence and rental allowances as prescribed by sections 5 and 6 of the act, authorized by section 14 of such act, at page 631. No allowance on account of travel performed by National Guard officers is prescribed by such act and reference must be had to section 37a of the national defense act, 41 Stat. 776, which places such officers on a parity with officers of the Regular Army for the payment of travel allowances, the section providing that reserve officers—

> * * * When on active duty he shall receive the same * * * allowances as an officer of the Regular Army * * * and mileage from his home to his first station and from his last station to his home * * *.

Mileage is provided for Army officers by section 12 of the pay readjustment act, 42 Stat. 631, at 8 cents per mile, the distance to be computed over the shortest usually traveled route.

You are accordingly advised that reserve officers assigned to active duty in the Militia Bureau in accordance with the provisions of the act of September 22, 1922, cited, are entitled to mileage at 8 cents per mile for travel performed in proceeding from their homes to their place of duty, and for travel performed in returning to their homes from the Militia Bureau when relieved from duty therein. See in

this connection 3 Comp. Gen. 293, and decision to Theodore Schultz of November 30, 1923, 27 MS. Comp. Gen. 1307.

You also ask as to the allowance of such officers, "for travel performed in connection with their duties in the Militia Bureau." It is assumed that all such travel is "on duty in connection with the National Guard." If so, under the terms of sections 37a and 67 of the national defense act, as amended, 41 Stat. 776 and 42 Stat. 1034, the officer will be entitled to actual expenses on the same basis and under the same limitations as an officer of the Regular Army traveling on duty in connection with the National Guard.

(A–561)

QUARTERS AND SUBSISTENCE ALLOWANCES—MARINE CORPS ENLISTED MEN ON FURLOUGH

An enlisted man of the Marine Corps stationed at the depot of supplies, naval operating base, Hampton Roads, Va., is not stationed at a "staff office" within the meaning of the act of March 4, 1917, 39 Stat. 1191, notwithstanding that place had been designated by the Major General Commandant as a staff office, and is not entitled to quarters and subsistence allowances under the act of June 10, 1922, 42 Stat. 630, while on furlough from such station.

Decision by Acting Comptroller General Ginn, July 17, 1924:

In the matter of the claim of James W. Edwards, quartermaster sergeant, United States Marine Corps, there is for consideration and decision the question whether he is entitled to quarters allowance and commutation of rations while on furlough during the period from August 1 to 30, 1923, from duty as clerk at the depot of supplies, Naval Operating Base, Hampton Roads, Va.

The act of March 4, 1917, 39 Stat. 1191, provides:

> That hereafter no part of the pay and allowances authorized for enlisted men detailed as clerks and messengers in the office of the Major General Commandant and the several staff offices shal be forfeited when granted furlough for not exceeding thirty days in each calendar year.

In the appropriation "Provisions, Marine Corps," act of July 11, 1919, 41 Stat. 154, there is the following proviso:

> That hereafter, except when detached by the President of the United States for duty with the Army, enlisted men of the Marine Corps shall be entitled to the same allowance for rations as are enlisted men of the Navy, under such rules and regulations as may be prescribed by the Secretary of the Navy.

This provision of law broke the assimilation of the Marine Corps to the Army under section 1612, Revised Statutes, so far as rations are concerned. 1 Comp. Gen. 39.

Section 11 of the act of June 10, 1922, 42 Stat. 630, in so far as is here material, provides:

> To each enlisted man not furnished quarters or rations in kind there shall be granted, under such regulations as the President may prescribe, an allowance

for quarters and subsistence, the value of which shall depend on the conditions under which the duty of the man is being performed, and shall not exceed $4 per day. These regulations shall be uniform for all of the services mentioned in the title of this Act. Subsistence for pilots shall be paid in accordance with existing regulations, and rations for enlisted men may be commuted as now authorized by law.

The subsistence and quarters allowances here provided as fixed by the President in Executive order of June 19, 1922, are applicable to enlisted men while on duty and the allowance is not authorized to such enlisted men while on furlough unless otherwise specifically provided by law. 3 Comp. Gen. 579, March 3, 1924, case of Goodwin.

The act of March 4, 1917, cited, by the direction that pay and allowances shall not be forfeited, authorizes the payment while on furlough of the authorized allowances to enlisted men of the Marine Corps who are detailed for duty to the office of the Major General Commandant and the several staff offices. At the time of the enactment, enlisted men so detailed were entitled to commutation of quarters therein provided when "employed as clerks and messengers." 39 Stat. 1190.

The provision in the act of March 4, 1917, is not repealed by implication by the provision of the act of June 10, 1922, providing a quarters and subsistence allowance when on duty to enlisted men generally of the Army, Navy, Marine Corps, and Coast Guard.

The question in this case is therefore whether claimant was detailed as a clerk or messenger in one of "the several staff offices" of the Marine Corps. The papers show he was "stationed at the depot of supplies, naval operating base, Hampton Roads, Va.," and that the Major General Commandant by order of November, 1920, designated it as a staff office.

The act of March 4, 1917, page 1190, provided under "Commutation of quarters, Marine Corps," for—

* * * commutation of quarters for enlisted men employed as clerks and messengers in the offices of the commandant, adjutant and inspector, paymaster, and quartermaster, and the offices of the assistant adjutant and inspectors, assistant paymasters, assistant quartermasters, at $21 each per month, and for enlisted men employed as messengers in said offices, at $10 each per month, * * *.

Light is thrown on the generality of the phrase "the offices of the assistant adjutant and inspectors, assistant paymasters, assistant quartermasters" by the provision in the same act, page 1189, and in the appropriation act of January 22, 1923, 42 Stat. 1151, for the fiscal year 1924 under "Pay of civil force" for the offices of the Major General Commandant, paymaster, adjutant and inspector, and quartermaster, in Washington, D. C., and the offices of the assistant quartermasters at San Francisco and Philadelphia. These were the classes or types of offices comprehended in the phrase

"office of the Major General Commandant and the several staff offices" in the act of March 4, 1917.

The provision for the continuation of pay and allowances while on furlough not exceeding 30 days per year, in the act of March 4, 1917, is limited to staff offices as therein contemplated and does not extend to all stations at which enlisted men are assigned to staff duties.

It does not appear that claimant was detailed as a clerk or messenger at a staff office within the meaning of the act of March 4, 1917, and his claim for allowance for quarters and subsistence authorized by section 11, act of June 10, 1922, 42 Stat. 630, to enlisted men on duty as therein prescribed must be disallowed.

(A-1074)

MILITARY LEAVE—NATIONAL GUARD MEMBERS ATTENDING RIFLE MATCHES

Civil employees of the United States who are also members of the National Guard are not entitled to leave of absence with pay, in addition to their regular annual leave, while absent from duty attending rifle matches, such matches not constituting field or coast-defense training within the meaning of the act of June 3, 1916, 39 Stat. 203.

Acting Comptroller General Ginn to Capt. S. R. Beard, United States Army, July 17, 1924:

There has been received your request of January 26, 1924, for decision whether payment is authorized of a voucher for $107.75, transmitted therewith, in favor of Thomas A. Lamb for pay as laborer, Air Service, Rockwell Field, Calif., from September 5, 1923, to October 4, 1923, while absent from his duties for the purpose of participating in the national matches held at Camp Perry, Ohio, as a member of the State rifle team, California National Guard.

The act of June 3, 1916, 39 Stat. 203, provides:

SEC. 80. LEAVES OF ABSENCE FOR CERTAIN GOVERNMENT EMPLOYEES.—All officers and employees of the United States and of the District of Columbia who shall be members of the National Guard shall be entitled to leave of absence from their respective duties, without loss of pay, time, or efficiency rating, on all days during which they shall be engaged in field or coast-defense training ordered or authorized under the provisions of this Act.

General Order No. 10, promulgated by order of the Governor of the State of California, under authority of Militia Bureau Circular Letter No. 54, dated June 14, 1923, detailed Sergt. Thomas A. Lamb, Four hundred and sixty-third Company, Coast Artillery Corps, California National Guard, as a member of the State rifle team, California National Guard, to participate in the national team match and other matches to be held at Camp Perry, Ohio. He was directed to leave San Diego, Calif., August 27, 1923, and return thereto upon

completion of the regular annual matches, during which time he was to be under strict military discipline and at all times subject to the orders of the team captain.

The orders of the governor were based on Militia Bureau Circular Letter No. 54, of June 14, 1923, which contained the following:

1. It is desired that each State having federally recognized units of the National Guard be represented by a National Guard team at the national matches. One such team only is authorized for each State. (Funds this year will permit the attendance of teams from the Territories of Hawaii and Porto Rico.)

Each member of such team may hold any recognized grade, but must be a member of the federally recognized National Guard in his respective grade and organization prior to his appointment as a member of such team. The team captain, however, can not draw higher pay than that provided for major and other team members higher than that provided for captain. Members of the National Guard Reserve are not eligible. This conforms to the provisions of paragraph 484, National Guard Regulations, and is not in conflict with the provisions of paragraphs 486 and 487 (e), which apply to State rifle competitions held for the purpose of selecting new shooting members, as mentioned in paragraph 11 of this circular letter.

* * * * * * *

4. Property and disbursing officers will pay authorized members of duly detailed National Guard teams at the *pay* of their grades on properly executed vouchers certified by the team captain for the following periods:

(*a*) The period of necessary travel to and from Camp Perry, Ohio.

(*b*) The period of the national matches (Sept. 19–27).

(*c*) For other practice at the range at Camp Perry, not exceeding eight days prior to the first day of the national matches (Sept. 11–18).

(*d*) For other practice at the range at Camp Perry for those attending the school of instruction in marksmanship, not exceeding eighteen days prior to the first day of the national matches (Sept. 1–18).

Section 92 of the national defense act, 39 Stat. 206, requires the participation of each company, troop, battery, and detachment of the National Guard in "encampments, maneuvers, or other exercises, including outdoor target practice at least 15 days in training each year, including target practice" unless excused by the Secretary of War, and section 94 provides for "encampments, maneuvers, or other exercises, including outdoor target practice, for field or coast-defense instruction."

The provisions of section 80 of the act for leave of absence without deduction of pay, time, or efficiency rating for members of the National Guard, who are also employees of the United States Government "on all days during which they shall be engaged in field or coast defense training," ordered or authorized under the provisions of the national defense act are based on the requirements for encampments, including outdoor target practice, of organizations of the National Guard contemplated by sections 92 and 94. Section 97 of the act, 39 Stat. 207, provides:

Under such regulations as the President may prescribe the Secretary of War may provide camps for the instruction of officers and enlisted men of the National Guard. Such camps shall be conducted by officers of the Regular Army detailed by the Secretary of War for that purpose, and may be located either within or without the State, Territory, or District of Columbia to which the members of the National Guard designated to attend said camps shall belong.

Officers and enlisted men attending such camps shall be entitled to pay and transportation, and enlisted men to subsistence, in addition, at the same rates as for encampments or maneuvers for field or coast-defense instruction.

Paragraph 483 of the National Guard Regulations, 1922, provides:

Service at rifle competitions will not be reckoned in the assemblies for drill and instruction nor as part of period of encampment or maneuvers prescribed in section 92, national defense act. Periods of service at competitions under Federal pay are periods for which officers and enlisted men are lawfully entitled to the same pay as officers and enlisted men of the corresponding grades in the Regular Army, in the meaning of sections 109 and 110, national defense act, and such periods for which compensation is paid under the provisions of those sections.

In competitions individual members, not organizations, of the National Guard participate, and if entitled to the Federal pay of their grades during the period of their attendance at such competitions it must be on the theory that it is an attendance at a camp "for the instruction of officers and enlisted men of the National Guard." During periods of attendance at camps of instruction for individuals under section 97, the individual members are not engaged in field or coast-defense training within the meaning of section 80, and if employed by the United States are not entitled to additional leave of absence or "military leave" while absent from their duty attending such rifle competitions or other camps of instruction.

You are not authorized to pay the voucher.

(A-2337)

COMMISSIONERS, UNITED STATES—FEES—WARRANTS OF ARREST

Making a copy of complaint, issuing warrant of arrest, and entering return on the warrant, after a defendant has submitted to the jurisdiction of the commissioner by voluntarily appearing before him are unnecessary and do not entitle the commissioner to fees therefor.

Acting Comptroller General Ginn to the Attorney General, July 17, 1924:

There has been received your letter of December 20, 1923, inclosing copy of Exhibit B attached to the report of Examiner Marcus, upon the office of J. A. Craft, United States commissioner, Louisville, Ky., for the period April 1, 1922, to March 31, 1923, requesting that the accounts be reopened and that certain items listed by the examiner for disallowance, heretofore allowed, in the amount of $222, be recharged to the commissioner if the facts warrant such action.

The items recommended for disallowance represent fees charged for making copy of complaint, issuing warrant of arrest, and entering return on the warrant, $1.20 in each case.

It is explained by the examiner that it is the practice of the prohibition officers where searches are made and violations found and where the offenders are residing on the premises, not to arrest

them at the time, but to instruct them to appear before the commissioner to answer to the charge. In such cases the commissioner issued a warrant after the defendant had appeared and submitted to his jurisdiction, and placed the same in the hands of the marshal, the service of same being made by entering the return of the arrest in the office of the commissioner. A copy of the list of such cases as listed by the examiner was submitted to the commissioner for his approval, and he agreed that the facts as set forth in the statement were correct but took issue with the examiner as to such charges being subject to disallowance.

The commissioner, under date of July 7, 1923, addressed a letter to the examiner which reads in part as follows:

> It is hereby admitted that items listed by you in reference to what you consider items subject to recommendation for disallowance and designated as *Exhibit B* in your report to the Attorney General, * * * is correct as to the manner in which they were handled by me as commissioner, and the charges as shown by you are the correct amounts as charged, and no objection is offered as to the statement of facts.

The commissioner takes issue with the examiner as to the items listed being subject to disallowance and submits his reasons for such objections, citing various sections of the Kentucky Code of Criminal Practice, as follows:

> SECTION 10. Offenses within the jurisdiction of the justice of the peace or of the city or police court, the punishment of which is a fine limited to $100, may be prosecuted by a summons or warrant of arrest in which shall be stated in general terms the crime to have been committed.
> SECTION 35. An arrest may be made by a peace officer or a private person.
> SECTION 36. A peace officer may make an arrest, first, in obedience to warrant of arrest delivered to him; second, without a warrant when public offense is committed in his presence.
> SECTION 37. That private persons may make an arrest for a felony alone.

The commissioner states that in practically all of the cases where search warrants are issued they are directed to the prohibition agents, who have no power to make arrests, except where they find some person in the act of transporting intoxicating liquors in violation of law.

Section 26, Title II, of the national prohibition act, October 28, 1919, 41 Stat. 315, provides in part as follows:

> When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this title in any court having competent jurisdiction * * *.

Under the provisions of this title the commissioner, his assistants, inspectors, or any other officers of the law are authorized to arrest any offenders for violations of the national prohibition act, and to at

once proceed against them by taking them before any court having competent jurisdiction for a hearing.

An examination of the vouchers shows that the offense charged was for violations of the national prohibition act. Some of the defendants were placed under arrest at the time the search warrant was executed; other violators residing on the premises, it is explained, were not arrested, but instructed to appear before the commissioner to answer the charge. Those arrested were taken before the commissioner, and after submitting to his jurisdiction the complaint, copy of same, and warrant of arrest were issued and service of warrant made by a deputy marshal. In cases where no arrests were made the defendants voluntarily appeared before the commissioner; warrants were issued after the defendants appeared to answer to the charge. The object of the warrant is to produce the defendant before the commissioner; therefore, the issuance of the copy of complaint, warrant of arrest, and entering return on warrant after the defendants had submitted to the jurisdiction of the commissioner were unnecessary, and the fees charged therefor in the amount of $222 will be recharged to the commissioner.

(A–3420)

MODIFICATION OF LEAVE WITHOUT PAY TO SICK LEAVE—INTERIOR DEPARTMENT

An employee of the Interior Department who is absent at the end of the calendar year without pay and continues absent at the beginning of next year is not, under the regulations of that department, entitled to annual or sick leave on the new year's allowance until return to duty for an aggregate of 30 days; thereafter the leave without pay previously taken in that year may be modified to sick or annual leave to the extent that credit for such sick or annual leave is earned in that year and when so modified the employee is entitled to pay therefor.

Leave without pay granted a temporary employee of the Interior Department may, under the regulations of that department, be changed to annual leave, if his appointment is made permanent in the same calendar year, and payment therefor is then authorized.

Acting Comptroller General Ginn to the Secretary of the Interior, July 18, 1924:

I have your letter of May 23, 1924, requesting review of settlement 016332, dated April 4, 1924, in which was disallowed the claim of Fred N. Stone, an examiner in the Patent Office, for $25.18, being pay for three days' sick leave.

It appears that the claimant on account of illness had exhausted all his leave for the year 1922 and was in a nonpay status from January 1 to February 4, and from February 7 to June 30, 1923. On July 1, 1923, he returned to duty and was absent on sick leave from August 13 to 15, 1923, three days, and again absent sick from

August 20 to 28, 1923, nine days, which latter period was charged to leave without pay.

The act of March 15, 1898, 30 Stat. 316, authorizes the heads of departments under such regulations as they may prescribe to grant not to exceed 30 days' leave with pay in any year, known as annual leave, and also not more than 30 days' sick leave in any year.

Rule 54 of the regulations of the Interior Department governing leave of absence provides:

> An employee who is absent at the end of the year without pay and continues absent at the beginning of the next year is not entitled to annual or sick leave on the new year's allowance until return to duty for an aggregate of thirty days; thereafter leave of absence with pay from January 1 is permissible.

At the end of the calendar year 1923 the nine days' leave without pay, taken by claimant from August 20 to 28, was modified to sick leave and he was paid therefor. That period, together with the three days' sick leave granted claimant from August 13 to 15 made a total of 12 days' sick leave granted claimant on account of his services from July 1 to December 31, 1923. During the latter period claimant earned 15 days' sick leave and might have been granted 3 days' sick leave in addition to what was actually granted and the present claim is for pay for 3 days' sick leave that might have been granted under rule 54, *supra*, in place of 3 days taken without pay prior to July 1, 1923. In other words, the employee claims the benefit of rule 54 for the balance of sick leave earned by him in addition to the nine days previously modified from leave without pay to sick leave.

This case differs from the cases in which pay is denied for leave not granted or taken during the year in which it was earned. In the instant case leave without pay was granted and in accordance with regulations subsequently was modified to sick leave.

Upon review $25.18 is certified due claimant. See 4 MS. Comp. Gen. 774; 12 Comp. Dec. 398; 13 *id.* 347.

In your letter you also request decision whether a clerk who was absent on leave without pay from January 1 to 5, 1924, returned to duty on January 7, 1924, and has proved her illness from January 1 to 5, 1924, may have the leave without pay modified to sick leave and be paid therefor under rule 54, the employee having served more than 30 days after return to duty. You are advised that I see no legal objection to such action if given proper administrative approval.

Under rule 13 of leave regulations of the Interior Department temporary employees are not allowed leave with pay for the first two months of service. It has been the practice to allow an employee who is made permanent within the same calendar year leave from day of entering the service as temporary employee and reim-

bursement for leave charged without pay during the temporary service. You request to be advised whether there is any distinction to be made between this and the other cases herein decided. The practice followed represents the department's construction of the leave regulations, and such construction has been acquiesced in by the accounting officers. You are advised that the practice in question does not contravene any provision of the leave laws and I see no good reason for changing it.

(A–4118)

HONORABLE DISCHARGE GRATUITY—FORFEITURE BY COURT-MARTIAL SENTENCE

The honorable discharge gratuity which accrued under the act of May 11, 1908, 35 Stat. 110, to a soldier upon reenlistment, is an "allowance" within the meaning of a court-martial sentence forfeiting all pay and allowances due or to become due, and if unpaid is forfeited by such sentence.

Decision by Acting Comptroller General Ginn, July 18, 1924:

Harry L. Ingram has requested review of settlement No. W–895135, dated May 21, 1923, wherein was disallowed his claim for the reenlistment bonus of three months' pay upon reenlistment in the Army October 8, 1919.

It appears that the claimant entered the military service on September 30, 1915, as a private, Troop F, Ninth Cavalry, and served continuously as a private until October 7, 1919, when he was honorably discharged. He reenlisted on October 8, 1919, for three years, and was honorably discharged for the convenience of the Government March 23, 1922. It further appears that claimant was tried by general court-martial for violation of the ninety-fourth article of war and sentenced by Order No. 468, headquarters Southern Department, dated June 7, 1920, to serve one year in the United States Disciplinary Barracks, Fort Leavenworth, Kans., and to forfeit all pay and allowances due or to become due while under confinement. The unexecuted portion of the sentence was remitted and claimant honorably restored to duty March 23, 1921. The claim for reenlistment bonus was disallowed for the reason that it was forfeited by the court-martial sentence.

The act of May 11, 1908, 35 Stat. 110, provides:

That hereafter any private soldier, musician or trumpeter honorably discharged at the termination of his first enlistment period who reenlists within three months of the date of said discharge shall, upon such reenlistment, receive an amount equal to three months' pay at the rate he was receiving at the time of his discharge.

The enlistment period of active service was four years under the act of August 24, 1912, 37 Stat. 590, which was in force at the time of claimant's original enlistment. By section 7 of the act of May 18,

1917, 40 Stat. 81, all enlistments in the Army were continued in force during the emergency. Claimant passed into his second enlistment period September 30, 1919, being the next day after he completed his first enlistment period of four years, and upon reenlistment of October 8, 1919, he was immediately entitled to the reenlistment bonus in an amount equal to three months' pay of the grade of private held by him on September 29, 1919, 26 Comp. Dec. 715; 27 *id.* 40. The payment of such bonus was not made to claimant prior to the time that he was sentenced to forfeit "all pay and allowances" due or to become due. It is for determination whether the reenlistment bonus was within the term "pay and allowances" and forfeited by the court-martial sentence. A court-martial sentence is penal and must be strictly construed; only such emoluments as are within the descriptive term "pay and allowances" are forfeited in this case. 16 Comp. Dec. 439; 22 *id.* 470.

The case of *Landers* v. *United States*, 92 U. S. 77, was a claim for pay and bounty between sentence to forfeit all pay and allowances and a subsequent honorable discharge. The claimant had recovered judgment in the Court of Claims and the United States prosecuted the appeal. In the opinion of the Supreme Court it is said:

> The bounty which the petitioner claimed was included in the allowances forfeited. Under the term "allowances," everything was embraced which could be recovered from the Government by the soldier in consideration of his enlistment and services, except the stipulated monthly compensation designated as pay. This is substantially the conclusion reached by the late Attorney General, Mr. Hoar, after full consideration of the statutes bearing upon the question (Opinions of Attorneys General, vol. xiii, pp. 198, 199); and such, we are informed, has been the uniform ruling of the War Department.

Whether, therefore, the amount payable under the act of May 11, 1908, be termed a bounty for enlisting or a gratuity, it was one of the items "which could be recovered from the Government by the soldier in consideration of his enlistment and service," and is included in the term allowances under the *Landers* decision, and was forfeited by the court-martial sentence forfeiting all pay and allowances due at date of promulgation of sentence. 3 Comp. Dec. 676

On review of the matter the settlement is sustained.

(A–1628)

NAVY PAY—LONGEVITY—SERVICE AS INTERNE IN PUBLIC HEALTH SERVICE HOSPITAL

Service as an interne in a Public Health Service hospital is civilian service and not such service as the acts of May 18, 1920, 41 Stat. 604, and June 10, 1922, 42 Stat. 627, authorize to be counted for longevity pay purposes by officers of the Navy. 27 Comp. Dec. 549 overruled; 1 Comp. Gen. 246 modified.

Decision by Acting Comptroller General Ginn, July 18, 1924:

There is for consideration the question as to whether E. L. Woods, lieutenant commander (M. C.), United States Navy, is entitled to credit for service as interne in the Public Health Service from October 6, 1904, to August 15, 1905, 10 months and 10 days, in computing his pay under section 11 of the act of May 18, 1920, 41 Stat. 604, and in computing his pay and allowances under the act of June 10, 1922, 42 Stat. 625, 627.

It appears that claimant was appointed an interne in the Public Health Service for duty at New York, N. Y., October 6, 1904, and resigned effective August 15, 1905. He was appointed an assistant surgeon in the Navy from October 14, 1905, accepted the appointment and executed the required oath of office on October 19, 1905, and has continuously served in the Navy since that date. He held the temporary rank of commander from May 18, 1920, to December 31, 1921, when he reverted to his permanent rank of lieutenant commander.

Section 11 of the act of May 18, 1920, 41 Stat. 604, provides:

That hereafter longevity pay for officers in the Army, Navy, Marine Corps, Coast Guard, Public Health Service, and Coast and Geodetic Survey shall be based on the total of all service in any or all of said services.

The act of June 10, 1922, 42 Stat. 627, provides:

For officers appointed on and after July 1, 1922, no service shall be counted for purposes of pay except active commissioned service under a Federal appointment and commissioned service in the National Guard when called out by order of the President. For officers in the service on June 30, 1922, there shall be included in the computation all service which is now counted in computing longevity pay, and service as a contract surgeon serving full time; and also 75 per centum of all other periods of time during which they have held commissions as officers of the Organized Militia between January 21, 1903, and July 1, 1916, or of the National Guard, the Naval Militia, or the National Naval Volunteers since June 3, 1916, and service as a contract surgeon serving full time, shall be included in the computation.

The question presented is whether said service as interne in the Public Health Service is service in the Public Health Service within the meaning of section 11 of the act of May 18, 1920.

At the time of the enactment of the act of May 18, 1920, the Public Health Service consisted of commissioned medical officers whose pay and designations were fixed by law, and civil employees whose compensation was fixed either by regulation or by the Secretary of the Treasury. Act of August 14, 1912, 37 Stat. 309; Regulations, United States Public Health Service, 1913. Internes are not commissioned officers, but come in the class of civil employees in regard to whose compensation paragraph 85 of said regulations provides:

The compensation of internes shall be fixed by the Secretary of the Treasury, and in addition they shall be entitled to quarters (one room), subsistence, and laundry.

By section 4 of the act of July 1, 1902, 32 Stat. 712, the President was authorized, in his discretion, to utilize the Public Health

and Marine Hospital Service, now Public Health Service, in times of threatened or actual war to such extent and in such manner as shall in his judgment promote the public interest.

Paragraph 5 of the Public Health Service Regulations of 1913 provides that the commissioned officers of that service shall rank relatively with and after commissioned officers of the Revenue Cutter Service (Coast Guard), and commissioned officers of the latter service rank with commissioned officers of the Army and Navy. Act of April 12, 1902, 32 Stat. 100; act of April 16, 1908, 35 Stat. 61; act of January 28, 1915, 38 Stat. 800. This relative rank was apparently recognized by Congress in the act of August 14, 1912, 37 Stat. 309, by providing the same rates of base pay and longevity increase for each five years' service for commissioned officers of the Public Health Service as had been provided for commissioned officers of the Army and Navy of corresponding rank and length of service. See also act of May 18, 1920, 41 Stat. 601; act of June 10, 1922, 42 Stat. 625.

The pay of the officers and other employees of the Public Health Service below the commissioned grades has not been placed on a parity with the noncommissioned officers or enlisted men of the military services. The act of May 18, 1920, entitled "An act to increase the efficiency of the commissioned and enlisted personnel of the Army, Navy, Marine Corps, Coast Guard, Coast and Geodetic Survey, and Public Health Service," increased the pay of the commissioned officers of the Army, Navy, Marine Corps, and Public Health Service, of the warrant officers of the Navy, and of the enlisted men of the Army, Marine Corps, and Navy, and assimilated the pay and allowances of the commissioned officers of the Coast and Geodetic Survey and the commissioned officers, warrant officers, and enlisted men of the Coast Guard to those of corresponding grades or ratings and length of service in the Navy and contained the above provision relative to counting the total of all service in any or all of said services for the purpose of computing longevity pay of the officers. In the statement of the managers on the part of the House in the conference report (H. Rept. No. 948) on the amendments of the Senate to the bill H. R. 11927, it was stated, in part, as follows:

> The bill as agreed upon places all of the military or quasi military services of the Government on a similar basis as regards rates of pay. * * *
> Section 1 of the bill as agreed upon provides specific increases in the pay of commissioned officers. * * *
> Section 11 * * * contains a proviso placing all the services on an equality in the matter of computation of longevity or service pay.

It will be noted that so far as the Public Health Service is concerned the said act dealt only with the pay of the commissioned officers, and this is also true with respect to the act of June 10, 1922.

The Public Health Service is not a part of the military forces of the Nation, but is a part of the civil government. 27 Comp. Dec. 153. The commissioned officers thereof, however, have relative rank and receive the same pay as the commissioned officers in the military services and to that extent have a quasi military status.

Prior to the act of May 18, 1920, officers of the Army, Navy, and Marine Corps were authorized to count in computing longevity pay all prior military service rendered in the Army, Navy, and Marine Corps, as distinguished from civilian service. Act May 13, 1908, 35 Stat. 128; act of June 30, 1882, 22 Stat. 118, *United States* v. *Morton*, 112 U. S. 1; *United States* v. *La Tourrette*, 151 U. S. 572; *Schreiner* v. *United States*, 43 Ct. Cls. 480.

As the act of May 18, 1920, deals only with the pay of persons having a military or quasi military status it would seem that the intendment of the longevity provision of section 11 therein was to authorize the counting of only military or quasi military service as distinguished from service as a civilian; especially in view of the prior legislation on the subject.

It is not to be presumed that Congress intended to authorize the commissioned officers of the military services to count for longevity pay purposes prior service as a civilian in the Public Health Service or the Coast and Geodetic Survey while the right to count such service in other branches of the Government service is denied.

It is concluded that service as interne in the Public Health Service is not service in the Public Health Service within the meaning of said act of May 18, 1920, and therefore can not be counted in computing the longevity pay of an officer of the Navy under the act of May 18, 1920, or the pay and allowances of such officer under the act of June 10, 1922. See in this connection 2 Comp. Gen. 350.

It was held by a former Comptroller of the Treasury that the word "service" in the provision of the regulations of the Marine Hospital Service that additional compensation shall be allowed commissioned officers above the rank of assistant surgeon "for each five years' service" means not only commissioned but other service in the Marine Hospital Service, including service as hospital stewards, acting assistant surgeons, and as internes. 6 Comp. Dec. 508; 9 *id.* 314.

The said decisions related to a period of time before commissioned officers of the Public Health Service were given a quasi military status. It does not follow, however, that officers in the other services mentioned in the act of May 18, 1920, are entitled to count such civilian service under that act. In 27 Comp. Dec. 549, it was held that an Army officer was entitled under said sec-

tion 11 of the act of May 18, 1920, to count prior service as deck officer in the Coast and Geodetic Survey, a grade below that of commissioned officer. Although not stated, the apparent reason for this holding was that service as deck officer was service in the Coast and Geodetic Survey, and therefore came within the letter of the law. While said holding is in accordance with the letter of the law, it is apparent that it does not come within the spirit and reason of the law. The said decision will, therefore, not be followed hereafter. The decision in 1 Comp. Gen. 246 is modified to conform with the views herein expressed.

(A–3641)

EMERGENCY MEDICAL TREATMENT—VETERANS' BUREAU

The regulations of the Veterans' Bureau prescribing rates allowable to private physicians for authorized medical treatment to its beneficiaries are not applicable to claims of beneficiaries for amounts paid for emergency medical treatment when not in excess of the reasonable value of the services administratively approved by the director of the bureau. (Modified by 4 Comp. Gen. 480.)

Acting Comptroller General Ginn to Wm. H. Holmes, disbursing clerk, United States Veterans' Bureau, July 19, 1924:

I have your letter of June 24, 1924, requesting decision whether payment is authorized of a voucher in favor of Albert Stein for reimbursement of amounts paid by him for medical treatment procured by him in an emergency.

It appears that Stein is a beneficiary patient of the Veterans' Bureau, his disability being diagnosed as psychoneurosis, neurasthenia, hysterical trend; that he had frequently complained to the bureau physicians about his stomach, and especially about his vomiting; that as these conditions were attributed by said physicians to the patient's neurological condition, they would not give him treatment for the stomach; that he became seriously ill and was taken by his family to a private hospital and operated on for gastric ulcer; and that he paid and claimed reimbursement for the charges for the operation and expenses incidental thereto.

The items here in question are the amounts of the charges for the the anæsthetic, consultation, and nursing, which were in excess of the rates fixed by the schedule of fees for such services allowed by General Order 162a of the Veterans' Bureau in effect at the time the expenses under consideration were incurred.

The voucher bears the notation in connection with administrative approval thereof that General Orders 162 and 162a "are hereby specially waived." General Order 162a is the regulation of the Veterans' Bureau fixing the amounts of various fees that will be approved for the items of expenses named. You state that there is

a question in your mind whether the orders prescribing maximum fees may be retroactively waived. The question as to retroactive waiver need not be considered in this case, for the reason that the orders or regulations referred to relative to allowances made by the bureau to private physicians who claim pay for services performed for beneficiaries of the bureau are not applicable to a claim for reimbursement of amounts paid by a beneficiary for emergency treatment.

Since the director of the bureau has approved the voucher for payment and the charges appear to be reasonable you are advised that payment of the voucher is authorized if it is correct in all other respects.

(A-3958)

CLASSIFICATION OF CIVILIAN EMPLOYEES—INCREASES OF COMPENSATION WITHIN GRADE

The filing of any vacancy, whether previously filled or not, either by promotion, transfer, reinstatement, or new appointment, is prohibited by the average compensation provision in the act of April 4, 1924, 43 Stat. 64, unless it can be done within the proper average; i. e., any new adjustments of salaries after the establishment of initial salaries on July 1, 1924, under the provisions of the classification act, within the limitations of available appropriations, must not violate the average provision.

The compensation of an employee may be increased from the minimum to the maximum rate in the same grade, if the proper average is maintained and he has attained the required efficiency rating, by one administrative action constituting in effect a series of promotions simultaneously effective.

Where there is only one employee in a grade no comparative efficiency rating can be made, and if the employee is determined administratively to have attained the proper efficiency, his compensation may be fixed at any rate of pay within his grade.

Acting Comptroller General Ginn to the Secretary of the Treasury, July 19, 1924:

I have your letter of July 11, 1924, requesting decision of two questions, as follows:

> Your opinion is desired on the following questions:
> 1. Does the appropriation act for the Treasury and Post Office Departments for the fiscal year ending June 30, 1925, and for other purposes, prohibit the reinstatement or transfer and appointment of an employee above the minimum salary in a grade, when such reinstatement or transfer will cause the average salary of the total number of employees in the grade to exceed the average of the compensation rates specified for the grade?
> 2. When there is but one employee allocated to a grade in an appropriation unit, may the salary of such employee be increased to any rate up to the maximum of the grade by one promotion, or does section 7 of the classification act limit an increase to the next rate within the salary range of the grade?

The act referred to in the submission, act of April 4, 1924, 43 Stat. 64, provides as follows:

> * * * *Provided*, That in expending appropriations or portions of appropriations, contained in this Act, for the payment for personal services in the District of Columbia in accordance with "The Classification Act of 1923," the

average of the salaries of the total number of persons under any grade or class thereof in any bureau, office, or other appropriation unit, shall not at any time exceed the average of the compensation rates specified for the grade by such Act; *Provided*, That this restriction shall not apply (1) to grades, 1, 2, 3, and 4 of the clerical-mechanical service, or (2) to require the reduction in salary of any person whose compensation is fixed, as of July 1, 1924, in accordance with the rules of section 6 of such Act, or (3) to prevent the payment of a salary under any grade at a rate higher than the maximum rate of the grade when such higher rate is permitted by "The Classification Act of 1923," and is specifically authorized by other law.

Question 1 is stated in general terms and appears to be answered in decision of June 26, 1924, 3 Comp. Gen. 1001, under question 2, as follows:

* * * The filling of any vacancy, whether previously filled or not, either by promotion, transfer, reinstatement, or new appointment, would be prohibited unless it can be done within the proper average. In other words, any new adjustments of salaries after the establishment of initial salaries on July 1, 1924, under the provisions of the classification act, within the limitations of the available appropriations, must not violate the average provision.

There appears no reason for any amendment of the former decision as stated in such general terms.

Section 7 of the classification act of 1923, 42 Stat. 1490, provides in part as follows:

Increases in compensation shall be allowed upon the attainment and maintenance of the appropriate efficiency ratings, to the next higher rate within the salary range of the grade * * *.

Section 9 provides that the Personnel Classification Board shall establish a system of efficiency ratings on which is to be based changes in rates of pay within the grade by promotion or demotion, and the heads of departments are required to rate in accordance with such system of efficiency each employee under his control or direction. This general requirement for rating relates equally to one person in a grade as it does to more than one person in the grade. It is assumed that a higher rating of efficiency must be attained for each rate of pay within the grade. In considering an employee for an increase in compensation within the range authorized for his grade his efficiency is for comparison with each employee receiving the same rate of compensation within the grade, and the classification act contemplates an increase in compensation to the next higher rate when the proper efficiency is attained. There exists no time limit within which the employee may be again considered for promotion upon comparison of his efficiency rating with those employees receiving the rate of compensation to which he has already been promoted, and a series of such promotions from the minimum to the maximum of the grade may be made simultaneously if the proper average is maintained and appropriation has been provided therefor.

Any increase of compensation as a result of such comparative efficiency rating through more than one rate in a grade, while in

effect constituting a series of increases "to the next higher rate within the salary range of the grade," may be accomplished by one administrative action, no oath being required.

Where there is only one in a grade no comparative efficiency rating may be made; and if the employee is determined administratively to have attained the proper efficiency, his compensation may be fixed at any rate of pay within his grade.

(A-4015)

CLASSIFICATION OF CIVILIAN EMPLOYEES—TRANSFERS BETWEEN GRADES

Any new adjustment of salaries by transfer, reinstatements, etc., in a grade in which the average has already been exceeded due to the exceptions expressed in the average provision of the appropriation act, must tend to reduce the average, and to that end all such transfers, reinstatements, etc., must be made at the minimum salary of the grade.

Acting Comptroller General Ginr to the Secretary of the Treasury, July 19, 1924:

I have your letter of July 15, 1924, as follows:

The Surgeon General of the U. S. Public Health Bureau has recommended the transfer of a bookkeeper at $1,680 per annum, CAF 3, in the War Department to bookkeeper at $2,000 per annum, CAF-5, in the Public Health Bureau, in a position which was vacated by the resignation since July 1, 1924, of an employee who was receiving $2,300 per annum, the average of the salaries of the total number of persons in said grade in the Public Health Bureau being in excess of the average of the compensation rates specified for said grade.

Your opinion is requested as to whether such transfer would be in violation of the classification act of 1923. Would your answer be the same if the resignation was from a position at the minimum salary?

Section 10 of the classification act of 1923, 42 Stat. 1491, provides as follows:

That, subject to such rules and regulations as the President may from time to time prescribe, and regardless of the department or independent establishment in which the position is located, an employee may be transferred from a position in one grade to a vacant position within the same grade at the same rate of compensation, or promoted to a vacant position in a higher grade at a higher rate of compensation, in accordance with civil service rules, any provision of existing statutes to the contrary notwithstanding: *Provided*, That nothing herein shall be construed to authorize or permit the transfer of an employee of the United States to a position under the municipal government of the District of Columbia, or an employee of the municipal government of the District of Columbia to a position under the United States.

The act of April 4, 1924, 43 Stat. 64, in which appropriations for the Public Health Service are made, provides as follows:

* * * *Provided*, That in expending appropriations or portions of appropriations, contained in this Act, for the payment for personal services in the District of Columbia in accordance with "The Classification Act of 1923," the average of the salaries of the total number of persons under any grade or class thereof in any bureau, office, or other appropriation unit, shall not at any time exceed the average of the compensation rates specified for the grade by such

Act: *Provided*, That this restriction shall not apply (1) to grades 1, 2, 3, and 4 of the clerical-mechanical service, or (2) to require the reduction in salary of any person whose compensation is fixed, as of July 1, 1924, in accordance with the rules of section 6 of such Act, or (3) to prevent the payment of a salary under any grade at a rate higher than the maximum rate of the grade when such higher rate is permitted by "The Classification Act of 1923," and is specifically authorized by other law.

This provision was enacted subsequent to the classification act and therefore any provision appearing in the classification act in conflict with this provision with reference to average is rendered ineffective thereby to the extent that it is in conflict with the said average provision. Therefore transfers authorized under section 10 of the classification act may be made only when they may be accomplished without violation of the average provision.

Section 10 of the classification act authorizes transfers "to a vacant position in a higher grade at a higher rate of compensation." But this may not be accomplished if it is proposed to pay the employee transferred a rate of compensation which will violate the average provision. It is assumed that the present excess in the grade is due to the exceptions made by the average provision itself. It was held in decision of June 26, 1924, to the Civil Service Commission, 3 Comp. Gen. 1001, that in fixing the initial salaries on July 1, 1924, these excepted salaries might be eliminated in determining the average. But it was also held in said decision that any new adjustments of salaries after the establishment of the initial salaries must not violate the average provision. The transfer contemplated in this case involves a new adjustment after July 1, 1924; therefore the salary of all persons in the grade, including those who were excepted in the allocation, must be considered in determining whether the transfer will violate the average provision.

Clearly it was not the intent of Congress that all appointments in or transfers to a grade must cease on and after July 1 if the average of the grade has already been exceeded. Considering the transfer provision in connection with the average provision, the rule will be that any new adjustment of salaries by transfer, reinstatements, etc., in a grade in which the average has already been exceeded due to the exceptions expressed in the average provision of the appropriation act, must tend to reduce the excess average so that eventually the average will not be exceeded, and this can be accomplished most expeditiously by requiring the transfers, reinstatements, etc., to be at the minimum rate of salary of the grade.

Accordingly, in the case submitted the transfer to the Public Health Service of the bookkeeper at a salary of $2,000 is not authorized, but under the rule above stated the transfer may be made only at the minimum salary of the grade, viz, $1,860.

If the transfer is to fill a vacancy caused by a resignation from a position at the minimum salary of the grade and the average of the grade is exceeded, the transfer would be authorized at the minimum salary.

(A–3752)

IMMIGRATION VISAS

Immigrants desiring to enter the United States on and after July 1, 1924, may not exchange without cost unused and unexpired visaed passports, issued under the prior laws for the "immigration visas" required by the act of May 26, 1924, 43 Stat. 153, but must pay the $9 fee required for immigration visas by the act.

Acting Comptroller General Ginn to the Secretary of State, July 19, 1924:

I have your letter of June 30, 1924, requesting decision whether immigration visas under the provisions of the immigration act of 1924 may be issued gratuitously to bearers of unused and unexpired visas of passports issued under laws in force prior to July 1, 1924.

The act of June 4, 1920, 41 Stat. 750, in force prior to July 1, 1924, provided as follows:

SECTION 2. From and after the 1st day of July, 1920, there shall be collected and paid into the Treasury of the United States quarterly a fee of $1 for executing each application of an alien for a visé and $9 for each visé of the passport of an alien: * * *.

SEC. 3. The validity of a passport or visé shall be limited to two years, unless the Secretary of State shall by regulation limit the validity of such passport or visé to a shorter period.

Section 2 of the immigration act of 1924, dated May 26, 1924, 43 Stat. 153, effective July 1, 1924, provides for issuance of "immigration visas" under certain conditions therein expressed. Paragraph (c) of that section provides: "The validity of an immigration visa shall expire at the end of such period, specified in the immigration visa, not exceeding four months, as shall be by regulations prescribed." Paragraph (h) of the same section provides as follows:

A fee of $9 shall be charged for the issuance of each immigration visa, which shall be covered into the Treasury as miscellaneous receipts.

You state that visas of passports granted prior to July 1, 1924, were as a rule valid for one year; that in most of the cases the fees collected therefor have been covered into the Treasury; and that under the provisions of the immigration act of 1924 owners of the visaed passports coming to the United States on and after July 1, 1924, unless they belong to the limited classes specified in section 3 of that act as not being "immigrants," will be required to obtain additional documents known as "immigration visas."

The provision of the act of May 26 requiring the immigration visas did not take effect until July 1, 1924; that is to say, any immigrant who on May 26, 1924, held a visa, which prior to that date would entitle him to enter the United States could have entered the United States thereon at any time prior to July 1, 1924, without an immigration visa such as is required under the said act of May 26, 1924. It is reasonable to assume that if any other concessions to holders of visas theretofore issued had been intended they would have been made in the act.

For the issuance of the immigration visas required on and after July 1, 1924, the statute specifically directs that a charge of $9 be made. This provision is mandatory and makes no exception, nor does it authorize crediting the holder of an unused and unexpired visaed passport issued under laws in force prior to July 1, 1924, with any portion of the fee charged therefor.

Any relief to holders of unused and unexpired visaed passports, in so far as any refund or credit to them may be concerned, is a matter for the attention of Congress.

Your question is answered in the negative.

(A-3925)

ARMY PAY—LONGEVITY—REENLISTMENT GRATUITY—PHILIPPINE SCOUT SERVICE

Service as an enlisted man in the Philippine Scouts is service in a military capacity in the Army, and an enlisted man of the Regular Army is entitled to count prior service in the Philippine Scouts for longevity increase of pay under the act of June 10, 1922, 42 Stat. 629.

Service as an enlisted man in the Philippine Scouts, while in a broad sense service in the Army and counted for longevity increase in subsequent enlistments in the Regular Army, is not service in the Regular Army, and an enlistment in the Regular Army following discharge from the Philippine Scouts is not a reenlistment and does not entitle the soldier to the gratuity provided by the act of June 10, 1922, for reenlistments.

Acting Comptroller General Ginn to the Secretary of War, July 19, 1924:

There was received July 10, 1924, your request for decision as to whether Ramon Rojo, private, first class, specialist, third class, service company, Twenty-seventh Infantry, is entitled to the enlistment allowance provided by the act of June 10, 1922, 42 Stat. 629, and to count prior service in the Philippine Scouts for increase of pay.

It is stated that the soldier has had service as follows:

Company I, 1st Philippine Infantry, July 6, 1916, to July 5, 1920; service company, 45th Infantry (P. S.), August 17, 1920, to August 16, 1923.

Enlisted in the Regular Army August 18, 1923, at Manila, P. I., for three years; transferred Sept. 24, 1923, to Fort McDowell, Calif., for assignment to Hawaiian Department; arrived in Hawaiian Department November 26, 1923, and assigned to service company, 27th Infantry, December 8, 1923.

The act of June 10, 1922, 42 Stat. 629, provides:

> Sec. 9. * * * Commencing July 1, 1922, warrant officers of the Army * * * including warrant officers of the Army Mine Planter Service and enlisted men of the Army * * *, shall receive, as a permanent addition to their pay, an increase of 5 per centum of their base pay for each four years of service in any of the services mentioned in the title of this act not to exceed 25 per centum. On and after July 1, 1922, an enlistment allowance equal to $50, multiplied by the number of years served in the enlistment period from which he has last been discharged, shall be paid to every honorably discharged enlisted man of the first three grades who reenlists within a period of three months from the date of his discharge, and an enlistment allowance of $25, multiplied by the number of years served in the enlistment period from which he has last been discharged, shall be paid to every honorably discharged enlisted man of the other grades who reenlists within a period of three months from the date of his discharge.

Section 36 of the act of February 2, 1901, 31 Stat. 757, authorized the President to enlist natives of the Philippine Islands in organizations to be known as scouts for service in the Army. The Philippine Scouts are a part of the Regular Army, existing by virtue of and subject to the limitations of special statutes. 3 Comp. Gen. 135.

What service with the Army may be counted for the purpose of longevity increase of pay has been the subject of numerous decisions, both of the accounting officers and the courts. It seems to be settled that under a statute broadly providing for a percentage increase of pay "for service in the Army" (there being no limiting statutes otherwise applicable; for example, sec. 6, act of August 24, 1912, 37 Stat. 594) any service in a military capacity is to be included, as distinguished from service rendered as a civilian accompanying the Army, whether serving by appointment or under contract. See *United States* v. *Morton*, 112 U. S. 1; *Hendee* v. *United States*, 124 U. S. 309; 27 Comp. Dec. 289; 2 Comp. Gen. 350. Service as an enlisted man in the Philippine Scouts is service in a military capacity in the Army, and an enlisted man of the Regular Army is entitled to count prior service in the Philippine Scouts for increase of pay as provided in the act of June 10, 1922. 27 Comp. Dec. 309.

An enlistment in the Regular Army after service in the Philippine Scouts is not a reenlistment, but an enlistment. While service in the Philippine Scouts is service in the Army for the purpose of longevity increase of pay under the existing statute, that service was not in the Regular Army proper, but in an organization created by specific and separate provision of law, existing separately and distinct from the Regular Army and primarily for duty in the Philippine Islands. From its creation it has had a separate provision for pay and has operated in a limited field. A reenlistment bounty for enlistments in the Regular Army proper after honorable discharge from the Philippine Scouts, when such bounty is not payable for reenlistments in the Philippine Scouts, would encourage enlistments in the Regular Army to the injury of recruiting for the

Philippine Scouts. The provision for an enlistment allowance was to secure reenlistments in the service from which discharged, not to build up one service, branch, or component at the expense of another. 2 Comp. Gen. 162, 163. That provision is not, therefore, applicable to an enlistment in the Regular Army within three months after honorable discharge from the Philippine Scouts.

The item of $75 reenlistment allowance is not authorized to be paid. The item of pay, including longevity increase for Philippine Scout service, if otherwise correct, may be paid.

(A–3105)

DOUBLE COMPENSATION—LABORER AND SPECIAL-DELIVERY MESSENGER

The position of laborer in the custodian service, Treasury Department, with compensation fixed by long-established practice, having the force of a regulation, although not published as such, is separate and distinct from that of special-delivery messenger in the Postal Service, the fees payable for special delivery being also fixed by regulation, the holding of both positions is not barred by section 1765, Revised Statutes, nor by the act of May 10, 1916, 39 Stat. 120, fees for special-delivery service not being salary within the meaning of the latter act.

Acting Comptroller General Ginn to the Secretary of the Treasury, July 19, 1924:

I received on May 29, 1924, your letter of May 23, 1924, stating that Hiram G. Stebbins, laborer in the custodian service at Keokuk, Iowa, is also employed by the postmaster at Keokuk and paid fees for the delivery of special-delivery letters and packages, such work being done outside the regular hours of services as a laborer. You request decision whether such dual employment is in violation of any of the statutes relative to double compensation, etc.

It is understood that the pay of laborers in the custodian service is fixed by departmental practice within certain limits, depending upon the size of the building in which they are employed. While the rates of pay are not set out in published regulations, yet the long-continued practice has the force of a regulation, and it may properly be said that the pay of laborers in the custodian service is fixed by regulation. The pay of messengers for delivery of special-delivery mail is fixed by section 868 of the Postal Laws and Regulations at not to exceed 8 cents for each piece delivered or attempted to be delivered.

Under the decision in the case of *Saunders* v. *United States*, 120 U. S. 126, sections 1764 and 1765, Revised Statutes, do not prohibit payment of compensation to one person for services performed in two distinct compatible employments the pay of each of which is fixed by law or regulation. The two employments here under consideration are distinct and the pay of each is fixed by regulation.

The compensation for the service in delivery of special delivery mail is in the nature of a fee, being a certain amount for each delivery. It has been held that fees are not salary within the meaning of the act of May 10, 1916, 39 Stat. 120, as amended, which prohibits payment to any person receiving more than one salary where the combined amount of such salaries exceeds the rate of $2,000 per annum. See 2 Comp. Gen. 37.

You are advised that there appears to be no legal objection to the stated arrangement under which a laborer in the custodian service is employed, outside of his regular working hours as such, to deliver special delivery mail on a fee basis at the rate fixed in the Postal Laws and Regulations, it being understood that such employment does not interfere with the performance of the full number of hours of service required under the position as laborer.

(A–3432)

PART-TIME EXAMINERS AND PHYSICIANS—VETERANS' BUREAU

Attending specialists, part-time examiners, and part-time physicians, employed by the Veterans' Bureau for limited or special professional services to the beneficiaries of the bureau, are not "United States medical officers" within the purview of the act of September 6, 1916, 39 Stat. 743, and are not required to furnish medical treatment to beneficiaries under the employees' compensation act.

Acting Comptroller General Ginn to the Director, United States Veterans' Bureau, July 19, 1924:

I have your letter of June 11, 1924, requesting decision whether attending specialists, part-time examiners, and part-time physicians employed by the bureau are "United States medical officers" within the meaning of section 9 of the employees' compensation act of September 7, 1916, 39 Stat. 743–744, and are therefore under obligation to render services free of charge to beneficiaries under that act.

Your description of the employment of persons covered by your submission is as follows:

The letters of appointment of these medical officers of the bureau, after giving the appointees the titles above indicated, read precisely the same as the appointment of other medical officers except that the words "part time" are inserted in the letters of appointment. However, prior to such appointment there is a distinct understanding between the bureau and such persons as to how much of their time they will give or how much time it is supposed they will have to give to the service of the bureau. These conditions are contained in the letters recommending the appointment of these persons. It is distinctly understood that such persons retain the right to carry on their private practice in so far as their practice does not conflict with their public duties. They are paid a regular salary. They are employed to do special work on a salary rather than a fee basis for two reasons, first, to avoid the detail involved in paying for services on a fee basis, and, second, because it is more economical to employ them on a salary rather than on a fee basis. The

salary in each case is based upon consideration of the amount of money that would be probably earned on a fee basis, a deduction being made for the regularity of payments. In this way the services of skilled physicians are secured which otherwise might not be available to the bureau. Such being the case, these part-time physicians consider that it is unjust for them to be called upon to render services so wholly beyond the scope of their agreement.

Section 9 of the act of September 7, 1916, cited, provides as follows:

That immediately after an injury sustained by an employee while in the performance of his duty, whether or not disability has arisen, and for a reasonable time thereafter, the United States shall furnish to such employee reasonable medical, surgical, and hospital services and supplies unless he refuses to accept them. Such services and supplies shall be furnished by United States medical officers and hospitals, but where this is not practicable shall be furnished by private physicians and hospitals designated or approved by the commission and paid for from the employees' compensation fund. If necessary for the securing of proper medical, surgical, and hospital treatment, the employee, in the discretion of the commission, may be furnished transportation at the expense of the employees' compensation fund.

It is believed that the proper definition of "United States medical officer" as used in this statute is that of those whose professional services are mainly to the Government under regular appointment or contract of employment in any branch of the service. Those employed by the Veterans' Bureau under "special" contracts or letters of appointment for limited or special professional services to the beneficiaries of the bureau need not be classed as "United States medical officers" within the meaning of the term as used in this statute, and they would not be required to furnish medical treatment to beneficiaries under the employees' compensation act unless there were some obligation in that respect expressed in the special contract or letter of appointment.

Based on your statement of the character of employment of "attending specialists," "part-time examiners," and "part-time physicians," the question submitted is answered in the negative.

(A–2441)

TRAVELING EXPENSES—USE OF OWN AUTOMOBILE—INTERNAL REVENUE

Charges for lubrication of a privately owned automobile when used for official travel by the owner thereof may be reimbursed when identified with and actually incurred as an incident to the particular travel.

Decision by Acting Comptroller General Ginn, July 19, 1924:

Rex B. Goodcell, collector and special disbursing agent, Internal Revenue Service, Los Angeles, Calif., by letter dated April 11, 1924, requests review of settlement No. C–7596–Ti, dated March 4, 1924, in which credit was disallowed for an item of $8 on voucher No. 1694 of the May, 1923, accounts, said item representing a charge

for lubrication incident to the use of his own automobile in traveling on official business from Los Angeles to San Francisco and return, May 8 to 13, 1923.

In his reply to the original suspension of this item the collector stated:

> In the operation of my automobile I renew oil and grease regularly for every thousand miles traveled and have made no claim for replacements nor for expense of grease and oil currently, but have submitted these items after having operated my car for at least a thousand miles traveling on Government business. The expense seems to me to be entirely within the meaning of the law, and I believe is a just claim for reimbursement of actual expenses incurred, inasmuch as this expense was incurred while on official business, and such expense for oil and grease is allowable under par. 12, section 1556, Internal Revenue Manual.

In the request for review it is further stated:

> This office believes your interpretation to be in error, and your attention is invited to the fact that gasoline and oil are allowed as a proper charge where a machine is used in connection with official business. It certainly can not be said that lubrication does not come within the oil allowance or that it is speculative in character and the amount charged is an estimate. Your attention is invited to the fact that the amount claimed on Form 63½ was accompanied by receipt showing payment.
>
> I do not consider the charge for lubrication any more of a commuted rate charge than the charge for gasoline, inasmuch as it is necessary to refill the gasoline tank after traveling a given number of miles, and it might be considered a commuted rate charge on the same grounds. As the charge for gasoline is not a commuted rate charge, neither would the charge for lubrication be, the only difference being that it is only necessary to have the car lubricated approximately every one thousand miles.
>
> As collector of internal revenue, I drive a Cadillac sedan approximately one thousand miles each month in connection with my official duties. At various times during the year I make a complete tour of my district, covering approximately three thousand miles. It is only during such tours that I ever ask for reimbursement for lubrication charges. These charges are just as essential in connection with the operation of an automobile as is the charge for gasoline. It is a charge in connection with transportation and in no case represents an amount spent for repairs or upkeep of car.

Paragraph 12, of section 1556, of the Internal Revenue Manual, provides:

> Charges for use of own conveyance can not be allowed as a travel expense in the accounts of any officer or employee. (20 Comp. Dec. 666, 696; 21 id. 219; 22 id. 325, 378; 74 MS. Comp. Dec. 652.) Charges for such necessary incidental expenses incurred in connection with the use of own conveyance as are readily ascertainable, as for gasoline, oil, or horse feed, used on trip, can be allowed, but only to the extent of the actual cost thereof as evidenced by vouchers. Charges which are speculative in character, such as repairs, can not be allowed. A commuted rate charge can not be allowed in any case. (21 Comp. Dec. 1; 74 MS. Comp. Dec. 653; 75 id. 81; 76 id. 98.)

To be an actual expense for use of own car in travel such expense must be identified with and actually be incurred as an incident to the particular travel.

The voucher claiming reimbursement of travel expenses, of which the sum in question is an item, shows that there was travel by own auto from Los Angeles to San Francisco and return, May 8 to 13, a distance stated as 926 miles, and the claim for the specified amount

is accompanied by receipt showing payment for lubrication. The subvoucher is dated at San Francisco, May 10, and is an item of a bill for $15.28, which includes labor and some small repair parts.

There appears nothing to question the reasonableness of the charge or that it was not connected with the travel in question.

Upon review the item of $8 is allowed as a credit in the account.

(A-3567)

PRORATING LAUNDRY, CLEANING AND PRESSING CHARGES—INTERNAL REVENUE

Subject to the statutory maximum of $5 per day for expenses of subsistence, it is within the discretion of the Secretary of the Treasury to provide by regulation for a maximum weekly allowance, and a proportionate maximum for fractional weeks, for expenses of laundry, cleaning and pressing incurred by employees of the Bureau of Internal Revenue performing official travel on an actual expense basis, and to authorize the division of such expenses among the days of the week or fractional week according as the amount of other expenses of subsistence on the respective days is less than $5.

Acting Comptroller General Ginn to the Secretary of the Treasury, July 19, 1924:

There was received your letter of June 3, 1924, requesting to be advised if the proposed modification, therein set out, of the internal revenue regulations in regard to charges for laundering and pressing clothes incurred by employees in a travel status is authorized and also, in view of the circumstances shown, that there be removed all suspensions and disallowances in disbursing officers' accounts that have been based upon the construction by this office, April 4, 1924, of the provision of the existing regulation in regard to allowances for each day of a fractional week.

First you quote the present regulations, which read:

Charges for laundering, cleaning, and pressing clothes will be allowed in amounts not to exceed an aggregate of $2.80 per week, provided the employee submitting the claim was absent from his post of duty, in a traveling status seven or more consecutive days during the month covered by his expense voucher. The first seven days of a trip in a given month constitute the first "laundering, cleaning, and pressin" week, and each subsequent week, or fraction thereof, on the same trip, shall be considered in the "laundering. cleaning, and pressing" period for which the employee will be entitled to reimbursement for actual expenses incurred for laundering, cleaning, and pressing clothes at the rate of not to exceed $2.80 per week, or 40 cents per day for each day of fractional week. The expense of laundering, cleaning, and pressing clothes being cumulative and not actually incurred in one day, the charge for a period, although it should be entered in the account as of the date of payment, will be held to be distributable among the preceding days of the period and allowed to the extent that the expense for subsistence, exclusive of laundering, cleaning, and pressing clothes on such days is less than $5. Laundry slips, tailor checks, or receipted bills must support all such charges, and must show the date of payment and the receipt of the payee.

After referring to decision of April 4, 1924, in which this office construed these regulations to provide for allowance at the close of a fractional week, where the total absence is more than seven days, an amount for laundering, cleaning, and pressing, to the extent, not exceeding 40 cents per day for each day of such period, that expenses incurred for subsistence were less than the maximum of $5, provided the amount expended for such items for said period equaled or exceeded the rate of 40 cents per day for the period, you state:

In this connection it may be stated that at the time of the adoption of the regulation referred to it was not intended that the charges to be allowed for laundry, etc., were to be restricted to 40¢ per day for a fractional part of a week. It was intended that such charges were to be allowed at the rate of not to exceed as many sevenths of a weekly allowance of $2.80 as there are number of days making up a fraction of a week. It was also intended that the charges were to be distributable among the days comprising the fraction of a week and be applied to any or all of them in which the totals of other allowable subsistence charges were sufficiently below the $5.00 maximum as to absorb all or any part of a laundry, etc., expense not greater in the aggregate amount than as many sevenths of $2.80 as there were number of days involved. Since your decision is merely an interpretation of a phrase in the regulation, the department is desirous of correcting and clarifying the matter, and to that end the substitution of the following modified regulation for the one hereinbefore quoted is contemplated:

"Charges for laundering, cleaning, and pressing clothes will be allowed in amounts not to exceed an aggregate of $2.80 per week, provided the employee submitting the claim was absent from his post of duty, in a traveling status, seven or more consecutive days during the month covered by his expense voucher. The first seven days of a trip in a given month constitute the first 'laundering, cleaning, and pressing' week, and each subsequent week, or fraction thereof, on the same trip, shall be considered in the 'laundering, cleaning, and pressing' period for which the employee will be entitled to reimbursement for actual expenses incurred for laundering, cleaning, and pressing clothes at the rate of not to exceed $2.80 per week, or for a fraction of a week, at the rate not to exceed as many sevenths of $2.80 as there are number of days comprising such fraction of a week. The expense of laundering, cleaning, and pressing clothes being cumulative and not actually incurred in one day, the charge for a period, although it should be entered in the account as of the date of payment, will be held to be distributable among the preceding days of the period and allowed to the extent that the expense for subsistence, exclusive of laundering, cleaning, and pressing clothes on such days is less than $5. Illustration for claiming laundry, pressing, and cleaning charges for seven or more consecutive days: For 7 days (1 week) subsistence, other than laundry, cleaning, and pressing, $4.75, $4.25, $5.00, $4.60, $4.10, $4.95, and $3.00. Laundry, cleaning, and pressing expenses incurred, $3.75. Amounts distributable back which will be allowed 25¢, 75¢, nothing, 40¢, 90¢, 5¢, and 45¢; total $2.80. For 3 days (3/7 week), subsistence, other than laundry, cleaning, and pressing, $4.80, $5.00, and $2.10. Laundry, cleaning, and pressing expenses incurred $1.65. Amounts distributable back 20¢, nothing, $1.00; total $1.20. Laundry slips, tailor checks, or receipted bills must support all such charges and must show the date of payment."

In order that there shall be no further question as to laundering, cleaning, and pressing clothes allowances and the application thereof, it is respectfully requested that you advise the department whether the proposed modification of the regulation allowing laundry, etc., charges is in accord with your decision of February 3, 1922, wherein you state that under proper travel regulations the expense of laundering, cleaning, and pressing clothes may be distributed and charged against the maximum subsistence allowance for each day of a preceding period. 1 Comp. Gen. 403.

Since the issuance of your memorandum A–24, dated April 4, 1924, the General Accounting Office, in the certificates of settlement issued against the ac-

counts of disbursing officers of the Internal Revenue Service, has been setting up suspensions where laundry, etc., charges have been allowed in amounts in excess of 40¢ per day in cases of fractional parts of a week. As the regulations governing the matter were generally misconstrued throughout the Internal Revenue Service, and the necessary steps have been taken to modify the regulation to allow laundry, etc., charges as was originally intended under the old regulation, it is respectfully requested that all such excess payments that have been disallowed be reconsidered and allowed in view of the circumstances involved.

In decision of February 3, 1922, 1 Comp. Gen. 403, it was stated, with reference to the then existing regulations providing for allowance of charges for laundering and pressing clothes in amounts not to exceed $3 per week, with a provision that charges should not be prorated over a number of days but should be charged as an expense of the date on which delivered, that the proposed change in the amount of the aggregate maximum weekly allowance, reducing it to $2.80, was a matter of administrative discretion and responsibility, and that there was no legal objection to the regulation providing for the distribution of the weekly allowance over the several days of the weekly period. It was also stated in said decision that the views therein expressed, in so far as approval of regulations was concerned, were to be understood in a general sense, and that the legality of any particular provision was for determination should it specifically come in question.

The proposed modification of the present regulations consists in omitting the phrase " or 40 cents per day for each day of a fractional week," substituting therefor " or for a fraction of a week, at the rate not to exceed as many sevenths of $2.80 as there are number of days comprising such fraction of a week." The modification sets out also examples illustrating claims for laundering, pressing, and cleaning, for seven or more consecutive days, with the apportionment of charges allowable, varying according as the amount for subsistence for each day for the period over which the charges are distributable is less than the statutory maximum of $5, the maximum allowance for a period of seven days being limited to $2.80 and for a period of less than seven days to as many sevenths of $2.80 as there are days comprised therein.

The regulation as modified provides for not to exceed a certain amount for a full week, for a proportionate part thereof for a fraction of a week, and for a practical procedure for the distribution of the allowance over the several days of the period to which applicable. There appears no objection to the regulation as modified and it is accordingly approved. See 1 Comp. Gen. 403; 2 id. 246.

With reference to your request that, in view of the circumstances shown, all suspensions and disallowances in disbursing officers' accounts made on the basis of the decision of April 4, 1924, be re-

moved, you are advised that the matter is now being reconsidered in a review requested by the Acting Secretary in letter of June 10, 1924, of disallowances in settlement No. C–10362, dated May 14, 1924, accounts of John A. Kirk, special disbursing agent, Internal Revenue Service.

(A–1985)

COMPENSATION—GOVERNMENT EMPLOYEES AS WITNESSES IN THE DISTRICT OF COLUMBIA

Government employees, who in obedience to a subpœna or direction by proper authority, appear as witnesses for the Government in court proceedings in the District of Columbia, prosecuted in the name of the United States, are entitled, under section 850, Revised Statutes, to their regular compensation while absent from duty and to any actual and necessary expenses, but are not entitled to any witness fees or mileage. If the proceedings are conducted in the name of the District of Columbia the provisions of section 850 are not applicable and employees acting as witnesses in such cases are not entitled to their regular compensation while absent from their place of duty unless entitled to and granted annual leave for that purpose.

Acting Comptroller General Ginn to the Secretary of the Navy, July 19, 1924:

By your direction I have for decision the question, presented by Commander G. M. Adee, United States Navy, whether employees of the Navy Yard, Washington, D. C., summoned to appear before courts in the District of Columbia as witnesses for the Government are entitled to regular compensation in lieu of witness fees.

Forwarded with the request are three certificates of attendance upon the police court. The certificates are in different forms and signed by different officials, and information is requested whether such certificates are in proper form and signed by the proper officials.

Section 850 of the Revised Statutes provides:

> When any clerk or other officer of the United States is sent away from his place of business as a witness for the Government, his necessary expenses, stated in items and sworn to, in going, returning, and attendance on the court, shall be audited and paid; but no mileage or other compensation in addition to his salary, shall in any case be allowed.

Government employees who, in obedience to a subpœna or direction by competent authority, appear as witnesses for the Government are entitled under section 850 of the Revised Statutes to their necessary expenses in going to, returning from, and while in attendance on the court, and also to their regular compensation as such employees while going to, returning from, and while in attendance on the court, but such employees are not entitled to mileage or other fees and compensation as such witnesses. The employees so attending should be treated as in the performance of duty under their employment and paid accordingly in addition to such expenses. 17 Comp. Dec. 282 and 584. 2 Comp. Gen. 534 and 629: 3 *id.* 271.

In the District of Columbia prosecutions for violations of police or municipal ordinances or regulations and for violations of penal statutes in the nature of police or municipal regulations where the maximum punishment is a fine only, or imprisonment not exceeding one year, are conducted in the name of the District of Columbia and by the corporation counsel or his assistants. All other criminal prosecutions in the police court of the District of Columbia are conducted in the name of the United States and by the attorney of the United States for the District of Columbia or his assistants. Sections 58, 932, and 933, District of Columbia Code.

It is apparent, therefore, that it is dependent upon who is the prosecutor and not the branch of the court that determines whether the Government employee is entitled to compensation or a fee when in attendance in such court, and that only in cases prosecuted in the name of the United States do the provisions of section 850, Revised Statutes, apply to an employee attending as a witness for the Government in such police court.

In the cases presented two of the certificates are signed by deputy clerks of the police court and one by the assistant corporation counsel. The law provides for a clerk and deputies or assistants who are authorized to sign processes, certificates, and other official acts required by the practice of the court, to administer oaths and affix the seal of the court. Sections 52 and 174, District of Columbia Code. It is apparent, therefore, that the clerk or his deputy or assistant, whose general duties include the keeping of the records of the court, is the proper official to sign certificates of attendance of witnesses on the court, though there appears to be no express provision of law which would invalidate a certificate signed by other officials of the court. It is evident, however, that a certificate signed by an assistant corporation counsel does not concern a case prosecuted in the name of the United States.

The certificate should show that the employee did in fact attend as a witness for the Government—the United States—and the duration of such attendance. Upon such showing, for the time the employee was in attendance upon the court he is entitled to his regular compensation, if he would otherwise be entitled thereto. It is to be understood that where the employee attends court as a witness under conditions where compensation as an employee continues in lieu of being paid witness fees, no question arises of the employee being absent as on leave with pay; but where the employee attends court as a witness and becomes entitled to witness fees, etc., then the employee may be placed in a status of leave with pay if such leave otherwise would be allowable.

(A–3832)

COMPENSATION—INTERNAL REVENUE—STOREKEEPER-GAUGERS

The compensation of storekeeper-gaugers of the Internal Revenue Service, although payable from a lump-sum appropriation for the fiscal year 1925, is specifically limited to $4 per day by the act of August 15, 1876, 19 Stat. 152, as amended; such employees may not, therefore, be paid in excess of that rate during the fiscal year 1925 unless and until other legislation so providing has been enacted. (See 4 Comp. Gen. 599.)

Acting Comptroller General Ginn to the Secretary of the Treasury, July 19, 1924:

I have your letter of July 1, 1924, as follows:

You are requested to render a decision in regard to the payment of compensation to storekeeper-gaugers in the Internal Revenue Bureau during the next fiscal year.

Under section 1, act of August 15, 1876 (19 Stat. 152), the compensation of storekeeper-gaugers is fixed at $4.00 per diem. Up to and including June 30 of this fiscal year this class of employees has received the $240 bonus when assigned to active duty. However, in letter of the Director of the Bureau of the Budget dated June 16, 1924, it is indicated that heads of departments will be permitted to allocate to the first two quarters of the fiscal year 1925 amounts sufficient to enable them to adjust the compensation as intended by the provisions of bill H. R. 9651 [9561], *except those employees whose compensation is specifically fixed or limited by the appropriation acts for the fiscal year 1925 or other basic laws.* In view of that portion of the memorandum of the Director of the Budget which I have underscored, advice is requested as to whether storekeeper-gaugers will be limited to $4.00 per diem during the coming fiscal year or will it be permissible to adjust their compensation so that they may receive some equivalent to the bonus heretofore granted.

As it is necessary that allowances be issued at an early date in order to provide for the July salaries of said storekeeper-gaugers, an early decision in the matter will be greatly appreciated.

H. R. 9561, entitled "A bill making additional appropriations for the fiscal year ending June 30, 1925, to enable the heads of the several departments and independent establishments to adjust the rates of compensation of civilian employees in certain of the field services," failed of enactment prior to termination of the last term of Congress. The provisions thereof are not law nor do they have any force or effect as such. Accordingly there is no statutory authority for adjustment of salaries in field forces in accordance with the classification act of 1923.

The act of August 15, 1876, 19 Stat. 152, provided that "hereafter no storekeeper shall receive a greater compensation than four dollars per day." The same act authorized the Secretary of the Treasury to issue a commission as storekeeper and gauger and provided "but the compensation for his services as storekeeper and gauger shall be that of storekeeper only." Section 63 of the act of August 27, 1894, 28 Stat. 567, as amended by the act of May 13, 1910, 36 Stat. 369, limited the compensation of storekeepers and gaugers when traveling from one assignment to another to the same

compensation per day during the time necessarily occupied in traveling that they would be entitled to if on duty at a place to which assigned or transferred or from which relieved, together with actual traveling expenses. The act of June 28, 1902, 32 Stat. 492, provided that the combined office of storekeeper and gauger shall be denominated as "storekeeper-gauger" and limited the compensation to that of a storekeeper when the employee was assigned to perform the duties of storekeeper-gauger or of storekeeper only and to that of a gauger when assigned to perform the duties of a gauger. See act of June 19, 1878, 20 Stat. 187.

Notwithstanding that the compensation of storekeeper-gauger is paid from a lump-sum appropriation (act of April 4, 1924, 43 Stat. 71), the cited statutory limitations may not be exceeded by the administrative office in making payments thereunder to storekeepers-gaugers for the fiscal year 1925 unless and until other legislation so providing has been enacted.

Your question is answered accordingly.

(A-2274)

GRATUITIES—REENLISTMENT ALLOWANCE—MARINE CORPS ENLISTED MEN

An enlisted man of the Marine Corps discharged four years from the date of his enlistment without making up four days while under confinement awaiting trial by summary court-martial did not serve four years under such enlistment, and upon his reenlistment on or after July 1, 1922, and within a period of three months from his discharge is entitled only to the reenlistment gratuity based on three years' service.

The act of August 22, 1912, 37 Stat. 331, authorizing the discharge of enlisted men of the Navy within three months before the expiration of their enlistment without prejudice to any right, privilege, or benefit, etc., they would otherwise have if serving the full term of enlistment is not applicable to the Marine Corps.

Decision by Comptroller General McCarl, July 19, 1924:

There is before this office for consideration the correctness of settlement 016665, March 11, 1924, in which was allowed Charles Fleming $25 enlistment allowance in addition to $75 enlistment allowance theretofore paid to him by a disbursing officer. His service history shows he reenlisted in the Marine Corps October 25, 1919, for a term of four years, was honorably discharged October 24, 1923, upon expiration of the term of enlistment as a corporal and that he lost four days, December 13 to 16, 1921, while in confinement awaiting trial and disposition of his case by a summary court-martial. Reenlisted November 5, 1923, at Philadelphia, Pa., for a term of four years. The enlistment allowance is claimed for this last reenlistment under section 9 of the act of June 10, 1922, 42 Stat. 629, which so far as here material provides:

* * * On and after July 1, 1922, an enlistment allowance equal to $50, multiplied by the number of years served in the enlistment period from which he has last been discharged, shall be paid to every honorably discharged enlisted man of the first three grades who reenlists within a period of three months from the date of his discharge, and an enlistment allowance of $25, multiplied by the number of years served in the enlistment period from which he has last been discharged, shall be paid to every honorably discharged enlisted man of the other grades who reenlists within a period of three months from the date of his discharge.

It has been held that periods during which an enlisted man is under arrest, awaiting trial, sentence, or serving sentence, he is not "serving" and the time so lost is not to be included in the computation of his service for the purpose of the enlistment allowance. 2 Comp. Gen. 633. The present claim is filed under decision of November 23, 1923, 3 Comp. Gen. 330, the case of an enlisted man of the Navy whose enlistment was, under decisions of this office, automatically extended by absence without leave but who was discharged on the date his enlistment was originally due to expire. It was there held that the time absent, but less than three months, during which he was not held to service should be treated as the equivalent of a discharge within three months before the expiration of enlistment under the act of August 22, 1912, 37 Stat. 331. That statute provides:

That under such regulations as the Secretary of the Navy may prescribe, with the approval of the President, any enlisted man may be discharged at any time within three months before the expiration of his term of enlistment or extended enlistment without prejudice to any right, privilege, or benefit that he would have received, except pay and allowances for the unexpired period not served, or to which he would thereafter become entitled, had he served his full term of enlistment or extended enlistment: *Provided*, That nothing in this Act shall be held to reduce or increase the pay and allowances of enlisted men of the Navy now authorized pursuant to law.

The provision appears in the appropriation for the Navy under "Pay, miscellaneous." It is in terms applicable to enlisted men of the Navy and not to enlisted men of the naval service. The statute authorizes regulations by the Secretary of the Navy, with the approval of the President, and any rights enlisted men may have are under regulations made in pursuance of the law. Article 1686, Navy Regulations, provides for a dischrage of enlisted men within three months of the expiration of enlistment in accordance with the statute and contains the following sentence:

The construction to be placed on this provision is that it will work for the benefit of the Government and not as a convenience to the enlisted man, and then only in cases where reasons for such request are fully set forth and the services of the man can be spared.

Article 582 of the regulations applicable to the discharge of enlisted men of the Marine Corps contains no provision for the discharge of enlisted men of that corps within three months before expiration of enlistment pursuant to the act of August 22, 1912,

Such was also true in the Navy Regulations of 1913 (see art. 3601 as amended by CNR–9), where provision is made for discharge within three months of expiration of enlistment for men of the Navy; and see article 4154 as amended by CNR–5, respecting discharge of enlisted men of the Marine Corps, where the various conditions under which a man may be discharged before expiration of enlistment are set out in detail, and no provision is made for discharge within three months of expiration of enlistment.

The uniform and long-continued procedure as to the act of August 22, 1912, by the department charged with its execution supports the construction that the law in itself does not provide for the discharge of enlisted men of the Marine Corps. The right of the Navy Department to discharge enlisted men before the expiration of enlistment is not questioned, but before an enlisted man is entitled to the benefit of the act of August 22, 1912, his case must be within that law.

The act of June 4, 1920, 41 Stat. 836, provides:

SEC. 7. That hereafter enlistments in the Navy and in the Marine Corps may be for terms of two, three, or four years, and all laws now applicable to four-year enlistments shall apply, under such regulations as may be prescribed by the Secretary of the Navy, to enlistments for a shorter period with proportionate benefits upon discharge and reenlistment: *Provided*, That hereafter the Secretary of the Navy is authorized, in his discretion, to establish such grades and ratings as may be necessary for the proper administration of the enlisted personnel of the Navy and Marine Corps.

While this provision has been construed in connection with other provisions of law to extend to enlisted men of the Marine Corps the reenlistment allowance for honorable discharge gratuity theretofore provided for enlisted men of the Navy, 27 Comp. Dec. 31, 37; 1 Comp . Gen. 489, 2 id. 258, it has no application to the present case. It requires that all laws applicable to four-year enlistments in the Marine Corps shall be applicable to the two and three year enlistments therein authorized, but it indicates no purpose that the law applicable, respectively, to enlistments in the Marine Corps and enlistments in the Navy shall have an interchangeable application.

The act of August 22, 1912, not being applicable to enlisted men of the Marine Corps it follows the allowance of the claim was improper, the settlement is accordingly reversed and $25 is certified due the United States which the commandant of the Marine Corps will be requested to have checked on the pay roll.

(A–3917)

PAPER AND ENVELOPES—PURCHASE BY PUBLIC PRINTER FOR BUREAU OF ENGRAVING AND PRINTING

Contracts for the purchase of paper on or after July 1, 1924, for use of engraving and printing in printing liquor permits may be entered into by the

director of the bureau only upon a certification by the Public Printer that the particular kind of paper is not in common use by two or more departments, establishments, or services of the Government in the District of Columbia.

On and after July 1, 1924, all paper and envelopes, not including envelopes printed in the course of manufacture, in common use by two or more departments, establishments, or services of the Government in the District of Columbia, are required by the act of June 7, 1924, 43 Stat. 592, to be procured from the Public Printer, the authorization given the Public Printer by said act being considered directory.

Comptroller General McCarl to the Secretary of the Treasury, July 23, 1924:

I have your letter of July 9, 1924, requesting decision of the question whether the Director of the Bureau of Engraving and Printing may enter into contracts for the purchase of certain classes of paper for use in printing permits for purchasing liquor, or whether the paper must be procured from the Government Printing Office, under a provision in the act of June 7, 1924, 43 Stat. 592, as follows:

The Public Printer is hereby authorized to procure, under direction of the Joint Committee on Printing as provided for in the Act approved January 12, 1895, and furnish on requisition paper and envelopes (not including envelopes printed in the course of manufacture) in common use by two or more departments, establishments, or services of the Government in the District of Columbia, and reimbursement therefor shall be made to the Public Printer from appropriations or funds available for such purpose; paper and envelopes so furnished by the Public Printer shall not be procured in any other manner thereafter.

The Director of the Bureau of Engraving and Printing states in part as follows:

This bureau invited bids June 9 for 70,000 sheets salmon, 35,000 sheets pink, 100,000 sheets canary, 70,000 sheets light blue, and 100,000 sheets light green bond paper, 22" x 34", substance # 9, of shade, quality, formation, and finish of samples furnished by bureau, which paper is required for printing permits for purchasing liquor. Bids were opened June 23, and the preferred bidder is the Whitaker Paper Company, Baltimore, Maryland, at $0.25375 per pound f. o. b. Washington, D. C.

The appropriation from which it is proposed to pay for the paper is not indicated, but it is assumed to be the appropriation provided under the general heading "Bureau of Engraving and Printing," act of April 4, 1924, 43 Stat. 73, which includes an item for printing of not to exceed 2,031,250 deliverel sheets of withdrawal permits.

When a law authorizes a public officer to perform a duty, such authorization is most generally construed as a direction. In addition, the statute cited specifically provides that the paper and envelopes so furnished by the Public Printer shall not be procured in any other manner. It intends the primary procedure of procurement of all paper "in common use by two or more departments, establishments, or services of the Government in the District of Columbia" to be through the Public Printer.

If the paper required by the Bureau of Engraving and Printing is a paper in common use by two or more departments, establishments,

or services of the Government in the District of Columbia, it may be procured only through the Public Printer, and such paper is authorized to be procured other than through the Public Printer only upon his certification under direction of the Joint Committee on Printing that the particular kind of paper is not in common use by two or more departments, establishments, or services of the Government in the District of Columbia.

(A–4134)

NAVAL PAY—AVIATION DUTY—EN ROUTE TO NEW STATION

Orders detaching a naval officer, lawfully in receipt of aviation-duty pay, from his present station and from such other duty as may have been assigned him with direction to report to a new station for duty, do not revoke his general detail to flying duty in the absence of other facts indicating such a revocation, and he continues entitled to the aviation-duty pay while en route to his new station.

Decision by Comptroller General McCarl, July 23, 1924:

Clarence A. Hawkins, lieutenant (j. g.), United States Navy, applied December 3, 1923, for review of settlement No. M–14151–N, dated October 20, 1923, disallowing his claim for the amount checked against his account on rolls of E. D. Foster, lieutenant (S. C.), United States Navy, first quarter, 1922, as additional pay for aviation duty from February 27 to March 23, 1918, while en route from Pensacola, Fla., to Moutchic, France, under orders of February 19, 1918.

It appears that claimant was designated as naval aviator November 1, 1917, from October 2, 1917, and detailed to duty involving actual flying in aircraft by the commanding officer naval air station, Pensacola, Fla., which designation and detail was approved by the Secretary of the Navy on November 20, 1917.

While on this duty at the naval air station, Pensacola, Fla., he received said orders of February 19, 1918, as follows:

1. Your detachment from duty at your present station and from such other duty as may have been assigned you is effective as indicated below, and you will proceed to the destination given via New York, N. Y., and Liverpool, England, for the following duty:

Hereby detached; to Paris, France, and report to the commander U. S. Naval Aviation Forces abroad, and by letter to the commander U. S. Naval Forces Operating in European Waters, for such duty as may be assigned you.

* * * * * * *

5. This employment on shore duty beyond the seas is required by the public interests.

* * * * * * *

7. Your designation as a naval aviator remains in force until specifically revoked.

The indorsements thereon show that the order was delivered to him and that he was detached February 26, 1918; that he proceeded as directed and reported March 19, 1918, to the commander United

States Naval Aviation Forces abroad at Paris, France, who further directed him to proceed and report to the commanding officer United States naval air station at Moutchic, France, for duty. He reported as thus directed on March 24, 1918.

The law providing additional pay for officers of the Navy on aviation duty in effect during the period in question, is the provision in the act of March 3, 1915, 38 Stat. 939, as follows:

> Hereafter officers of the Navy and Marine Corps appointed student naval aviators, while lawfully detailed for duty involving actual flying in aircraft, including balloons, dirigibles, and aeroplanes, shall receive the pay and allowances of their rank and service plus thirty-five per centum increase thereof; and those officers who have heretofore qualified, or may hereafter qualify, as naval aviators, under such rules and regulations as have been or may be prescribed by the Secretary of the Navy, shall, while lawfully detailed for duty involving actual flying in aircraft, receive the pay and allowances of their rank and service plus fifty per centum increase thereof.

Claimant is entitled under said act to increase of pay and allowances "while lawfully detailed for duty involving actual flying in aircraft." See *United States* v. *Luskey*, 262 U. S. 62.

The only question present in this case is whether during the period of travel from Pensacola, Fla., to Moutchic, France, February 27, to March 23, 1918, claimant was detailed to duty involving flying; if so, he is entitled to the pay claimed, otherwise not. The order recites that his designation as a naval aviator remained in force during the period, but designation and detail are not synonymous. His detail to duty of November 1, 1917, is as follows:

> 1. You are hereby designated as naval aviator (seaplane) from October 2, 1917, and detailed for duty involving actual flying in air craft, including balloons, dirigibles, and airplanes, in accordance with acts of Congress approved March 3, 1915, and August 29, 1916; and in accordance with Bureau of Navigation's third indorsement N6KN, 5570–436, of October 26, 1917.

This detail to duty involving flying was not limited by any terms of the order to the period of duty at Pensacola, Fla. Upon claimant's arrival in France he was assigned to flying duty without additional detail, and if the increased pay paid to him after March 23, 1918, was proper it must have been under the detail of November 1, 1917. The only implication in the order of February 19, 1918, of a revocation of claimant's detail involving flying is the language, "Your detachment from duty at your present station, and from such other duty as may have been assigned you."

A detail to duty involving flying in effect sets the officer apart as available for assignment to flying duty when necessity therefor arises. The officer has a dual status. He is an officer available for assignment to the usual duties of an officer of his rank and in addition is available for assignment to flying duty. When detached from station and from additional duties assigned him, in the absence of other facts indicating a revocation of the detail it is a detachment only from duties assigned to him pertaining to the station

from which detached and is not intended to revoke his detail to flying duty. This seems to have been the understanding of claimant's superior officer in France, as he was immediately assigned to flying duty upon arrival there. It was also apparently the purpose of the Navy Department, as in this case the department was requested October 4, 1923, to inform this office "the effective dates for detail as aviator" of claimant and the department replied October 12, 1923:

> Replying to your letter of 4 October, 1923, #M-14151-RAP, Lieutenant Clarence A. Hawkins, U. S. N., was designated a naval aviator from 2 October, 1917, while holding an appointment as boatswain. This designation has been in effect continuously since that date and still remains in effect.

The present case is to be distinguished from the case of Ottaway, 28 MS. Comp. Gen. 763, December 17, 1923, where a reservist who, when on active duty in 1918, was detailed to flying duty and was relieved from active duty in February, 1919, was ordered to active duty in July, 1920, and detailed to duty involving actual flying in aircraft at the naval air station, Rockaway Beach, Long Island, N. Y., upon the officer's subsequent detachment from that station, assignment to duty on a vessel, and upon arrival in Hawaii was detached from the vessel and directed to report to the commandant fourteenth naval district "for duty involving actual flying in aircraft at the naval air station, Pearl Harbor, T. H.," it was held that the officer was not detailed to duty involving flying under his detail of 1918, that detail having lapsed with his relief from active duty in 1919, that his detail to flying duty at Rockaway Beach being limited to duty at that station terminated with his detachment therefrom, and that he was not entitled to flying pay after detachment until reporting under his subsequent detail to flying duty at Pearl Harbor.

In the present case there was no detail to a particular station and no revocation of the detail to flying duty, either intended or implied, by the order detaching claimant from the naval air station, Pensacola, Fla., and assigning him to duty in France, and he is accordingly entitled to the increased pay authorized for flying duty. Upon review of the matter the settlement is modified, and there is certified due claimant $70.12, being twenty-seven thirtieths of $77.92, amount of his flight pay for one month.

(A-4023)

SALE OF SURPLUS WAR SUPPLIES—REFUNDS

A disbursing officer is not authorized to make any refund in connection with the sale of surplus war supplies without first submitting the matter to the General Accounting Office for decision.

The sale of surplus war supplies "as is" carries no warranty as to the condition of such supplies and the purchaser is entitled to no refunds when, upon removing the goods some 30 days after the sale, it is found that a quantity of the supplies so purchased were worthless.

Decision by Comptroller General McCarl, July 23, 1924:

Capt. E. Berg, agent finance officer and custodian of the retained records of Lieut. Col. Ward Dabney, has applied for review of settlement No. W–72923, dated September 22, 1922, wherein credit was not allowed for a refund of $1,111.47 made in January, 1922, to the Industrial Safety Corporation, said refund being a part of the purchase price paid by said corporation for 889,173 tubes of Sag paste purchased by it from surplus supplies of the Army.

It appears that on July 8, 1921, the Quartermaster Corps advertised for sealed proposals for 889,173 tubes of Sag paste. The proposals were opened on July 25, 1921, and the next day the entire lot was awarded to the Industrial Safety Corporation.

The advertisement for proposals specifically provided that "All material will be sold 'as is,' and under no consideration will a refund or adjustment be made on account of material not coming up to the standard of expectation." It also provided that no alterations or modifications of the terms of purchase should be permitted and that the material "must be removed within 30 days from date of acceptance." The material was not removed by the contractor until November 4, 1921, more than 90 days after acceptance, and within 10 days thereafter claim was made against the Government for 20 per cent of the sale price of the material on the ground that the contractor estimated that 20 per cent of the paste was in such state of deterioration as to make it worthless.

The contractor states that the defective material is chiefly from a lot manufactured by the J. B. W. Co., and that out of the 7,500 cases he had a disinterested person examine 50 of the cases marked "J. B. W. Co., and found 10 cases were bad or hard. It does not appear that the contractor made any further inspection or that the Government made any inspection whatever, but relying upon the unsupported statement of the contractor, the Government officers apparently assumed that if the contractor found 10 cases which were bad or hard out of a lot of 50 cases, there must have been 750 cases out of the entire lot in like condition, and on the basis of that assumption the Quartermaster General's Office recommended, and Colonel Dabney made, the refund of $1,111.47.

Even if there had been an express warranty as to the condition of the paste, there was no authority or justification for basing refund upon the mere unsupported statements of the claimant as to the amount of damaged material received, and without inspection or investigation by the Government. Furthermore, there was no authority

in the Quartermaster General or any other officer of the Army to adjudicate such a claim as was here involved or to direct a payment thereon. And it has been held repeatedly and uniformly that in no case is a disbursing officer authorized to refund any part of the proceeds of a sale without first submitting the matter to this office for decision.

It is shown that a sample of the paste was furnished to the contractor, but it does not appear that any representations were made with reference to the sample. The mere showing of a sample in connection with a sale does not constitute a sale by sample such as would raise a warranty of the quality of the entire lot. 2 Comp. Gen. 309. Even if the sale had been a sale by sample with a warranty as to condition of the entire lot there would have been no justification for the refund by the disbursing officer unless and until authorized by this office. Claims for refunds or damages are to be distinguished from fixed obligations of the Government such as disbursing officers are authorized to pay in due course.

Upon review the item in question will be disallowed.

(A–4003)

OATHS OF OFFICE

Clerks of the United States courts are authorized to administer oaths to appointees to public office and to collect a fee therefor which they are required to remit in their quarterly accounts; the fee so charged the appointee, however, is a personal expense necessary to qualify him for the position to which appointed and is not reimbursable.

Comptroller General McCarl to W. M. Lockwood, disbursing officer, Interstate Commerce Commission, July 23, 1924:

There has been received your letter of July 14, 1924, transmitting a voucher in favor of William H. Bonneville, special assistant attorney to the United States district attorney for the western district of Pennsylvania, for reimbursement in the amount of 45 cents which he paid to the clerk of the United States district court upon taking the oath of office as special assistant to the United States attorney, pursuant to appointment to that position by the Attorney General, and requesting to be advised if it was proper for the clerk of the United States district court to charge this fee in administering the oath of office, and if so, whether you may reimburse Mr. Bonneville for the amount of the fee.

Section 19 of the act approved May 28, 1896, 29 Stat. 184, provides in part as follows:

> That United States commissioners and all clerks of United States courts are hereby authorized to administer oaths.

Section 9 of the act approved February 26, 1919, 40 Stat. 1183, an act to fix the salaries of the clerks of the United States district courts, etc., provides in part as follows:

> That the clerk of every district court, except the clerks of the district courts of Alaska, shall account quarterly for all the fees and emoluments earned during the quarter last preceding such accounting, * * * and all fees and emoluments received within the quarter which had been earned prior thereto. Such accounting shall be in writing and shall be made to the Attorney General in such form as he may prescribe, * * *.

Therefore it is clear that clerks of the United States courts are authorized to administer oaths and to collect a fee therefor and to remit same in their quarterly accounts. But the expense of taking the oath is not properly chargeable to the Government, since it is the duty of the person receiving appointment to qualify himself at his own expense for the office to which he has been appointed.

You are not authorized to pay the voucher.

(A–3949)

PERSONAL FURNISHINGS—WADING TROUSERS

Wading trousers required only occasionally and used indiscriminately by the engineers of the Geological Survey as necessary protection in gauging the flow of streams, and not for the regular use of employees in the ordinary and usual occupation for which engaged, or of a character such as an employee might reasonably be expected to furnish for his personal comfort or protection, may be purchased from public funds.

Comptroller General McCarl to the Secretary of the Interior, July 23, 1924:

I have your letter dated July 11, 1924, in which, referring to my decision of January 19, 1924, 3 Comp. Gen. 433, and decisions of a like tenor, rendered subsequently, you express a desire to have my decision on the propriety of the purchase of wading trousers by the Geological Survey from appropriations made for that bureau, and for the purpose of disclosing an obligation resting upon the Government to supply what are essentially personal furnishings you explain that wading trousers are used by hydraulic engineers in making measurements of the flow of streams in water varying in depth from a foot or so to 3 or 4 feet, reaching sometimes about to the arm pit, and in currents against which it is difficult for the engineers to maintain their footing, and sometimes in floating ice or channels cut through ice which is not strong enough to bear up the weight of the engineer.

The further statement is made that the necessity for using wading trousers may not occur more than once on a trip, and seldom, if ever, more than twice or three times; that the engineers work out from field headquarters usually singly, traveling in automobiles and dressed in clothing required by the ordinary traveler,

prepared to meet the public and cooperating State officials in the usual civilian garb; that the regular equipment of each district office includes one or two pairs of wading trousers which are issued like other equipment to the engineers when they start on their trips, and that these wading trousers are not procured or held for the personal use of any one engineer, but have always been regarded as general official equipment for stream gauging.

The appropriation which it is understood is proposed to be charged with the expenditure for these articles is that provided by the act of January 24, 1923, 42 Stat. 1208, under the head of "General expenses, Geological Survey," "For gauging streams and determining the water supply of the United States, the investigation of underground currents and artesian wells, and the preparation of reports upon the best methods of utilizing the water resources, $170,000. * * *"

From the statement of the use to be made of these articles it appears that they are not for the regular use of any particular employee; that they are not to be used regularly in the ordinary and usual occupation for which the employees are engaged; and that they do not constitute equipment of a character such as an employee might reasonably be required to furnish as a part of the personal equipment necessary to enable him to perform the regular duties for which he was employed.

They were viewed rather as unusual articles and such as it is reasonable to believe would not be utilized except upon extraordinary occasions in the necessary accomplishment of a public purpose, which it is represented could not be undertaken without them.

Upon the understanding that they are to become public equipment at headquarters camps for indiscriminate use, purchase of the articles under the appropriation cited hereinbefore is authorized as necessary for a public purpose. 3 Comp. Gen. 433.

(A–3712)

COMPENSATION FOR LEAVE OF ABSENCE—NAVY YARD EMPLOYEES—APPROPRIATIONS

Compensation for leave of absence granted navy yard employees is chargeable to the appropriation current when the leave of absence is taken and payable at the rate then current, regardless of the rate or appropriation current when the leave was earned.

Comptroller General McCarl to the Secretary of the Navy, July 24, 1924:

I have your letter of June 24, 1924, reading:

In the decision of the Comptroller of the Treasury of January 16, 1906, (XII Comp. Dec. 398), the department was authorized to reimburse employees for leave of absence originally taken without pay where such employees subsequently surrendered an equal number of days accrued leave. This decision

also required that the days for which payment was being made be shown on the pay roll.

In the original enforcement of this decision the Auditor for the Navy Department required, where the period covered by such retroactive leave of absence was in a prior fiscal year, that the appropriation of the prior fiscal year, and to which the employee would have been charged had he been paid at the time, be shown on the pay roll.

In subsequent decisions of March 6, 1907, (XIII Comp. Dec. 584), December 4, 1911, (XVIII Comp. Dec. 414), August 21, 1916, (XXIII Comp. Dec. 136), September 22, 1916, (XXIII Comp. Dec. 193), November 2, 1916, (XXIII Comp. Dec. 277), June 12, 1917, (XXIII Comp. Dec. 724) and August 7, 1918, (XXV Comp. Dec. 128), while the appropriation chargeable was not in question and was not specifically mentioned, the inference has been drawn that the appropriation, the rate of pay, and all other conditions were to remain as though the employee were being paid on the date on which the absence originally occurred.

There are two classes of employees affected by this procedure:

(a) Clerks, draftsmen, chemists, messengers, etc., who are appointed from specific appropriations.

(b) Mechanical or shop employees who are employed without regard to specific appropriations and who are charged to the appropriation under which they are directly or indirectly engaged in work.

In the case of employees appointed under specific appropriations, the determination of the appropriation to which this retroactive leave of absence is chargeable can be determined without difficulty. In the case of the mechanical or shop employees, it is in many instances impossible to specify the appropriation accurately. Many of these employees are charged to maintenance accounts which are allocated to appropriations in total, the distribution being in accordance with the act of June 30, 1914. In such cases the designation of an appropriation is purely arbitrary and without possibility of substantiation.

At the present time some of the navy yards are endeavoring to comply with the original requirements of the Auditor for the Navy Department, while other yards, with the approval of the General Accounting Office, are only designating the appropriation on the pay roll in the case of retroactive leave granted clerks, draftsmen, chemists, messengers, etc., for a prior fiscal year.

Your decision is requested as to whether the appropriation of the prior fiscal year to which an employee would have been charged if working, shall be shown on the pay roll in the case of retroactive leave.

(a) In the case of clerks, draftsmen, chemists, messengers, etc., carried on the classified roll; and

(b) In the case of mechanics and other employees carried on the shop roll where the appropriation to which they are chargeable is not definitely determined.

It was held in 25 Comp. Dec. 128, as to leave with pay of navy yard employees granted in the second service year and applied against or substituted for days of leave without pay granted in the first service year, that the rate of pay authorized for such employees was the rate current when the leave without pay was actually taken, the appropriation or appropriations to be charged being those current at the time of such leave without pay. Following that decision, where two fiscal years were involved, it was necessary to state the appropriations for the current as well as for the prior fiscal year, because the pay roll is required to be summarized or segregated to show the charges against the appropriations properly chargeable with the amount of the pay roll.

From the standpoint of practical accounting, the charging of appropriations current when leave is granted appears to be the better

accounting procedure, and it is not altogether clear but that such accounting practice is required. A navy yard employee who, in accordance with the terms of the act of August 29, 1916, 39 Stat. 617, may be granted second service year leave with pay, as well as leave with pay for his first service year, may receive such leave with pay in his second service year; that is, he is authorized to be absent 60 working days in his second service year and to receive therefor pay at the rate current when the leave is granted and taken, chargeable under the then current appropriation, and that regardless of the fact that the leave actually accrued during a prior year though the granting of such leave may not have been authorized until a subsequent fiscal year. It is difficult to distinguish this situation from the one where the leave with pay granted in the second service year is substituted for leave without pay granted in the first service year. In each instance the grant may be based on leave accruing on account of service in a prior fiscal year, the authority to grant such leave with pay not accruing until the expiration of the first service year, which may be, and usually is, the fiscal year subsequent to the one in which the leave was being earned.

The rule as to leave with pay is that it is chargeable under the appropriation or appropriations of the department or establishment, or subdivision thereof, where the grantee is employed at the time the leave is taken, payment being made for such leave at the rate then current, regardless of the rate current when the leave was earned and regardless of the leave being partly earned in a department or establishment, or subdivision thereof, other than the one granting the leave. 13 Comp. Dec. 584.

The statutory authority to grant the leave the second year results in obligating the appropriation for the second year with all the leave authorized to be taken in the second year. There can be no retroactive obligation of an appropriation and the prior year appropriation is not chargeable with leave accruing for first-year service. Such procedure may be followed hereafter.

(A–3967)

CLASSIFICATION OF CIVILIAN EMPLOYEES—EFFECTIVE DATE OF REVISED ALLOCATIONS

The provision in the classification act that the compensation of any employee shall not be increased unless Congress has appropriated money from which the increase may be paid, relates to increases of compensation within a grade and does not prevent the reallocation of positions. Such reallocations are effective generally as of and from July 1, 1924, and payment at the reallocated rates is mandatory notwithstanding the appropriations available were based on lower estimates for the reallocated positions.

Comptroller General McCarl to the Librarian, Library of Congress, July 24, 1924:

I have your letter of July 14, 1924, requesting reconsideration of decision of July 14, 1924, of the three following questions:

1. Are we required to pay the salaries provided for in the revised allocations of the Personnel Classification Board where the grade has been advanced?
2. Are we authorized to pay them?
3. Are we authorized to approximate them by advancing the pay within the grade appropriated for?

The former decision answers questions 1 and 2 in the affirmative and question 3 in the negative.

You base your request for reconsideration on the following statement:

> The legislative appropriation act for the fiscal year 1924–25, approved on June 7, 1924, carried a lump sum for "personal services in accordance with 'the classification act of 1923.'" The estimates upon which this lump sum was based embodied allocations of the various positions as handed down to us by the Personnel Classification Board in September, 1923. On July 1 we received from the board a revision of many of the allocations, in certain cases advancing the grade and therefore the salary. The lump sum appropriated will not, of course, suffice to include these advances.
>
> We assume, of course, that these new decisions of the board have an equal validity—"finality"—with those originally made, and that in due course Congress will recognize them by a supplementary or deficiency appropriation. But in view of section 7 of the classification act ("*Provided, however*, That in no case shall the compensation of any employee be increased unless Congress has appropriated money from which the increase may lawfully be paid.") we are in doubt as to our duty or authority to recognize them in the pay rolls beginning July 1 and until Congress has acted.

As previously stated, section 4 of the classification act of 1923, 42 Stat. 1489, provides: "Such allocations shall be reviewed and may be revised by the [Personnel Classification] board and shall become final upon their approval by said board." The last action of the Personnel Classification Board in allocation of positions is the proper basis for fixing the rate of compensation, and such rate is in general effective as of and from July 1, 1924. The fact that the amount of the appropriation now available will not suffice for the payment of the rate of compensation based on the revised allocation during the entire fiscal year does not authorize payment of any other than the rate of compensation based on the revised allocation. Any resulting deficit in the appropriation must otherwise be avoided.

The proviso in section 7 of the classification act, 42 Stat. 1490, "That in no case shall the compensation of any employee be increased unless Congress has appropriated money from which the increase may lawfully be paid" relates to increase of compensation within a grade and not to payment of increase of compensation by reason of reallocation of positions.

Decision of July 14, 1924, is affirmed.

(A–2432)

"C. I. F." CONTRACTS

When purchases are made by the United States under a "c. i. f." contract, title to the thing purchased passes to the Government when the articles or things purchased are placed on board the vessel and the vendor delivers to the Government a bill of lading therefor, together with insurance policies covering the value of the shipment, and receipts for freight, and all further risks, liability, etc., are assumed by the United States, including any shortage in weight discovered at destination.

Decision by Comptroller General McCarl, July 25, 1924:

The Emmons Coal Mining Co., Philadelphia, Pa., by letter dated June 9, 1924, requested further consideration of its claim for $7,264.10, the value of $427\frac{425}{2000}$ tons of coal disallowed by settlement No. W–781460, dated February 7, 1923, which disallowance was heretofore sustained by this office on review by decisions of March 13, 1923, 19 MS. Comp. Gen. 617, October 3, 1923, 26 *id.* 80, and April 23, 1924, 32 *id.* 1018. The company urges as a basis for its request the interpretation that should be placed on the term c.i. f.—meaning cost, insurance, and freight—employed in the order under which the purchase of the coal was made.

By purchase order No. 2–21–11323 of March 16, 1921, the company was authorized to make immediate delivery of approximately 8,000 net tons (one cargo) bituminous run-of-mine coal, pool 1, c. i. f. Manila, P. I., at $17 per ton, inspection at origin being waived with the understanding that the shippers guarantee the coal to be of the kind and quality called for and had received the usual mine inspection.

The coal was placed aboard the steamship *Osteric* at Norfolk, Va., in April, 1921, and according to the evidence the shipment contained a total of 9,559.8 tons of 2,000 pounds, as shown by railroad weights, when loaded on the vessel, but when the vessel completed its unloading at Manila on June 6, 1921, there were found to be on board only $9,132\frac{1175}{2000}$ net tons, or a shortage of $427\frac{425}{2000}$ tons, as determined by the basket system of weighing used at that port. It was for payment for this difference in tonnage that the claim was originally made and disallowed.

The matter as heretofore presented was on the question of the variation in weights and was considered on the view that the term "c. i. f.," while not meaning the same as the term "f. o. b.," as used in contracts or purchase orders, was synonymous with that term in so far as delivery was concerned, and according to that view title to the coal did not pass to the United States until delivery at Manila, and therefore the vendor was responsible for any shortage existing in the cargo as found when the vessel was unloaded at destination.

The right of the parties to the transaction being dependent upon a correct interpretation and application of the stipulation "c. i. f.," as used in the purchase order, some of the cases that have been adjudicated by the courts wherein similar transactions were involved and in which the court found it necessary to define the meaning of c. i. f. as used in contracts of purchase will here be referred to.

In the case of *Thames & Mersey Marine Insurance Company, Ltd.*, v. *United States*, 237 U. S. 19, where the question of tax on marine insurance on exports was decided, Mr. Justice Hughes in delivering the opinion of the court said:

> The requirements of exportation are reflected in the familiar "c. i. f." contract (that is, at a price to cover cost, insurance, and freight), which has "its recognized legal incidents, one of which is that the shipper fulfils his obligation when he has put the cargo on board and forwarded to the purchaser a bill of lading and policy of insurance with a credit note for the freight, as explained by Lord Blackburn in *Ireland* v. *Livingston*" (L. R. 5 H. L. 395, 406). *Stroms Bruks Aktie Bolag* v. *Hutchison* (1905) A. C. 515, 528. See also *Mee* v. *McNider*, 109 N. Y. 500.

In *Klipstein & Co.* v. *Dilsizian*, 273 Fed. Rep. 473, the court said, relative to the duties of the seller under contracts of this character, that—

> The c. i. f. contract is an expression which indicates that the price fixed covers the cost of the goods and insurance and freight on them to the place of destination. Under such a contract, the seller must ship the goods, arrange the contract of affreightment to the place of destination, pay its cost and allow it from the purchase price, and procure insurance for the buyer's benefit for the safe arrival of the goods and pay therefor. When the seller has done this, and forwarded the papers to the buyer, he has fulfilled his contract, and delivery is complete. There is no obligation by the seller to deliver the goods at place of destination. But the liability of the parties here must be controlled by the terms of the contract into which they entered.

Like definitions were given to the meaning of c. i. f. contracts in *Seaver* v. *Lindsay Light Co.*, 233 N. Y. 273; 135 N. E. 329, and in *Smith Co. (Ltd.)* v. *Marano*, 267 Pa. 107.

The courts in these decisions have consistently held that when purchases are made under c. i. f. agreements title to the thing purchased does, in fact, pass to the vendee when the articles or things purchased are placed on board the vessel and the vendor delivers to the vendee a bill of lading therefor, together with insurance policies covering the value of the shipment and receipts for freight, after which time the vendor no longer has any ownership, liability, or interest therein, but all further risks, liability, etc., are thereupon assumed by the vendee.

The legal meaning of the term "c. i. f." as used in contractual agreements as determined by the cases cited will be accepted and, applying such meaning to the instant case, any loss claimed through the weighing in unloading the coal at destination is not chargeable to the vendor, it being shown that the vendor forwarded to an

officer of the Quartermaster Corps the necessary documents, including bill of lading, insurance certificate, invoice for cargo, etc. The amount placed on board the vessel at place of loading, as claimed by the vendor, having been certified to by sworn weighmasters, that weight will be accepted and payment therefor will accordingly be made.

Upon reconsideration there is hereby certified the sum of $7,264.10 as being due the claimant company.

(A-2147)

NAVY PAY—NAVAL ACADEMY BAND

By virtue of section 21 of the act of June 10, 1922, 42 Stat. 633, as amended by section 5 of the act of May 31, 1924, 43 Stat. 251, members of the Naval Academy Band continue to be entitled to the pay at the base rates provided in section 6 of the act of May 18, 1920, 41 Stat. 602, together with the additions for continuous service provided by the act of August 22, 1912, 37 Stat. 331, and if citizens of the United States also the increase under General Order 34, irrespective of the longevity increase provided in section 10 of the act of June 10, 1922, 42 Stat. 630.

Decision by Comptroller General McCarl, July 26, 1924:

There is before this office the claim of Emigdio Quinones, musician, first class, United States Navy, for difference between $79.20 and $56.10 per month for the period July 1, 1922, to January 5, 1923, and between $82.80 and $58.65 per month for the period January 6 to June 30, 1923. Quinones is a member of the Naval Academy Band.

The service record of claimant as furnished by the Bureau of Navigation shows that he first enlisted September 22, 1914; was honorably discharged September 21, 1918; reenlisted September 24, 1918; was honorably discharged July 30, 1919; reenlisted November 11, 1919, and extended this enlistment for two years from November 10, 1923; and that on July 1, 1922, his rating was changed from musician, second class, to musician, first class.

Section 21 of the act of June 10, 1922, 42 Stat. 633, provided:

> That nothing in this act shall operate to change in any way existing laws, or regulations made in pursuance of law, governing pay and allowances of the * * * enlisted men of the * * * Naval Academy Band.

Section 5 of the act of May 31, 1924, 43 Stat. 251, amending the act of June 10, 1922, provides:

> That section 21 of said Act be, and the same is hereby, amended by substituting a colon for the period and adding the following proviso at the end thereof: *Provided*, That the pay and allowances of the members of the Naval Academy Band shall be not less than that which was authorized for the various ranks and ratings in said bands on June 30, 1922, under decisions of the Comptroller of the Treasury in force on that date.

The acts in effect, governing the pay and allowances of the enlisted men of the Naval Academy Band, when the act of June 10,

1922, was enacted were the act of July 11, 1919, 41 Stat. 152, and May 18, 1920, 41 Stat. 602.

The act of July 11, 1919, provided:

Naval Academy Band: The Naval Academy Band shall hereafter consist of * * * and the said leader of the band, second leader of the band, drum major of the band, and the enlisted musicians of the band shall be entitled to the same benefits in respect to pay emoluments, and retirement arising from longevity, reenlistment, and length of service as are or may hereafter become applicable to other officers or enlisted men of the Navy.

The act of May 18, 1920, provided:

SEC. 6. That, commencing January 1, 1920, the following shall be the rate of base pay for each enlisted rating: * * * That the rate of base pay for each rating in the Naval Academy Band shall be as follows: Second leader, with acting appointment, $99 per month, with permanent appointment, $126 per month; drum major, $84 per month; musicians, first class, $72 per month; musicians, second class, $60 per month: * * * *Provided further*, That the rates of base pay herein fixed shall not be further increased 10 per centum as authorized by an Act approved May 13, 1908, nor by the temporary war increases as authorized by section 15 of the Act approved May 22, 1917, as amended by the Act approved July 11, 1919.

* * * * * * *

SEC. 13. * * * That the rates of pay prescribed in sections * * * 6 hereof shall be the rates of pay during the current enlistment of all men in active service on the date of the approval of this Act, and for those who enlist, reenlist, or extend their enlistments prior to July 1, 1922, for the term of such enlistment, reenlistment, or extended enlistment * * *.

In decision of the Comptroller of the Treasury of October 22, 1920, 95 MS. Comp. Dec. 272, it was held that under the act of July 11, 1919, enlisted members of the Naval Academy Band were entitled to the continuous-service pay and the increase in pay authorized by General Order No. 34 of 1906, as provided for enlisted men of the Navy generally.

Taking into consideration the original provision of section 21 of the act of June 10, 1922, and the amendment thereto of May 31, 1924, it is apparent that Congress intended that the base rates of pay provided in section 6 of the act of May 18, 1920, were to become the permanent base rates for enlisted members of the Naval Academy Band and that the provisions of prior law (act of August 22, 1912, 37 Stat. 331) giving what was known as continuous-service pay should remain applicable, together with the increase under General Order No. 34, to enlisted members of the Naval Academy Band subsequent to June 30, 1922, irrespective of the following provision of section 10 of the act of June 10, 1922, 42 Stat. 630, which is, in part, as follows:

* * * In lieu of all permanent additions to pay now authorized for enlisted men of the Navy and Coast Guard, they shall receive, as a permanent addition to their pay, an increase of 10 per centum on the base pay of their rating upon completion of the first four years of enlisted service, and an additional increase of 5 per centum for each four years' service thereafter, the total not to exceed 25 per centum. * * *

The act of May 18, 1920, fixed a base rate of $72 per month for a musician, first class, of the Naval Academy Band, to which, in the case of claimant, there would be added, for the period July 1, 1922, to November 10, 1923, $2.99 per month as continuous-service pay and $8.80 per month under General Order No. 34. He was paid for the period July 1, 1922, to January 5, 1923, at $56.10 per month; from January 6, 1923, to November 10, 1923, at $58.65 per month. The supply officer of the U. S. S. *Reina Mercedes* reports to this office that he has adjusted claimant's account from November 11, 1923.

Upon review $426.34 is certified due claimant for the period July 1, 1922, to November 10, 1923.

(A–2465)

REFUND OF CIVILIAN RETIREMENT DEDUCTIONS—SET-OFF FOR THEFTS FROM INSURED PARCEL-POST MAIL

The amount in the retirement fund to the credit of a former employee of the Post Office Department may be used to liquidate a claim against the employee by reason of his thefts of insured parcel-post packages to the extent of the indemnity paid thereon by the Government where opportunity has been afforded the employee to reply to the claim for set-off and his liability for the thefts in question has been established to the satisfaction of the General Accounting Office.

Comptroller General McCarl to the Secretary of the Interior, July 26, 1924:

I have your request of July 3, 1924, for further consideration of the claim of Morris Bialostosky for refund of retirement deduction made from his salary while an employee of the Postal Service. The amount to Bialostosky's credit in the retirement fund is reported as $101.02, but the Post Office Department is asserting a claim amounting to $120.49 against any funds due Bialostosky, on account of indemnity paid to Havens & Co., of New York City, on insured parcel-post packages lost in the mails and which are alleged to have been taken by Bialostosky. The individual items forming the basis of this claim for set-off are as follows:

Insured parcel No. 847, mailed October 17, 1922, at Callaway, Nebraska, by Joy Chiles, addressed to Havens and Company, 19 Thompson Street, New York, N. Y. Indemnity in sum of $20.10 paid June 23, 1923, by P. M., Omaha, Nebraska. * * * Claim No. 7943.

Insured parcel No. 1803, mailed October 25, 1922, at Belleville, N. J., by Helen B. Collard, addressed to Havens and Company. Indemnity of $5 paid September 5, 1923, by P. M., Newark, N. J., under Newark claim No. 28149.

Insured parcel No. 417, mailed November 1, 1922, at New Hope, Pa., by William Pursell, addressed to Havens and Company, New York, N. Y. Claim paid January 20, 1923, in the sum of $14.18, by P. M., Philadelphia, Pa., under Philadelphia claim No. 3396.

Insured parcel No. 50402, mailed November 7, 1922, at Decatur, Illinois, by Frank Curtis, addressed to Havens and Company, New York, N. Y. Claim paid February 10, 1923, in the sum of $3.21 by P. M., Chicago, Illinois, under Chicago claim No. 148587.

Insured parcel No. 13540, mailed February 9, 1923, at Tucson, Arizona, by B. F. Daniels, addressed to Havens and Company, New York, N. Y. Claim

paid June 1, 1923, in the sum of $78.00 by P. M., Phoenix, Arizona, under Phoenix claim No. 1644.

In my decision of May 31, 1924, it was stated that the amounts paid as indemnity had been verified and that the claim of the Post Office Department had been established as a *prima facie* claim, but that no refund to the Post Office Department could be authorized in the absence of a showing that Bialostosky had been afforded an opportunity to answer the claim so presented. With your present submission you forward a copy of the confession alleged to have been signed by Bialostosky, as follows:

I, Morris Bialostosky, being first duly sworn, and being uninfluenced by threats or promises, make the following statement, realizing that same may be used against me: I am a letter carrier assigned to Varick Street station, New York P. O. I serve route No. 24. While distributing the mail for my route I stole four parcels, addressed to Havens & Co., 17 Thompson Street, New York, N. Y. These parcels were stolen by me from route 4.

While serving my route I went into 204 Franklin Street and there opened the four parcels I stole. I threw the wrappers away in the street and put the contents, 10 rings and two pins, in my pockets. I admit that two of these rings were marked for identification and the identification marks were shown to me after I produced them from my pockets. All four parcels were insured and the rings and pins contained therein apparently of gold.

I have been stealing parcels since November 1, 1922, and have received (at) least $100 through selling the contents of these parcels.

(Signed) MORRIS BIOLSTOSKY.

Subscribed and sworn to before me at New York, November 9, 1923.

R. E. BUSH,
P. O. Inspector.

In answer to notice of the claim of the Post Office Department, Bialostosky in letters, dated April 29 and June 3, 1924, written from Atlanta, Ga., where he is confined, denies any knowledge of the theft in question, alleging that at the time he was under the influence of drugs, being a drug addict; that he did not know what he was doing either at the time of the alleged theft or when he signed the alleged confession. He pleads poverty and that he needs the money to contribute toward a sick mother.

Bialostosky's statements in the two letters set forth no facts which would overcome his signed confession. The fact that he may not have had knowledge of what he was doing does not release him from pecuniary responsibility for the packages taken by him. There has been no direct evidence submitted which would establish the actual taking of the parcels in question by Bialostosky, but in view of his confession that he took four packages addressed to Havens & Co., and that he had been taking packages since November 1, 1922, the presumption is sufficiently strong to warrant holding him responsible for the theft of all of the packages in question. Accordingly, you are advised that the proper Post Office Department appropriation may be reimbursed to the extent of the entire amount ($101.02) to Bialostosky's credit in the retirement fund.

(A-2948)

NAVY PAY—RETIRED COMMISSIONED WARRANT OFFICERS

Commissioned warrant officers entitled to pay of a warrant officer by reason of the "saving clause" in section 1 of the act of June 10, 1922, 42 Stat. 627, retired on or after July 1, 1922, are entitled to retired pay computed upon the pay of a warrant officer if higher than that to which entitled as commissioned warrant officer.

Decision by Comptroller General McCarl, July 26, 1924:

There is before this office the claim of John H. Cole, chief boatswain, United States Navy (retired), for difference in retired pay between that computed upon the pay of a chief warrant officer and a warrant officer for the period February 14, 1924, to March 31, 1924.

The Bureau of Navigation advises this office that after about 13 years of enlisted service claimant accepted appointment as a boatswain (temporary) on July 6, 1917; warranted, permanent, on May 8, 1922, to rank from December 19, 1919; transferred to the retired list from February 14, 1924, in accordance with the provision of section 1453 of the Revised Statutes and the act of March 4, 1911, 36 Stat. 1267; and on March 28, 1924, commission issued as a chief boatswain on the retired list to rank from July 2, 1923.

The act of June 10, 1922, 42 Stat. 625, 632, provides:

> That beginning July 1, 1922, for the purpose of computing the annual pay of the commissioned officers * * *, of the Navy below the grade of rear admiral, * * * pay periods are prescribed, and the base pay for each is fixed as follows:
>
> The first period, $1,500; * * *.
>
> * * * * * * *
>
> The pay of the first period shall be paid to all other officers whose pay is provided for in this section.
>
> * * * * * * *
>
> Every officer paid under the provisions of this section shall receive an increase of 5 per centum of the base pay of his period for each three years of service up to thirty years: * * *.
>
> * * * For officers in the service on June 30, 1922, there shall be included in the computation all service which is now counted in computing longevity pay, * * *.
>
> * * * Commissioned warrant officers on the active list with creditable records shall, after six years' commissioned service, receive the pay of the second period, and after twelve years' commissioned service, receive the pay of the third period: *Provided*, That a commissioned warrant officer promoted from the grade of warrant officer shall suffer no reduction of pay by reason of such promotion. * * *.
>
> * * * * * * *
>
> SEC. 10. That on and after July 1, 1922, the monthly base pay of warrant officers of the Navy * * * shall be as follows: * * * after twelve years' service—at sea, $189; on shore $168. * * *.
>
> * * * * * * *
>
> SEC. 17. That on and after July 1, 1922, retired officers and warrant officers shall have their retired pay, or equivalent pay, computed as now authorized by law on the basis of pay provided in this Act: * * *.

Section 1588 of the Revised Statutes provides:

> The pay of all officers of the Navy who have been retired * * * on account of incapacity resulting from long and faithful service, from wounds or

injuries received in the line of duty, or from sickness or exposure therein, shall, when not on active duty, be equal to seventy-five per centum of the sea-pay provided by this chapter for the grade or rank which they held, respectively, at the time of their retirement.

The act of May 13, 1908, 35 Stat. 127, which carried an increase of pay over that provided in chapter 8 of the Revised Statutes, provided:

* * * The pay of all commissioned, warrant and * * * officers * * * of the Navy now on the retired list shall be based on the pay, as herein provided for, of commissioned, warrant and * * * officers * * * of corresponding rank and service on the active list; * * *.

The act of March 4, 1911, 36 Stat. 1267, provided:

Hereafter, if any officer of the United States Navy shall fail in his physical examination for promotion and be found incapacitated for service by reason of physical disability contracted in the line of duty, he shall be retired with the rank to which his seniority entitled him to be promoted.

The pay roll for the period February 14, 1924, to March 31, 1924, shows that claimant was paid at the rate of $93.75 per month (75 per cent of $1,500 per annum). He claims pay at $141.75 per month (75 per cent of $189 per month).

The saving clause in section 1 of the act of June 10, 1922, 42 Stat. 627, preserves to commissioned warrant officers the pay as a warrant officer if the rate therefor be higher than that provided for a commissioned warrant officer. 16 MS. Comp. Gen. 869, December 19, 1922; 3 Comp. Gen. 142; 25 MS. Comp. Gen. 439, September 14, 1923.

Prior to the act of June 10, 1922, it was provided by the act of March 3, 1909, 35 Stat. 771:

* * * and no warrant officer, heretofore or hereafter promoted six years from date of warrant, shall suffer a reduction in pay which, but for such promotion, would have been received by him: * * *.

This statute was uniformly construed to protect a warrant officer from reduction in pay on the retired list by reason of promotion to chief warrant officer, 18 Comp. Dec. 78; 55 MS. Comp. Dec. 1036, December 6, 1910, case of Chief Gunner Walker; 70 *id.* 879, August 28, 1914, case of Chief Machinist Fitton. The language of section 1 of the 1922 law is substantially the same as the language quoted from the 1909 law, and it is evident that the construction given the 1909 law is the construction intended to be given the 1922 law. In the case of Alm, 25 MS. Comp. Gen. 439, April 14, 1923, it was said:

The saving clause in section 1 of the act of June 10, 1922, was clearly intended to continue to officers promoted to chief warrant officers the benefits which they enjoyed against reduction in pay by reason of such promotion conferred by the act of March 3, 1909. See 16 MS. Comp. Gen. 869, December 19, 1922.

Claimant is accordingly entitled to retired pay from February 14, 1924, at 75 per cent of $189 per month, the pay he would have been entitled to receive as a warrant officer had he not been promoted to chief warrant officer.

(A–2132)

USE OF OWN VEHICLES BY EMPLOYEES OF THE IMMIGRATION SERVICE

In the absence of specific authorization by law, it is not permissible for the Immigration Service to reimburse employees for the hire or use of their own automobiles or horses in excess of the actual expenses of operation definitely ascertained and evidenced by proper vouchers and receipts.

Contracting between the Government and its employees, though not expressly prohibited by statute, is authorized only in exceptional cases, such practice being contrary to public policy.

Comptroller General McCarl to the Secretary of Labor, July 28, 1924:

There has been received your letter of June 6, 1924, requesting reconsideration of decision of June 4, 1924, wherein, upon review, settlement No. C–469–L, of July 25, 1923, was sustained as to disallowances made in 24 vouchers covering payments to employees of the Immigration Service for personally owned automobiles and horses used by such employees and others in connection with their official work in the enforcement of the immigration and Chinese exclusion laws. In the letter you state:

As the department interprets your decision, the appropriation "Expenses of regulating immigration" is available to hire horse or motor vehicles under such terms and conditions as the Secretary of Labor may prescribe, when necessary in the enforcement of the immigration and Chinese exclusion laws, outside of the District of Columbia. The terms and conditions of the rental or hire of the automobiles and horses are set forth in each authority granted for the allowance, and when such authority has been approved by the department it has the force of a regulation made in conformity with a mandate of Congress as expressed in the language of the appropriation from which the expenditure is to be made.

It may be further pointed out that the automobiles and horses owned by employees and hired to the Government are not used exclusively by them, but are placed at the disposal of the Government for service night and day by any other official or employee who finds it necessary to use such in the enforcement of the immigration and Chinese exclusion laws. The allowances are not in any sense made to reimburse the employee for expenses of travel, but are rates agreed upon to cover the cost of maintenance of the machine of which the employee owner allows the Government the use. That the wear and tear on machines due to the severe duty they are called upon to perform is excessive is evidenced by the repair bills for Government-owned machines used by the Immigration Service that are submitted for payment, and when it is considered that the employee owner is to bear all expenses of gasoline, oil, repairs, etc., arising from the use of his machine by the Government, the allowance, which runs between $1 and $2 per day, is very reasonable.

There are 46 machines and 6 horses placed at the disposal of the Government under an allowance agreement, 1 machine under an actual expense of maintenance basis, and 20 machines which are operated in the service of the Government upon an actual mileage basis, a total of 67 machines and 6 horses. If the authority contained in the appropriations cited must be construed as preventing the renting or hiring of automobiles and horses from its employees under the conditions as stated, the Immigration Service will be under the necessity of endeavoring to procure such machines and horses from other sources, which will result in a large increase of cost to the Government, for the reason that no owner will place his machine or horse entirely at the disposal of the Government for the strenuous day-and-night service required at the rate per month allowed the employees.

In the cases of allowance for maintenance of automobile on a mileage basis, there are 20 instances of this character, all limited to the Seattle, Wash., district of the Immigration Service. This is done for the reason that condi-

tions in that district are different from those in other districts, in that the machines are not in constant use by the Government. To hire a machine under such circumstances at a monthly allowance would not be economical, and therefore the mileage basis is adopted for that district. As in the cases heretofore referred to, the machines are always occupied by two or more immigration employees or officials, as well as aliens who may be arrested in the patrol, and the rate per mile allowed covers all costs of operating the machine—gasoline, oil, repairs, etc.

If such rental or hire can not be authorized by the Secretary of Labor, it will be necessary for the Immigration Service to hire machines from outside parties for each individual trip, at a cost which will prove to be far in excess of what it now costs the Government.

In the case of Alexander S. Fulton, the employee died on June 14, 1922. In all other cases itemization of the mileage performed has been furnished, and is now indicated on vouchers when submitted for payment.

Under the conditions as stated the department contends that it is acting entirely within the authority conferred upon the Secretary of Labor by Congress through the appropriations for the Immigration Service, and therefore requests your early reconsideration, in view of the fact that effective July 1 a largely increased border patrol will be put into service and it is essential that the department know what action it must take in regard to the allowances for maintenance of automobiles and horses.

In the decision of June 4, 1924, *supra*, it was said:

The three appropriations involved, "Expenses of regulating immigration," fiscal years 1921, 1922, and 1923, respectively, provides:

"* * * That the purchase, exchange, use, maintenance, and operation of horse and motor vehicles required in the enforcement of the immigration and Chinese exclusion laws outside of the District of Columbia may be contracted for and the cost thereof paid from the appropriation for the enforcement of those laws, under such terms and conditions as the Secretary of Labor may prescribe: *Provided further*, That not more than $12,000 of the sum appropriated herein may be expended in the purchase and maintenance of such motor vehicles: * * *." See 42 Stat. 487.

If in the enforcement of the immigration and Chinese exclusion laws, outside of the District of Columbia, it becomes necessary to hire horse or motor vehicles for official purposes, the appropriations referred to are available for such expenses when incurred under such terms and conditions as the Secetary of Labor may prescribe * * *.

The terms and conditions to be prescribed by the Secretary of Labor, whether in authorizations in specific cases or by general regulations, are such as may be necessary and appropriate to carry out and give effect to the authority in the appropriation to purchase, exchange, use, maintain, and operate vehicles. Authorizations approved by the department, like other commitments, contracts, engagements, etc., are binding on the Government to the extent only that they are in conformity with law; regulations have the force of law only when made in pursuance of a statute and to the extent that they are consistent with law. 26 Comp. Dec. 99.

It has been repeatedly held that the contracting with employees of the Government, though not expressly prohibited by statute, is authorized only in exceptional cases, such practice being contrary to public policy, provocative of trouble, and having a tendency toward favoritism. The practice is especially objectionable when the contracting is between the employee and the particular service in which he is employed, as in the instant cases.

It must necessarily be assumed that the hire of an employee's privately owned vehicle is primarily for such employee's own use, and that the use thereof by other employees is incidental only, it is not unusual for employees to furnish and use their own vehicles in connection with their official work, and it has been repeatedly held in such cases, in the absence of statute providing and authorizing reimbursement on a different basis, that reimbursement is limited to such actual expense as can definitely be ascertained and set forth in the vouchers, accompanied by receipts where receipts are necessary and practicable. In this connection it was said in decision of May 23, 1924, that—

> In those instances where maintenance, repair, or operation of vehicles are "specifically authorized by law," the actual expenses for gas and oil for the operation of privately owned vehicles authorized to be and actually used for official purposes are allowed. 23 Comp. Dec. 540. Such allowances are also authorized where the use of the vehicle is in connection with the performance of official travel away from official station. 1 Comp. Gen. 681; 2 *id.* 233 and 339. But in the absence of specific authority of law, an arrangement providing a vehicle for the continued use of an official or employee at official station, whether it be on the basis of a rental by the month or other period, on the basis of a commutation of actual maintenance and operating expenses, or on the basis of reimbursement of established costs of maintenance and operation, contravenes the intent of section 5 of the act of July 16, 1914, *supra*, and is not authorized. 21 Comp. Dec. 462; *id.* 560.

Specific legislative authority having been granted to certain departments, bureaus, etc., to prescribe allowances, etc., for the use by its employees of their privately owned vehicles (see particularly acts of June 5, 1924, 43 Stat. 418–419, 459; and June 7, 1924, 43 Stat. 557), it must be assumed that unless such specific authority has been granted the practice is not authorized.

However, since there appears nothing to indicate that the practice here in question was not established in good faith, or that the allowances pursuant thereto, predicated both on the use of the vehicles by the employee owners as well as others, were unreasonable, I am constrained to authorize credit in the accounts of the paying officer or officers of such of the items as are otherwise proper; but the unauthorized practice should be discontinued, and credit will not be allowed for any such payments made subsequent to March 4, 1925, unless and until such practice shall be specifically authorized by law.

(A–3867)

DESTITUTE AMERICAN SEAMEN—TRANSPORTATION

Payment for transportation of destitute American seamen from foreign ports to the United States on the vessel on which they last served or on vessels belonging to the same company is not authorized in the absence of evidence showing affirmatively that the owners of the vessel on which the seaman last served have been relieved from all duty, responsibility, and liability with respect to the seaman so transported.

Decision by Comptroller General McCarl, July 28, 1924:

Munson Steamship Line, 67 Wall Street, New York, N. Y., requested June 26, 1924, review of settlement No. 017360–S, dated May 23, 1924, wherein was disallowed its claim for (\$60+\$25) \$85, payment for the transportation of Max Baumgart and Hilario Sumangot, two destitute American seamen, from Buenos Aires, Argentina, and Santos, Brazil, to New York, in October, 1923, via S. S. *America* (operated by claimant as agent for the Emergency Fleet Corporation), claims Nos. 676 and 671, respectively.

Request has likewise been made for review of so much of settlement No. 028293, dated May 14, 1924, as disallowed said company's claim for \$255, transportation of six destitute American seamen, in March, 1924, via S. S. *America*, claims 713 and 714, as follows:

John Ryan from Santos to Philadelphia	\$25
Charles McGuire, Santos to Philadelphia	25
Benj. E. Nelson, Santos to Tacoma, Wash	25
Ralph Bachelder, Buenos Aires to Bayonne, N. J	60
Robert Fullerton, Buenos Aires to Tacoma, Wash	60
W. H. Wisdom, Buenos Aires to Philadelphia	60

And a further request for review of so much of settlement No. 031486, dated June 6, 1924, as disallowed \$60 for the transportation of Thomas B. Halsey, a destitute American seaman, from Buenos Aires, Argentina, to Baltimore, Md., in April, 1924, via S. S. *Western World*, claim No. 791.

The act of January 3, 1923, 42 Stat. 1072, provides:

> For relief and protection of American seamen in foreign countries, and in the Panama Canal Zone, and shipwrecked American seamen in the Territory of Alaska, in the Hawaiian Islands, Porto Rico, the Philippine Islands, and the Virgin Islands, \$200,000: *Provided*, That hereafter the amount agreed upon between the consular officer and the master of the vessel in each individual case not in excess of the lowest passenger rate of such vessel and not in excess of 2 cents per mile, together with such additional compensation for transporting sick or disabled seamen as is now provided by law, shall in each case constitute the lawful rate for transportation on steam vessels.

It appears that each of these men last served upon a vessel of the same company (United States Shipping Board Emergency Fleet Corporation) that brought them back to the United States. In one instance the destitute seaman was returned on the same vessel on which he last served.

The only evidence offered in support of the several claims is a statement that the claimant understands that similar claims have been allowed in the past.

In a similar question considered by this office it was held in 3 Comp. Gen. 148, quoting from the syllabus, that:

> As soon as the owners of a wrecked vessel take up the burden of subsisting and transporting the members of the crew they cease to be destitute seamen, and such owners may not be reimbursed from public funds for any part of the cost of subsistence and transportation of such seamen to a port of the United States.

From the evidence now before this office it does not appear that the Government is under any obligation to the claimant on account of the transportation furnished to the seamen discharged from its vessels in foreign countries. 33 MS. Comp. Gen. 537.

In the absence of evidence showing affirmatively that the owner of the vessel on which these seamen last served had been relieved of all duty, responsibility, and liability with respect to said seamen, payment to said owner, or its agents, for the return passage is not authorized.

Upon review the settlements are sustained.

(A–3886)

UNITED STATES COMMISSIONERS—RETURNS ON BENCH WARRANTS—WARRANTS OF ARREST FOR PERSONS IN CUSTODY

A bench warrant is returnable only to the court by which issued, and a United States commissioner is not entitled to a fee for entering a return thereon nor for drawing a bond for the defendant brought before him on a bench warrant.

Warrants of arrest are not required by the Texas code for defendants already in custody, and fees charged by a United States commissioner for copy of complaint, issuance of warrant, and entering return thereon when the defendants had previously been arrested by a deputy marshal are not allowable.

The issuance of a warrant of arrest implies the delivery thereof to some person authorized by law to serve it, and a United States commissioner is not entitled to fees for issuing a warrant when delivered to a county sheriff for service.

Comptroller General McCarl to Tom L. Rees, United States Commissioner, July 28, 1924:

There has been received your letter of June 24, 1924, returning Assistant Treasurer's check No. 91510, in the amount of $38.20, and requesting review of settlement No. 032242–j, dated June 7, 1924, disallowing and suspending certain items in your account for the quarter ended December 31, 1923, in the amount of $5.40, representing charges for entering returns on bench warrants, making copy of complaint, issuing warrants of arrest, and entering returns thereon in cases where the defendants were in custody prior to delivery of the warrant to the marshal for service, and for making copy of complaint when same was not attached to the warrant of arrest.

Item 1, page 1. *United States* v. *Charles Service.* Charge for entering return on bench warrant.

The item was disallowed for the reason the warrant was returnable only to the court that issued it.

An examination of page 1 shows that the complaint was filed by M. P. Crosby, Federal prohibition agent, offense charged violation of title 2 of the national prohibition act, warrant of arrest

issued by you and delivered to a deputy marshal for service August 25, 1923. At the bottom of the page, under the caption "Remarks," you state warrant was issued by the clerk of the United States district court, and the defendant was brought before you for the purpose of making a new bond by instruction of the district attorney. In answer to the Attorney General's inquiry, "Why charge for entering return of bench warrant?" you state: "Bench warrant was issued, and this defendant was brought before me by deputy United States marshal, by instructions, * * *." Upon your statements that the warrant was issued by the clerk of the United States district court you are not entitled to the fee for entering the return thereon, nor to the fee for drawing the bond, unless it is shown that you were instructed by the court after the defendant had been presented to the court to draw the bond, for the reason that a bench warrant is returnable only to the court which issued it. The disallowance of the fee of 15 cents for entering return is sustained, and in addition thereto the fee of 75 cents for drawing the bond is also disallowed.

Item 2, page 4. *United States* v. *W. E. Lamb.*

Charge for entering return on bench warrant, $0.15. Same as item 1. The disallowance is sustained, and in addition thereto the fee of 75 cents for drawing bond is disallowed.

Item 3, pages 2, 3, 5, and 7. Charge in each case for copy of complaint, issuance of warrant of arrest, and entering return on same, $1.20 each case, $4.80.

The items were suspended for further information and the commissioner requested to furnish a copy of the law of the State of Arizona, if there is such a law, requiring a warrant of arrest to issue in every case.

With the request for review there is submitted a copy of sections 836 and 837 of the 1913 Penal Code, which provide as follows:

SECTION 836. When complaint is laid before a magistrate he may also examine, under oath, the complainant or prosecutor and any witnesses he may produce, if there be any witnesses to the commission of the offense charged. But if the action or proceeding be commenced or the complaint filed under the direction of the county attorney of the county, no such examination shall be had.

SECTION 837. If the magistrate be satisfied from the complaint and from the examination provided for in the preceding section, if an examination be had, that the offense complained of has been committed, and there is reasonable ground to believe that the defendant has committed it, he shall issue a warrant of arrest.

The Penal Code provides as follows:

SECTION 854. A peace officer may arrest in obedience to a warrant delivered to him, or may, without a warrant, arrest a person—

(1) For a public offense committed or attempted in his presence.

(2) When a person arrested has committed a felony though not in his presence.

(3) When a felony has been in fact committed, and he has reasonable cause for believing the person arrested to have committed it.
(4) On a charge made upon reasonable cause of the commission of a felony by the party accused.
(5) At night when there is reasonable cause to believe that he has committed a felony.
SECTION 855. A private person may arrest another—
(1) For a public offense committed or attempted in his presence.
(2) When the person arrested has committed a felony, although not in his presence.
(3) When a felony has been in fact committed and he has reasonable cause for believing the person arrested to have committed it.

In explanation to inquiry of the Department of Justice you stated that you had knowledge, prior to the issuance of warrants, that defendants R. Gandarillos et al. (p. 2) and C. R. Dollins et al. (p. 5) were in custody at the time process was issued and that you had no knowledge that F. Rodriquez (p. 3) and B. Sequra (p. 7) were in custody.

An examination of the voucher, pages 2 and 5, shows that the arrest and arraignment were on the same date, that the arrest was made by a deputy marshal, who presumably presented the defendants before you prior to the issuance of the warrant of arrest. The office of the warrant of arrest is to bring the person or persons against whom it is issued within the jurisdiction of the issuing tribunal, and where a defendant is presented by an arresting officer before a commissioner prior to the issuance of the warrant, the commissioner is authorized to hear the case and the issuance of the warrant is unnecessary. Therefore the fees charged on pages 2 and 5 in the amount of $2.40 are disallowed. See 5 Comp. Dec. 320; 3 Comp. Gen. 13.

Defendants Rodriquez and Sequra, pages 3 and 7, respectively, not being in custody, the issuance of warrants was proper and the fees are allowed.

Item 4, page 6. *United States v. Marilio Sequra et al.* Charge for making copy of complaint, $0.30.

The item was disallowed for the reason the copy was not attached to the warrant of arrest.

The voucher shows that the complaint was filed by W. F. Wallace, county ranger, and that the warrant of arrest was delivered for service to W. A. Campbell, sheriff of Coconino County, one not authorized to serve the same. The issuance of a warrant implies the delivery of the same to some person authorized by law to serve it, and a commissioner is not entitled to fees for preparing a warrant which is not so delivered. The disallowance is sustained. See 4 Comp. Dec. 239.

Upon review, 90 cents is certified due claimant, and check for same will issue in due course. Check No. 91510 in the amount of $38.20 is returned herewith.

(A–3680)

PERSONAL FURNISHINGS

Rubber boots, leather-palm gloves, wood-sole shoes, and rubber gloves, disclosed not to be absolutely essential to the accomplishment of the public work but primarily as personal equipment for the personal comfort or protection of certain employees in the usual occupation for which employed are not a proper charge against an appropriation which makes no provision for the purchase of such articles.

Decision by Comptroller General McCarl, July 29, 1924:

In connection with the settlement of the accounts of J. A. Husted, disbursing agent, Bureau of Engraving and Printing, for the month of January, 1924, there is for consideration the question whether credit is authorized for payments made as shown by the following vouchers:

Voucher 1551—Harry Kaufman, Inc., 38 prs. men's knee rubber boots, item 3017–b–2	$136.04
Voucher 1550—Harry Kaufman, Inc., 1 doz. prs. leather-palm gloves, item 3073–A	9.60
Voucher 1675—Harry Kaufman, Inc., 37 pairs men's wooden-sole shoes, 31.18–b–4aa	72.15
Voucher 1883—Potomac Rubber Co., Inc., ½ doz. #14 Stockinette lined rubber gloves, item 3073–b–2	11.40

The payments in question were charged to the appropriation digested as "Material and miscellaneous expenses, Bureau of Engraving and Printing, 1924," act of January 3, 1923, 42 Stat. 1100, which provides:

For engravers' and printers' materials and other materials except distinctive paper, miscellaneous expenses, including paper for internal-revenue stamps and for purchase, maintenance, and driving of necessary motor-propelled and horse-drawn passenger-carrying vehicles, when, in writing, ordered by the Secretary of the Treasury, $1,600,000, of which $355,000 shall be immediately available, to be expended under the direction of the Secretary of the Treasury.

There is nothing in this appropriation specifically authorizing any such articles of personal furnishings, and if the purchase of such articles is to be sanctioned it must be by reason of their being so essential to the accomplishment of the purpose of the appropriation as to warrant a conclusion of their purchase being authorized by a necessary implication.

In justification of these purchases the following information has been furnished as to each purchase as scheduled, supra, which is quoted and discussed in sequence in the order above stated:

Relative to voucher 1551 for rubber boots furnished by Harry Kaufman, Incorporated, I would state that the boots are used largely in the rag laundry where the men are engaged in washing rags known as printers' wiping cloths used on power presses, and other laundry work which necessitates their working at times in several inches of water. The men are subject to the overboiling of tubs of hot water. They are also worn when filling tubs with soda ash and caustic soda used in cleaning printers' wiping cloths. To work under such conditions which are continually occurring without protection, would be very taxing to their health on account of the sudden change of temperature, drafts, wet feet, etc. If these articles in question were not provided for the

men, many of them would fail to properly protect themselves which would result in much sickness and injuries would necessitate their being put on the compensation rolls, the hiring of extra laborers to take the places of those absent from such causes and an increased expense to the bureau. The boots are also used occasionally in the fire room of the engine house and by the laborers of this bureau when cleaning boilers and various tanks, pits, and during the repair work where it is necessary to work in water.

Help in this particular line of work is rather limited due to the small amount of pay received, and this inconvenience to the service is felt at once when absence occurs due to injuries, etc. Boots are also kept in the tool rooms in this bureau for use of mechanics when put on jobs which necessitate their working in water, the boots being returned to the tool room when the job is completed.

Rubber boots, as well as the other articles furnished, as listed herein, are essentially personal furnishings, and the rule established as to such articles is, that if such are not absolutely necessary to the accomplishment of the purpose for which the appropriation was provided, or are for the personal convenience, comfort, or protection of employees, and such as are reasonably required as a part of the usual and necessary equipment for the work on which they are engaged or for which employed, then the appropriation is not available. 3 Comp. Gen. 433.

It seems clear that the boots in question are not absolutely essential to the accomplishment of the public work but are primarily for the protection and comfort of certain employees in their usual and regular occupation, and in the absence of specific legislative authority therefor such purchases are no more justified than would be the purchase of boots, rubbers, or arctics for the average laborer who works out in the weather on construction work or in ditches. See decision to Secretary of Commerce dated May 7, 1924, A. D. 2464. Every employee should be required to present himself for the particular duty for which engaged properly appareled according to the individual requirements and the exigencies of the occupation. The matter of safeguarding health rests primarily with the employee so far as concerns proper apparel, and concerning the question of compensation for such purpose, it must be presumed that the wage is adequate for the service; but if not, it becomes an administrative matter and not a subject for consideration in connection with the present question. While this purchase is represented to have been made in accordance with an existing authorization of the Secretary of the Treasury of long standing, yet such procedure was subsequent and contrary to the rule declared applicable to such purchases in 2 Comp. Gen. 258; id. 652. If there was any doubt as to the application of said decisions to these purchases the matter should have been submitted for an advance decision which when rendered would have served to absolve from a responsibility for an erroneous payment. The fact that a particular action under certain circum-

stances has insidiously grown into a practice can not operate to perpetuate the improper use of an appropriation; accordingly, as the appropriation charged does not specifically or by necessary implication authorize the purchase of such articles of personal equipment credit for the payments is not authorized.

Concerning voucher 1550, which covers leather-palm gloves, it is said:

* * * I would state that these gloves are used by workmen when sliding steel plates into trucks for delivery to the vault. The plates are in such condition that they would saw and cut the hands of the men if they were unprotected which would continually necessitate medical attention, payment of compensation for injuries and loss of time at their work. The amount of additional work derived by the Government through the use of these gloves works to its benefit, and the men who enter the Government employ could not reasonably be expected to supply this extra requirement for efficient service.

What has been said concerning item No. 1 ante will apply hereto. It is not contended that this duty could not be performed without such gloves. Rather is the point stressed of the comfort and protection of the employee. It is presumed that the particular duty mentioned is no more injurious than the handling of brick or lumber, and many kindred articles of commerce, and I am not aware that in the usual occupations involving the handling of rough material liable to produce minor casual injury it is customary to supply personal furnishings of this kind by way of protection. If, however, it is the custom under certain conditions, there is then this distinction: That private interests have a right of self-determination as to the use of the funds thus controlled in supplying personal furnishings thought desirable, while public funds are only available in terms of the appropriation or by a necessary implication.

The reasons given while persuasive of a desirability do not disclose a necessity in the public interest or otherwise bring the case within the rule as announced in 3 Comp. Gen. 433, therefore credit for the payment is not authorized.

Relative to voucher 1675, which is for men's wooden-soled shoes, it is stated:

* * * the shoes are largely used by the firemen in the engine house and laborers who are compelled to work at times where ashes and hot coals are continually falling out of the fire. The shoes are also worn for protection when the fires are cleaned. It is also necessary at times to get under stoker fires and replace broken grate bars and dump plates and make other repairs. They are also worn in the macerating room when filling the machines with caustic soda and soda ash, etc., as acid would eat through leather-sole shoes in a very short time and cause bad burns and injuries.

The substance of this statement is the suggestion that such articles are to be furnished employees to protect and save personal effects and personal expense at public cost. The reasons advanced for this purchase do not justify the payment of public funds, and credit for payment is not authorized.

The last item, voucher 1883, covers stockinette-lined rubber gloves, of which it is said that—

I would advise that these gloves are used at different times by men in the photolitho section of the engraving division when etching plates in acids and poisonous chemical baths. This is a necessary protection against poison to the hands and body, and could not reasonably be required to be furnished by the employee, and it is believed to be an economical measure, inasmuch as the employee would be continually under medical treatment, and prevents loss of time and payment of Government compensation.

Concerning one aspect of this purchase, it is apparent that the articles, if necessary for the protection of the employee in the performance of the duty described, appear to be of a class such as might reasonably be required to be furnished by the employee as the usual and necessary equipment for the work for which employed. 3 Comp. Gen. 433, and decision to the Secretary of the Interior, dated June 7, 1924, A–1932. Credit for the payment is therefore not authorized.

Relative to the question of furnishing any or all of the articles discussed herein as a measure of economy based upon the saving of time and payment of Government compensation, such a question involves a matter of policy proper for administrative and legislative consideration in connection with new legislation in the form of specific authority in appropriation acts or otherwise, but is not for consideration in connection with expenditures under the appropriation here involved.

The facts presented in this case do not establish (1) that the purchase of the articles is necessary to the accomplishment of the purpose for which the appropriation was made, and (2) that the nature of the articles or the circumstances of their use are such that they could not reasonably be required to be furnished by the employees.

The various items discussed will be disposed of as indicated herein.

(A–3960)

CLASSIFICATION OF CIVILIAN EMPLOYEES—DETAILS, PROMOTIONS, AND TRANSFERS

An employee whose position is allocated to one grade under the classification act of March 4, 1923, 42 Stat. 1488, when temporarily detailed to duties of a position in a higher grade, will be entitled only to continue in receipt of the compensation of the lower grade. Permanent assignment to a position in the higher grade can be accomplished only by regular promotion in accordance with the provisions of the classification act and the civil service rules and regulations.

An employee receiving $1,440 per annum in grade 2, clerical, administrative, and fiscal service, may be promoted to grade 3 of the same service, in which the average salary of the total number of persons in the grade, including him, will exceed the average rate of the grade, at the minimum rate of pay of grade 3, viz. $1,500.

The term "vacant position," as used in section 10 of the classification act relative to transfers, means a vacant place in a grade the salary of which is not necessarily that of the last incumbent but may be at any authorized rate within the grade which does not cause the proper average for the grade to be exceeded.

A transfer under section 10 of the classification act. such as does not constitute a "new appointment" to a newly created position, need not necessarily be at the minimum rate in the grade but is subject to the same rules applicable to other transfers relative to maintaining the proper average.

Any new adjustment of compensation in a grade subsequent to July 1, 1924, must take into consideration all persons in the grade, including those excepted upon allocation of initial salaries, in determining the proper average. When the proper average has already been lawfully exceeded by reason of express exceptions made in the law, new adjustments in compensation in a grade must tend to reduce the average, and this can most expeditiously be done by making appointments, transfers, and reinstatements at the minimum salary rate of the grade.

Comptroller General McCarl to the Secretary of the Interior, July 29, 1924:

I have your letter of July 11, 1924, as follows:

Your decision is respectfully requested upon the following questions arising in connection with the provisions of the classification act approved March 4, 1923:

1. The position of an employee whose salary is $1,440 per annum has been classified in grade 2, C. A. F. service, the salary range of which is $1,320 to $1,680 per annum. I.. the event the employee subsequently to July 1, 1924, is assigned to other duties classified in grade 3 with a salary range of $1,500 to $1,860 per annum, should he be paid a salary at one of the rates of grade 3, notwithstanding the average salary of the total number of persons in that grade, including him, may exceed the average rate of the grade?

2. Under the provisions of section 10 of the classification act an employee may be transferred from a position in one grade to a vacant position within the same grade, etc. Does "vacant position" mean the rate received by the last incumbent or can it be any rate within the grade fixed administratively? For instance, can an employee in grade 3, C. A. F. service, receiving a salary of $1,680 in one department, be transferred at the same salary within that department or to another department to a position in the same grade regardless of the salary received by the former employee therein? If transfer is to a newly created position, can it be at any other than the minimum rate of the grade?

3. If the average of the salaries of the total number of persons in a grade exceeds the average of the grade, apparently under your decision of June 26, 1924, no appointment, transfer, or promotion to this grade could be made unless it would bring the average of the salaries to or below the average of the grade. Where one appointment would not result in bringing the average of the salaries down to the average of the grade, could several appointments to that grade be made, provided there is necessity therefor, if the resulting average of the salaries would not be above the average of the grade?

4. In your decision of June 26, 1924, you state, relative to the computation of average salary, that "the initial salaries on July 1, 1924, of those persons coming within the exceptions provided in the average provision, may be eliminated in determining the average." Does this mean that all persons whose positions on July 1, 1924, came within either of the three exceptions contained in the average provision may be eliminated from consideration in determining the average, the exceptions referred to being numberd (1), (2), and (3) in the following proviso:

"*Provided*, That this restriction shall not apply (1) to grades 1, 2, 3, and 4 of the clerical-mechanical service, or (2) to require the reduction in salary of any person whose compensation is fixed, as of July 1, 1924, in accordance with the rules of section 6 of such act, or (3) to prevent the payment of a salary under any grade at a rate higher than the maximum rate of the grade when such higher rate is permitted by 'the classification act of 1923,' and is specifically authorized by other law."

1. It is not clearly understood what is meant by "assigned to other duties." If temporary detail is intended, the employee would continue to receive his rate of compensation in grade 2. If permanent assignment is intended, that could be accomplished only by regular promotion to grade 3 in accordance with the provisions of the classification act and the civil service rules and regulations regarding promotions. Assuming that the proper average now exists in grade 3, any promotion to that grade from grade 2 must be at an authorized rate that would maintain that proper average. If the average of the salaries of the total number of persons in the grade to which promoted exceeds the average of the compensation rates for said grade, promotion could be made only to the minimum salary for said grade.

2. The term "vacant position" as used in section 10 of the classification act means a vacant place in a grade. A certain number of places in each grade have been appropriated for and authorized by the Personnel Classification Board, and when there is one less employee in a grade than has been authorized there is a vacant position to which a promotion or transfer may be made. The salary of the vacant position is not necessarily that of the last incumbent, but may be at any authorized rate within the grade which does not cause the proper average for the grade to be exceeded. An employee in grade 3 receiving a salary of $1,680 per annum in one department could be transfered at the same salary, within that department or to another department, to a vacant position in the same grade regardless of the salary received by the former employee therein, provided the proper average is not exceeded. A transfer such as does not constitute a "new appointment" to a newly created position need not necessarily be at the minimum rate in the grade but is subject to the same rules applicable to other transfers.

3. If the excess over the proper average in a grade has resulted by reason of the exceptions expressly made in the average provision appearing in the appropriation acts for the fiscal year 1925, new adjustments therein subsequent to July 1, 1924, must tend to reduce the average, and this can most expeditiously be done by making appointments, transfers, and reinstatements at the minimum salary rate of the grade. Decision of July 19, 1924, 4 Comp. Gen. 79. Increase in the number of positions estimated for must be within the limit of the total available appropriation and with the approval of the Personnel Classification Board. Decision of June 26, 1924, question 5, 3 Comp. Gen. 1005.

4. The average provision has no application whatever to grades 1, 2, 3, and 4 of the clerical-mechanical service. The employees coming within (2) or (3) of the proviso quoted in the submission are

to be eliminated in determining the allocation of initial salaries as of July 1, 1924. But any new adjustment of compensation in a grade subsequent to July 1, 1924, must take into consideration all persons in the grade, including those excepted upon allocation of initial salaries, in determining the proper average. Where the proper average has already lawfully been exceeded by reason of express exceptions made in the law, new adjustments in compensation in a grade must tend to reduce the average and this can most expeditiously be done by making appointments, transfers, and reinstatements at the minimum salary rate of the grade. Decision of July 19, 1924, 4 Comp. Gen. 79.

(A–3402)

SEIZURE AND SALE OF VEHICLES BY CUSTOMS SERVICE—CLAIMS FOR PROCEEDS

Claimants asserting an interest in the proceeds received from the sale of vehicles seized for violation of the customs laws are required by the act of September 21, 1922, 42 Stat. 986, to make application to the Secretary of the Treasury within three months after date of sale, and failure to do so within the time limit forfeits any rights claimants may have to the proceeds thereof. An application filed with the collector of customs does not stop the running of the statutory limit.

Decision by Comptroller General McCarl, July 30, 1924:

The Automobile Finance Co. has applied for review of settlement No. 017896, of May 12, 1924, wherein was disallowed its claim for $46.86, representing the net proceeds of the sale of one Ford touring car, 1919 model, engine No. 2841312, seized, forfeited, and sold by the customs authorities for violation of the customs laws, having been seized on May 15, 1923, and sold on June 27, 1923, because of its being used "in the transportation of 42 bottles of smuggled Mexican liquor," the said proceeds of sale being reported as having been deposited and covered into the Treasury as miscellaneous receipts.

In letter to this office of January 12, 1924, the Assistant Secretary of the Treasury stated:

> It appears from the report of the customs officers that the said automobile was appraised at a value of less than $1,000.00 and advertised and sold pursuant to the provisions of sections 607 to 609 of the tariff act of 1922 and the net proceeds deposited in the Treasury.
>
> The claimant has shown to the satisfaction of the Secretary of the Treasury that it has a substantial interest in the said automobile; that the forfeiture was incurred without willful negligence or intent to defraud upon its part; that at the time of the seizure and sale it did not know and was not in a position to know of such seizure and forfeiture; and that within three months after the date of sale the application under consideration was filed.
>
> By virtue of the authority vested in the Secretary of the Treasury by section 613 of the tariff act of 1922, the forfeiture of the said automobile is hereby remitted, and it is ordered that the net proceeds of the sale thereof, amounting to $46.86, be restored to the applicant.

Section 606 of the tariff act of 1922, act of September 21, 1922, 42 Stat. 985, requires an appraisement at the instance of the collector of customs of any vehicle seized under the customs laws; section 607 of the same act requires publication of the seizure and the intention to forfeit and sell, if the vehicle is not valued at over $1,000; section 608 permits claims to be filed by parties claiming interest in the seized vehicle within 20 days of the first publication of notice of seizure; section 609 provides for declaration of forfeiture and sale at public auction if no such claim is filed, and section 613 provides:

Any person claiming any vessel, vehicle, merchandise, or baggage, or any interest therein, which has been forfeited and sold under the provisions of this act, may at any time within three months after the date of sale apply to the Secretary of the Treasury if the forfeiture and sale was under the customs laws, or to the Secretary of Commerce if the forfeiture and sale was under the navigation laws, for a remission of the forfeiture and restoration of the proceeds of such sale, or such part thereof as may be claimed by him. Upon the production of satisfactory proof that the applicant did not know of the seizure prior to the declaration or condemnation of forfeiture, and was in such circumstances as prevented him from knowing of the same, and that such forfeiture was incurred without any wilful negligence or intention to defraud on the part of the applicant, the Secretary of the Treasury or the Secretary of Commerce may order the proceeds of the sale, or any part thereof, restored to the applicant, after deducting the cost of seizure and of sale, the duties, if any, accruing on the merchandise or baggage, and any sum due on a lien for freight, charges, or contribution in general average that may have been filed. If no application for such remission or restoration is made within three months after such sale, or if the application be denied by the Secretary of the Treasury or the Secretary of Commerce, the proceeds of sale shall be disposed of as follows:

(1) For the payment of all proper expenses of the proceedings of forfeiture and sale, including expenses of seizure, maintaining the custody of the property, advertising and sale, and if condemned by a decree of a district court and a bond for such costs was not given, the costs as taxed by the court;

(2) For the satisfaction of liens for freight, charges, and contributions in general average, notice of which has been filed with the collector according to law;

(3) For the payment of the duties accruing on such merchandise or baggage, if the same is subject to duty; and

(4) The residue shall be deposited with the Treasurer of the United States as a customs or navigation fine.

The reason for the disallowance was as follows:

The car was sold by customs officers on June 27, 1923, after having been duly advertised in accordance with the law. No claim having been made for the proceeds of the sale within the required time, it was properly deposited in the Treasury and can now only be withdrawn by virtue of an act of Congress.

Claimant in its affidavit executed under date of December 19, 1923, stated:

That on May 15, 1923, this car was seized from George Hanley and Daniel Munoz by Customs Officer Roy Hearn and Immigration Officer Cottingham, for being used in the transportation of forty-two (42) bottles of smuggled Mexican liquor.

That the car was sold on June 27th, 1923, to C. M. Loughlin, of Premont, Texas, the proceeds of said sale reverting to the Treasury Department.

That the Automobile Finance Company had no knowledge of this car having been seized until after the sale of the car had been made, its first information to this effect having been received under date of July 14, 1923.

That under date of July 21st, 1923, we took this matter up with Mr. Ed Cotulla, assistant collector, district No. 23, San Antonio, Texas, advising him of our mortgage on the above-mentioned car, and on July 28th, 1923, we received his advices to the effect that the car had been sold under date of June 27th, 1923.

It is not shown when the amount of $46.86 was deposited in the Treasury, but presumably such deposit was not made until after three months from the date of sale, section 613, of the act quoted, supra, requiring the proceeds to be held for three months, or, in the words of that section, the proceeds of sale shall be disposed of as directed, "If no application for such remission or restoration is made within three months after such sale," etc.

The fact that the proceeds were deposited in the Treasury, presumably after three months from date of sale, indicates that claimant did not make application to the Secretary of the Treasury "within three months after the date of sale" as required by section 613. Taking the matter up with the collector within three months does not satisfy the requirements of the statute, and failure to make proper application within three months forfeits any rights of claimant to the proceeds of the sale.

Upon review of the matter the settlement is sustained.

(A–3911)

ACCOUNTING—DISTINCTIVE PAPER FOR CURRENCY, NATIONAL BANK NOTES, AND FEDERAL RESERVE NOTES

The appropriation for "Distinctive paper for United States securities, 1925," may be used for all purchases of distinctive paper for United States currency, including national-bank notes, and for Federal reserve notes, subject to reimbursement from time to time for the actual cost of such paper used for Federal reserve notes from the indefinite appropriation "Preparation and issue, Federal reserve notes, reimbursable," the latter appropriation to be reimbursed in turn by the Federal reserve banks, and provided the paper actually used for currency issued by the Treasury during the fiscal year 1925, does not exceed the amount of such paper on hand on July 1, 1924, plus the 157,500,000 sheets authorized to be purchased during the fiscal year 1925.

The expense of receipt, custody, and issue of distinctive paper for Federal reserve notes, and the receipt, examination, and destruction of mutilated Federal reserve notes arising in connection with the printing thereof, should be determined as accurately as possible and charged under the appropriation for "Preparation and issue of Federal reserve notes, reimbursable," and deposited in the Treasury as miscellaneous receipts. (Modified by 4 Comp. Gen. 258.)

Comptroller General McCarl to the Secretary of the Treasury, July 30, 1924:

I have your letter of July 8, 1924, reading:

Distinctive paper for paper currency is required for two accounts: (1) United States currency, including national-bank notes; and (2) Federal reserve notes.

Paper for United States currency, including national-bank notes, is charged to an appropriation annually granted by Congress. Paper for Federal reserve notes is charged to an indefinite appropriation established by the Federal reserve act, the established appropriation title being "Preparation and issue, Federal reserve notes, reimbursable," any charge to this appropriation being included in the cost of producing the notes, reimbursement thereafter being made by Federal reserve banks.

The paper used for two classes of work is identical in every respect. Distinctive paper is obtained under contract, and the total amount required annually exceeds the capacity of a single mill. Until the present time the force of Treasury employees necessary for duty at the mill, as authorized by Congress, the salaries of whom are charged to the annual appropriation, has been sufficient only for the operation of a single mill. Accordingly, the salaries of such employees as are necessary for the operation of a second mill have been charged to the indefinite appropriation above referred to or to the indefinite appropriation "Expenses of loans." In the former case only paper for Federal reserve notes was being made, and in the latter only bond paper was being made. This arrangement covered the situation until the fiscal year 1924, when for the first time requirements under the annual appropriation, supplemented by a deficiency appropriation, exceeded the capacity of a single mill. To meet the situation Congress in the first deficiency act, 1924, approved April 2, 1924, authorized additional employees for the operation of a second mill and reenacted the same authority in the act approved April 4, 1924, making appropriations for the Treasury and Post Office Departments for the fiscal year 1925.

In order to simplify the manufacturing procedure, records, and reports, and to insure more exact and convenient accounting, it is desirable that the distinctive currency paper be manufactured under one appropriation title for the current fiscal year 1925. Congress has provided an appropriation for the purchase of 157,500,000 sheets of distinctive paper for United States securities (required for United States currency, national bank currency, and Federal reserve bank currency), and possibly 40,000,000 sheets additional paper will be required for Federal reserve notes. The department wishes to order all paper manufactured as initially chargeable to the annual appropriation "Distinctive paper for United States securities," and thereafter from time to time make issues from such paper received for account of Federal reserve notes, the actual cost of such paper to be a charge against the indefinite appropriation "Preparation and issue, Federal reserve notes, reimbursable," the amount to be carried by counter warrant to the credit of the annual appropriation "Distinctive paper for United States securities," the indefinite appropriation thereafter to be reimbursed by Federal reserve banks as a part of the cost of the notes.

Will you please advise if there is any objection to this procedure.

Heretofore the department has not included as a part of the cost of Federal reserve notes the expenses incurred in the division of paper custody arising through the receipt, custody, and issue to the Bureau of Engraving and Printing of paper required for Federal reserve notes, and expenses subsequently incurred in connection with the receipt, examination, and destruction of mutilated Federal reserve notes arising in connection with the printing. It is proposed to continue to operate the division of paper custody under the established annual appropriation, and from time to time to compute the cost arising through the custody, etc., of paper for Federal reserve notes, certifying the amount thereof for settlement as a charge against the indefinite appropriation "Preparation and issue, Federal reserve notes, reimbursable," and as a credit to the annual appropriation "Public debt service," the amount thereafter to be included as a part of the cost of the notes to be reimbursed by Federal reserve banks.

Will you please advise if there is any objection to this procedure?

The procedure above proposed in the two instances is similar to the procedure in effect at the Bureau of Engraving and Printing for handling the cost of repay work, the annual appropriations granted by Congress being used for all expenses incurred and thereafter reimbursed when repay work is delivered.

Section 16 of the Federal reserve act of December 23, 1913, 38 Stat. 267, provides:

> Any appropriation heretofore made out of the general funds of the Treasury for engraving plates and dies, the purchase of distinctive paper, or to cover any other expense in connection with the printing of national-bank notes or notes provided for by the Act of May thirtieth, nineteen hundred and eight, and any distinctive paper that may be on hand at the time of the passage of this Act may be used in the discretion of the Secretary for the purposes of this Act, and should the appropriations heretofore made be insufficient to meet the requirements of this Act in addition to circulating notes provided for by existing law, the Secretary is hereby authorized to use so much of any funds in the Treasury not otherwise appropriated for the purpose of furnishing the notes aforesaid: *Provided, however,* That nothing in this section contained shall be construed as exempting national banks or Federal reserve banks from their liability to reimburse the United States for any expenses incurred in printing and issuing circulating notes.

The amount estimated for the fiscal year 1925 "for the purpose of furnishing the notes aforesaid," to be appropriated from time to time under the heading "Preparation and issue of Federal reserve notes, reimbursable," was $1,700,000. See "The Budget, 1925," page 667.

The appropriation for "Distinctive paper for United States securities, 1925," act of April 4, 1924, 43 Stat. 68, provides:

> Distinctive paper for United States securities: For distinctive paper for United States currency, national-bank currency, and Federal reserve bank currency, not exceeding 157,500,000 sheets, including transportation of paper, traveling, mill, and other necessary expenses, and salaries of employees and expenses of officer detailed from the Treasury Department, $50 per month when actually on duty; in all, $1,095,000.

The Federal reserve bank currency referred to in the appropriation for distinctive paper comprehends Federal reserve bank notes, as distinguished from Federal reserve notes, the former, as stated in Treasury Department circular of November 14, 1923, entitled "The Monetary System of the United States," being—

> identical in all their attributes with national-bank notes, except that the amount issued is not limited to the paid-in capital stock of the issuing Federal reserve bank. They may be issued in the same denominations as national-bank notes. Only a small amount of these notes are now outstanding * * *.

See hearing before subcommittee of House Committee on Appropriations, Treasury Department appropriation bill, 1925, page 189.

The appropriation for the "Public debt service, 1924," act of January 3, 1923, 42 Stat. 1092, provided:

> For necessary expenses connected with the administration of any public debt issues and United States paper currency issues with which the Secretary of the Treasury is charged, including * * * the salaries of * * * chief of the Division of Paper Custody at $3,000, and the salaries of such assistants, accountants, clerks, and other employees in the District of Columbia as the Secretary of the Treasury may deem necessary, * * *.

The appropriation for the "Public debt service, 1925," act of April 4, 1924, 43 Stat. 68–69, is substantially similar in terms to

the appropriation for the fiscal year 1924 except that the salaries of the chief of the division of paper custody and others are included under the provision contained in the 1925 appropriation for "other personal services in the District of Columbia in accordance with 'the classification act of 1923.'"

The possible objection to charging all purchases of distinctive paper under the appropriation for distinctive paper, act of April 4, 1924, 43 Stat. 68, 69, supra, whether it is for currency issued by the Treasury or for Federal reserve notes, distinctive paper for the latter being chargeable under the appropriation for "Preparation and issue of Federal reserve notes, reimbursable," act of December 23, 1913, 38 Stat. 267, supra, is that the combined purchases under the appropriation with the limitation would register in excess of such limitation. However, such excess would only be apparent, and I do not think that of itself should preclude carrying out the contemplated arrangements if they will result in a more efficient handling of the matter and a consequent saving in the appropriation as a whole.

In answer to that part of the submission relative to the purchase of all distinctive paper from the appropriation for "Distinctive paper for United States securities, 1925," you are advised that the procedure contemplated would appear to be authorized provided the paper actually used for currency issued by the Treasury during the fiscal year 1925 does not exceed the amount of such paper on hand on July 1, 1924, plus the 157,500,000 sheets authorized to be purchased during the fiscal year 1925.

In answer to that part of the submission relating to the receipt, custody, and issue of distinctive paper for Federal reserve notes, and the receipt, examination, and destruction of mutilated Federal reserve notes arising in connection with the printing thereof, you are advised that section 16 of the Federal reserve act, supra, clearly requires that such costs be borne by the Federal reserve banks; therefore, they should be determined as accurately as may be under the circumstances and charged under the appropriation for "Preparation and issue of Federal reserve notes, reimbursable," cited, supra; however, being a character of expense always heretofore charged under the appropriations for the "Public debt service," and such expense not appearing as susceptible of actual segregation and identification, which is the general requirement as to transfers between two operating appropriations, it would appear that the deposit should be to miscellaneous receipts rather than to the appropriation for the "Public debt service."

(A-1252)

CONTRACTS—LIQUIDATED DAMAGES

Under a contract providing that failure of the contractor to submit claim for extension of time within 30 days from the happening of the alleged cause of delay shall be "deemed and construed as a waiver of all claims and right to an extension of time" on account of the alleged delay, the contractor is not entitled to refund of liquidated damages when the application for extension is not submitted within the 30-day period.

Under a contract providing that liquidated damages should be remitted for all unavoidable delays, which are defined in the contract as including strikes but excluding delays in securing material, the contractor is not chargeable with liquidated damages for delays caused by railroad or stevedore strikes delaying transportation of materials, for which extensions of time were granted.

Decision by Comptroller General McCarl, July 31, 1924:

Eric Lange and A. H. Bergstrom, copartners doing business under the firm name of Lange & Bergstrom, requested March 12, 1924, review of settlement No. 189356-N dated February 11, 1924, disallowing their claim under contract dated January 29, 1919, for $935 deducted by Navy disbursing officers as liquidated damages for 11 days' delay and certifying a charge against them for $3,280 as liquidated damages not deducted for other delays in the construction of certain quarters at the naval air station, San Diego, Calif. The claim for $935 was disallowed on the ground that application for an extension of time for the 11 days' delay had not been made within 30 days after the happening of the causes of delay and the charge was certified against them on the ground that the extension of time granted was for delays in securing material which were expressly excepted from the terms of the contract as delays for which the contractors should not receive an extension of time with remission of liquidated damages.

A copy of the contract dated January 29, 1919, was delivered to the contractor on March 6, 1919, and required performance within 180 days thereafter, or by September 2, 1919. On account of extra work the time of completion was subsequently extended to September 27, 1919. Liquidated damages for each and every day of delay beyond the contract period were fixed at $215 a calendar day, divided among the various buildings as follows: Barracks for 400 men, $50; student officers' quarters, $40; dispensary and cubicle ward, $25; married officers' quarters, $15 each; storehouse, $25; and garage, $15, with the stipulation that the contractor should have an extension of time with remission of liquidated damages for all delays resulting from unavoidable causes which were defined to be:

* * * such as result from causes beyond the control of the contractor, such as acts of Providence, fortuitous events, inevitable accidents, abnormal

conditions of weather or tides, or strikes of such scope and character as to interfere materially with the progress of the work. Delays caused by acts of the Government will be regarded as unavoidable delays. Delays in securing delivery of materials, or by rejection of materials on inspection, or by changes in market conditions, or by necessary time taken in submitting, checking, and correcting drawings or inspecting material, or by similar causes will not be regarded as unavoidable. * * *

The contract further provided that—

Should the contractor at any time consider that he is entitled to an extension of time for any cause, he must submit in writing to the officer in charge an application for such extension, stating therein the cause or causes of the alleged delay. The officer in charge will refer the same at once with full report and recommendation to the Navy Department, Bureau of Yards and Docks, for consideration and for such action as the circumstances may warrant. The failure or neglect of the contractor to submit, as above provided, his claim for extension of time within 30 days after the happening of the cause or causes upon which his claim is predicated shall be deemed and construed as a waiver of all claims and right to an extension of time for the completion of the work on account of the alleged delay, and the contractor agrees to accept the finding and action of the Navy Department, Bureau of Yards and Docks, in the premises as conclusive and binding.

The 11 days' delay for which liquidated damages of $935 were deducted occurred in August, 1919. The claim for extension was made on January 7, 1920. Obviously the claim was not made within 30 days after the happening of the alleged causes of delay, and the attorney for claimants contends that the failure to make application within 30 days should not be "deemed and construed as a waiver of all claims and right to an extension of time," for the reason that the Chief of the Bureau of Yards and Docks received, considered, and granted the request for the extension of time, notwithstanding it was not submitted within the 30-day period and that his finding and action are conclusive on all parties.

The agreement of the contractors to accept the findings and actions of the Bureau of Yards and Docks in the premises as conclusive and binding, does not carry by necessary implication that such findings and actions are binding on the United States, especially in view of section 236, Revised Statutes, as amended by the act of June 10, 1921, 42 Stat. 24. It is unnecessary to determine whether the alleged causes of delay were causes excepted in the contract entitling the contractor to an extension of time with remission of liquidated damages for the reason that the failure to submit claim for an extension of time within 30 days from the happening of the cause is required by the terms of the contract to be "deemed and construed as a waiver of all claims and right of an extension of time" by reason of such causes of delay. In *Plumley* v. *United States*, the contract quoted in 43 Ct. Cls. 266, at page 269, required the contractor to notify

the Secretary of the Navy of causes of delay, and provided that no cause "shall be" considered unless the contractor "shall at the time of the occurrence of such delay notify him in writing of the facts and circumstances in each case," etc. The United States Supreme Court, on appeal, said in 226 U. S. 545, at page 548, that this provision of:

> The contract required that such notice should be given to the Secretary when the delay occurred, evidently for the purpose of informing the Department and enabling it, at the time, to remove the cause of the delay. It operated to prevent claims for damage and for failure to comply with this requirement of the contract (*United States* v. *Gleason*, 175 U. S. 588); the plaintiff is not entitled to recover.

While the claim in that case was for damages caused to the contractor by the delay, and the claim in this case is for refund of liquidated damages deducted from payments to the contractors on account of delays, the decision is apropos as to waiver of rights by reason of the failure to comply with the contract requirement of notification within 30 days after the happening of the event, and it must be held that the contractors are not entitled to the payment claimed. Moreover, the certification of the final payment voucher as correct and just and acceptance of payment even if the 30-day period had not then expired closed the transaction so far as the contractor is concerned. See decisions of the Court of Claims dated January 7, 1924, in Southern Pacific Co. case, January 14, 1924, in Northern Pacific Co. case, and February 11, 1924, in Seaboard Air Line case.

There remains for decision the question as to whether the charge is proper of $3,280 against the contractors as liquidated damages not deducted from payments by Navy disbursing officers. The delays occurred in securing materials for the construction of the buildings, and the delays as found by the Chief of the Bureau of Yards and Docks resulted from railroad and stevedore strikes. The delay was not the result of subcontractors from whom the contractors purchased the materials, nor did it result from delay of the contractors in purchasing the material. In other words, the delay was not caused by either the contractors or subcontractors, but by railroad and stevedore strikes in the transit of the material. Under the terms of the contract the contractors are not chargeable with such delays.

Upon review so much of the settlement as disallowed claim for $935 is affirmed and so much as charged the contractor with $3,280 is reversed.

(A–3112)

ESTATES OF DECEASED SOLDIERS AND INMATES OF THE UNITED STATES SOLDIERS' HOME

There is authorized to be established in the Treasury special fiscal-year funds entitled "Estates of deceased soldiers, United States Army (trust fund)," with fiscal year designated, to the credit of which amounts representing estates of deceased soldiers and deceased inmates of the United States Soldiers' Home are to be deposited and each fiscal-year fund thus established to remain available for settlement of proper claims for three full fiscal years, at the termination of which the balance, if any, shall be transferred to "Soldiers' Home, permanent fund (trust fund)."

Comptroller General McCarl to the Secretary of the Treasury, July 31, 1924.

There has been received your letter of June 11, 1924, forwarding letter from the Secretary of War, supplemental to your letter of May 28, 1924, concerning the proper disposition to be made of funds representing estates of deceased United States soldiers and deceased inmates of United States Soldiers' Home.

In decision of July 9, 1924, rendered on your submission of May 28, 1924, it was held that the amounts representing estates of deceased inmates of the Soldiers' Home heretofore deposited to "Pay, etc., of the Army" for fiscal years 1918, 1921, 1923, and 1924, could not be deposited to the credit of the appropriation "Soldiers' Home, permanent fund (trust fund)" in the absence of evidence that the amounts deposited to the 1923 and 1924 appropriations represented estates of inmates who have been dead more than three years or that the amounts deposited to the 1918 and 1921 appropriations have not heretofore been paid in claims to the heirs of inmates.

It was held also as follows:

The conditions maintaining present for adoption a procedure which will overcome such conditions in the future by the establishment of a special fiscal-year fund in the Treasury to the credit of which all these amounts may be deposited to be subject to settlement of claims for a period of three fiscal years, after which there will appear balances to be eventually transferred to the appropriation "Soldiers' Home, permanent fund (trust fund)." A proper submission thereon will be given due consideration.

The Secretary of War recommends that a special fund be established and you suggest that the amounts of the estates be deposited as "Miscellaneous receipts—Proceeds from estates of deceased soldiers (trust fund)" and carried by appropriation warrant to the credit of appropriation entitled "Estates of deceased soldiers, United States Army (trust fund)." There appears no objection to the appropriation title, except that it should be followed by the appropriate fiscal year, so that after three years from the end of the fiscal year in which the death occurs the balance remaining under the appropriation title set up for that fiscal year may be closed out and transferred to the Soldiers' Home fund.

The procedure will be that when the War Department, Soldiers' Home, or this office receives amounts representing estates of deceased soldiers or inmates of Soldiers' Home, and the provisons of the Articles of War have been complied with, the amounts will immediately be deposited in the Treasury as indicated and carried to the credit of the proper fiscal year appropriation, for instance, if the death occurs during the fiscal year, 1925, to "Estates of deceased soldiers, United States Army (trust fund), 1925." This fund will remain available for settlement of valid claims until June 30, 1928, after which the balance, if any, remaining will be transferred to "Soldiers' Home, permanent fund (trust fund)."

The transfer to this special fund of amounts heretofore deposited to "Pay, etc., of the Army" for fiscal years 1923 and 1924, and to "Soldiers' Home, permanent fund (trust fund)" of the amounts heretofore deposited to "Pay, etc., of the Army" for fiscal years 1918 and 1921, is authorized upon the furnishing of the evidence indicated in the decision of July 9, 1924.

(A–3795)

PERSONAL FURNISHINGS—RUBBER GLOVES

In the absence of evidence showing that rubber gloves were necessary to the accomplishment of a public duty or purpose rather than for the personal protection and comfort of the employees, and that they were not to be used regularly by an employee in the performance of the usual duties for which engaged, payment for such articles is not authorized.

Comptroller General McCarl to the Secretary of Commerce, July 31, 1924:

There has been received your letter dated June 25, 1924, requesting review of settlement No. 029902, dated June 6, 1924, wherein was disallowd the claim of the Potomac Rubber Co. (Inc.), for 12 pairs of men's rubber stockinet gloves, in the total sum of $19.80, delivered to the Bureau of Standards.

To establish the propriety of this purchase as a charge upon the appropriation for the Bureau of Standards, it is severally stated in a rather general way:

(1) That the work in connection with which this material was used could not be accomplished as expeditiously and satisfactorily from the Government's standpoint without them.

(2) That this equipment is not such as the employees reasonably could be required to furnish as part of the regular duties of the positions to which they were appointed or for which their services were engaged.

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(3) That the articles were not intended for the individual use of any one person but for the use of different employees.

The appropriation proposed to be charged with this purchase is that for "Industrial research, Bureau of Standards, 1924," stated to have been transferred to Bureau of Standards under the fortification act of May 21, 1920, which appropriation does not specifically provide for articles of this character, but if, as indicated, such articles are for a general use, then they more properly are chargeable, if at all, to the appropriation digested as "Equipment, Bureau of Standards, 1924." See decision of June 12, 1924, A–3050.

Rubber gloves are essentially personal furnishings of a character for which the public funds are seldom made available, and where the use of funds is to be sanctioned for such articles it must be by reason of a clear implication of a necessity to accomplish a public purpose. In this case it is not disclosed that the public duty or purpose was impossible of accomplishment without such articles, but it is stated that results could not be obtained as expeditiously and satisfactorily from the Government's standpoint without them. It is clear that the articles are intended for the comfort and protection of the employees under like conditions that might exist in any commercial pursuit. Masons, carpenters, transportation men, machinists, and chemists in many lines of industry are constantly occupied manually in ways and with materials that are liable to casually inflict minor injury or discomfort. It is presumed from the statement submitted in support of the purchase in this case that the particular duties are no more injurious or unpleasant than under private conditions, and I am not aware that in the usual occupations under similar conditions with private enterprises it is customary to supply personal furnishings of this kind by way of protection in what may be said to constitute the usual and customary duties for which employed. If, however, it is the custom in some private undertakings to furnish such articles to employees, then there is this distinction to be regarded, that the private interests have a right of self-determination as to the use of the funds thus utilized in supplying personal furnishings thought desirable, whereas public funds are only available for expenditures necessary to accomplish the purposes for which the appropriations are made.

The conditions under which articles in the nature of personal furnishings may be purchased were set forth in decision of January 19, 1924, 3 Comp. Gen. 433, and the purchase here involved was not made until April, 1924. Therefore, in the absence of a definite showing as to the specific purpose to be accomplished by the use of these gloves; that the Government and not the employee receives the

principal benefit resulting from said use; in other words, that the need for the gloves is not primarily to protect the hands of the employees from discolorations, discomforts, or minor or possible injuries; and that the gloves are not used regularly by the employee in the performance of the principal or ordinary duties of the position for which employed, it must be held that the purchase from Government funds was not authorized.

Upon review the disallowance is sustained.

(A–3975)

PERSONAL FURNISHINGS—RUBBER BOOTS—VEHICLES—PASSENGER-CARRYING

Rubber boots used regularly by employees of the General Land Office while employed in their usual occupation on land surveys and disclosed not to be absolutely essential to the accomplishment of the public work, but primarily as personal equipment for the personal comfort and protection of the employees, are not a proper charge against an appropriation which makes no provision for the purchase of such articles.

A motor cycle with a permanent side-car attachment for the purpose of carrying freight is not a passenger-carrying vehicle within the meaning of the act of July 16, 1914, 38 Stat. 508, prohibiting the expenditure of any sum without specific authority for the purchase, maintenance, repair, or operation of motor-propelled passenger-carrying vehicles, and reimbursement for necessary repairs made on such motor cycle is authorized.

Decision by Comptroller General McCarl, August 1, 1924:

E. D. Sorensen, United States surveyor general in Utah, requests review of settlement I–17427, dated September 28, 1922, and settlement C–1792–I, dated April 2, 1924, wherein credit for two items hereinafter mentioned was disallowed.

The item involved in the first settlement represents the cost of two oxy-acetylene welds on G. L. O. motor cycle No. 5, at $1 each, total, $2, paid for on voucher 536, December, 1921, and credit was disallowed for the reason that it appeared the repairs were made upon a passenger-carrying motor-propelled vehicle contrary to the act of July 16, 1914, 38 Stat. 508, section 5, prohibiting the expenditure of any sum for the purchase, maintenance, repair, or operation of motor-propelled passenger-carrying vehicles for any branch of the public service unless the same is specifically authorized by law.

It being now reported that the car in question was not constructed for nor apparently used as a passenger-carrying vehicle, but is a motor cycle equipped with a side car permanently and integrally attached, suitable only for freight-carrying purposes, the same will now be allowed in the accounts.

The item involved in the second settlement represents an expenditure of $12.50 for two pairs of rubber hip boots at $6.25 per pair, paid for on voucher 736, August, 1922, and credit was disallowed in accordance with 20 Comp. Dec. 306 and 2 Comp. Gen. 258, as being personal furnishings.

In justification of the purchase of these boots the assistant supervisor of surveys at Salt Lake City, under date of June 20, 1924, states:

* * * The boots in question were purchased for use of the various assistants engaged on Group No. 110, Utah. This work was entirely different from the usual public-land survey, and it was necessary for the assistants to be in water and mud all the time while engaged in the field. It was necessary in order to obtain assistants to provide rubber boots or waders for their use while engaged in the field survey work, and they were hired with the understanding that rubber boots would be provided. The boots were not purchased for any particular person and were worn by whoever happened to be employed. The boots always remained the property of the Government, and in no sense could be regarded as personal furnishings. * * * The boots were absolutely necessary, and if they had not been provided by the Government it would have been necessary to pay wages very materially in excess of those we did pay in order to obtain men for the work. It was good business and very much to the interest of the Government to provide the boots for use on this unusual survey.

Notwithstanding the statement herein quoted to the contrary, rubber boots are essentially personal furnishings.

It is proposed to pay for these articles from the appropriation, "Surveying the public lands, 1923," act of May 24, 1922, 42 Stat. 558, and this appropriation does not specifically provide for the purchase of such articles. Therefore in accordance with the rule as stated in 3 Comp. Gen. 433, there is for consideration whether the use of the boots was necessary, from the Government's standpoint, to the accomplishment of the purpose of the appropriation; and if so, whether the employees might reasonably be required to furnish them as a part of the personal equipment necessary to enable them to perform the duties for which they were engaged. From the Government's standpoint it would appear to be immaterial whether the persons engaged on the survey wore rubber boots. In other words, it would appear that the boots were worn for the personal comfort, benefit, or protection of the employees. But assuming that the work could not be accomplished as expeditiously or economically, from the Government's standpoint, without the boots as with them, the administrative report hereinbefore quoted indicates that the boots were worn regularly by the employees in the performance of the ordinary duties for which they were employed, and the very nature of the work required of surveyor's assistants in sections in which there are streams, swamps, etc., suggests the need of suitable wading boots. Therefore it must be assumed that if the boots in question were necessary to the accomplishment of the work the employees reasonably could be required to furnish

them for themselves as a part of the personal equipment necessary to enable them properly to perform the duties for which they were engaged. The fact that a pair of boots might not have been assigned to a particular employee for his individual use and that the boots would at all times be regarded as the property of the Government are not the sole determining factors. Such factors are not material when it is clearly shown that the articles are used regularly by the employee in the performance of the principal or ordinary duties of the position in which employed.

The question of adequacy of compensation or economy of expenditure incident to the rates as paid is not for consideration here, as a determination of the matter here presented depends upon whether there is authority of law therefor, and under the circumstances appearing I am constrained by the facts to decide that there is no authority for such expenditure and accordingly the disallowance as to the item of $12.50 is sustained.

Upon review of settlement I–17427 a difference of $2 is certified for credit in the disbursing officer's accounts.

(A–4181)

CLASSIFICATION OF CIVILIAN EMPLOYEES — ALLOCATION OF POSITIONS THE COMPENSATION OF WHICH IS PAID FROM MORE THAN ONE APPROPRIATION—RATE OF COMPENSATION

In the allocation of a "position" under the classification act of March 4, 1923, 42 Stat. 1488, the Personnel Classification Board is required to take into consideration all duties attached thereto regardless of the different appropriations, or funds from which different portions of the aggregate compensation may be payable, and in fixing the rate of compensation of the position as allocated within the proper grade, the aggregate of compensation regardless of the source must be included.

The compensation on June 30, 1924, attaching to the position of chief disbursing clerk, Department of the Interior, having been $3,500, including $2,500 for disbursement of Interior Department appropriations and $1,000 for disbursement of appropriations for the office of the Architect of the Capitol, and the position having been allocated in grade 10, clerical, administrative, and fiscal service, the initial salary of the position on July 1, 1924, under rule 3 of section 6 of the classification act of March 4, 1923, 42 Stat. 1490, was $3,500.

Comptroller General McCarl to the Secretary of the Interior, August 1, 1924:

I have your request of July 16, 1924, for decision as to the salary properly payable to the chief disbursing clerk, Department of the Interior, under the classification act of 1923.

It appears that the position has been allocated in grade 10 of the clerical, administrative, and fiscal service, and that the rate of compensation has been fixed at $3,500 per annum within that grade.

In the past, annual appropriation acts for the Department of the Interior have provided for a "chief disbursing clerk, $2,500." See

act of January 24, 1923, 42 Stat. 1174, for the fiscal year 1924. The act of March 3, 1879, 20 Stat. 391, provides as follows.

* * * And hereafter the disbursing clerk of the Department of the Interior is hereby required to act as disbursing clerk of the Architect of the Capitol, and to disburse all moneys appropriated for the United States Capitol extension and improvement of the grounds, and to receive an annual compensation of one thousand dollars, to be paid out of said appropriation.

Therefore prior to July 1, 1924, the disbursing clerk of the Department of the Interior, known as "chief disbursing clerk," was required, in addition to his other duties, to act as disbursing clerk of the Architect of the Capitol, and was entitled to receive for his entire services the aggregate sum of ($2,500 plus $1,000) $3,500.

Appropriation has been made for the fiscal year 1925, in the act of June 7, 1924, 43 Stat. 586, under the heading "Architect of the Capitol," for "compensation to disbursing clerk, $1,000."

The disbursing clerk is contending that the allocation of his "position" as an employee of the Department of the Interior to grade 10 of the clerical, administrative, and fiscal service with a minimum salary of $3,300, should be based exclusively on his duties requiring disbursement of appropriations provided for the Department of the Interior, and that the additional compensation of $1,000 authorized for the disbursement of appropriations provided for the Architect of the Capitol does not properly enter into the matter.

The enactment of 1879 did not create a position separate from that of the disbursing clerk of the Department of the Interior, but added an additional duty to the position of the department disbursing clerk and authorized the obligation of the appropriations for the Architect of the Capitol for $1,000 to pay for the performance of the additional duty. Decision of April 18, 1918, 85 MS. Comp. Dec. 231.

In the allocation of a "position" under the terms of the classification act of 1923, the personnel classification board is required to take into consideration all duties attaching thereto regardless of the different appropriations or funds from which different portions of the compensation for such duties may be payable. In fixing the rate of compensation within the grade as allocated the aggregate of compensation received on June 30, 1924, regardless of the source, must be included.

The classification sheet, a copy of which has been furnished, properly included as a duty of the position of chief disbursing clerk, Department of the Interior, the following:

Disburses all appropriations under the supervision of the Architect of the U. S. Capitol, for which he receives $1,000 per annum, included in above salary.

Assuming the position to have been properly allocated in grade 10 of the clerical, administrative, and fiscal service, in which there is

a salary rate of $3,500, the initial salary of the position on July 1, 1924, was $3,500. See rule 3, section 6, of the classification act.

Your question is answered accordingly.

(A-3696)

DAMAGES TO PRIVATE PROPERTY BY NATIONAL GUARD

Appropriations for arming, equipping, and training the National Guard are not available for the payment of claims for damages to private property caused by the concussion and vibrations from the firing of large-caliber guns by National Guard troops at a Regular Army fort.

Claims for damages to private property caused by the firing of large-caliber guns by National Guard troops at a Regular Army fort, if they are not the result of negligence and are within the maximum specified in the current appropriation for the payment of claims for damages to and loss of private property incident to the training, practice, operation, or maintenance of the Army, may be paid subject to the conditions specified therein on settlements made by the General Accounting Office.

Decision by Comptroller General McCarl, August 2, 1924:

The Chief of the Militia Bureau has applied for review of settlement No. M-5947-W, dated May 8, 1924, in which was disallowed in the accounts of Maj. J. F. Sherburn credit for a total of $137.38 paid to various claimants for damages to their private property, consisting of the breaking of windows, electric fixtures, and plaster by the concussion and vibrations occasioned by the firing of large-caliber guns at Fort MacArthur, Calif., on July 19, 1923, by the California National Guard troops, Coast Artillery Corps. The chief of a bureau is not the proper party to secure review of a settlement. 1 Comp. Gen. 776. But in this instance, and, to expedite matters, the request will be considered as if made by the disbursing officer or the Secretary of War.

By Special Orders, No. 121, dated July 19, 1923, a board of officers was appointed under the provisions of Army Regulations 35-7040 to investigate and report upon such claims for damage to and loss of private property incident to the training, practice, operation, or maintenance of the Army as may be referred to it. Said regulations direct such claims to be submitted to the General Accounting Office for settlement, as required by the act of March 2, 1923; 42 Stat. 1386. The claims in question were considered by said board but instead of being transmitted to this office for settlement as required by law, they were paid by Major Sherburn from National Guard appropriations. It is contended that the payments were in accordance with decision of the Comptroller of the Treasury dated March 10, 1910, in 16 Comp. Dec. 589 and paragraph 680 of the National Guard Regulations based upon that decision. It is to be observed that when the decision of March 10, 1910, was rendered there was no separate specific appropriation for the payment of damages to

private property, and in the absence of such a specific appropriation, an appropriation similar to the one in question was held to be available for the payment of certain damages. But by the act of August 24, 1912, 37 Stat. 586, which was the first law making a general provision with reference to payment of claims for damages to private property resulting from operations of the Army (see 27 Comp. Dec. 669) it was provided that thereafter—

> * * * the Secretary of War is authorized to consider, ascertain, adjust, and determine the amounts due on all claims for damages to and loss of private property when the amount of the claim does not exceed the sum of one thousand dollars, occasioned by heavy gun fire and target practice of troops, and for damages to vessels, wharves, and other private property, found to be due to maneuvers or other military operations for which the Government is responsible, and report the amounts so ascertained and determined to be due the claimants to Congress at each session thereof through the Treasury Department for payment as legal claims out of appropriations that may be made by Congress therefor.

Said provision was permanent legislation and constituted a prohibition against the payment by disbursing officers for damages to private property occasioned by heavy-gun fire and target practice of troops and for other damages to private property found to be due to maneuvers or other military operations for which the Government was responsible, and made the decision in 16 Comp. Dec. 589 inapplicable to such claims arising thereafter. The claims were required, under such provision, to be reported to Congress for payment out of appropriations to be thereafter made. The act of March 2, 1923, 42 Stat. 1386, provided that claims not exceeding $500, resulting from the training, practice, operation, or maintenance of the Army, could be paid to the extent of funds therein appropriated when the Secretary of War had ascertained the amount of the damage the claimant would accept, the amount recommended in full satisfaction of such damages, the payments to be made on certificates of the General Accounting Office. Similar provision was made by the act of June 7, 1924, 43 Stat. 483.

Where the claim for damages arises because of negligence the act of December 28, 1922, 42 Stat. 1066, requires such claims to be certified to Congress. See 2 Comp. Gen. 529. Also, if the claim for damages did not arise because of negligence in the training, practice, operation, or maintenance of the Army, but exceeds the maximum of $500 named in the acts of March 2, 1923, and June 7, 1924, relief must be obtained, if at all, from the Congress. See 2 Comp. Gen. 19.

Obviously, appropriations for arming, equipping, and training the National Guard are not available for payment of claims for damages to property caused by a National Guard organization during a period of summer training in firing heavy guns from a Regular Army fort or elsewhere. If the claims do not result from negligence of the members of the National Guard organization in the

scope of this summer training, as supervised and directed by officers of the Regular Army and do not exceed the maximum amounts specified, they may be paid from appropriations specifically made available for payment of claims for damages to private property due to the training, practice, operation, or maintenance of the Army and in the manner and subject to the conditions specified in the appropriations. If they do result from negligence on the part of the members of the National Guard organizations or their trainers, or if they exceed the maximum amounts specified in the appropriations, they can not be paid unless and until specifically appropriated for after presentation to and consideration of the Congress.

The claims in the instant case do not exceed the maximum amounts specified in the act of March 2, 1923, and the act of June 7, 1924, and they do not appear to have resulted from negligence within the meaning of the act of December 28, 1922. The claimants agreed to accept the amounts recommended by the board in full satisfaction of the damages sustained. The proceedings of the board should have been approved and transmitted to this office for settlement as required by law. See 26 Comp. Dec. 910. However, if the Secretary of War will now approve the proceedings of the board and recommend payment of the claims and transmit the recommendations to this office a settlement will be stated adjusting the appropriations and crediting the accounts of the disbursing officer.

As the matter now stands, the disallowance of credit must be, and is, affirmed.

(A–143)

COAST GUARD PAY—RETENTION BEYOND ENLISTMENT

An enlisted man of the Coast Guard who, while the Coast Guard was operating in time of war as a part of the regular Navy, was detained in the service after the expiration of his enlistment by his commanding officer because the vessel on which he was serving was in foreign service and the country was at war is entitled to the one-fourth additional pay provided by section 1422, Revised Statutes, as amended by the act of March 3, 1875, 18 Stat. 484.

Decision by Comptroller General McCarl, August 4, 1924:

I have for consideration the question whether Daniel P. Sweeney, former enlisted man in the rating of boy, first class, United States Coast Guard, is entitled to one-fourth additional pay under section 1422, Revised Statutes, for the period January 12 to September 30, 1918.

Section 1422, Revised Statutes, as amended by the act of March 3, 1875, 18 Stat. 484, provides:

That it shall be the duty of the commanding officer of any fleet, squadron, or vessel acting singly, when on service, to send to an Atlantic or to a Pacific port of the United States, as their enlistment may have occurred on either the

Atlantic or Pacific coast of the United States, in some public or other vessel, all petty officers and persons of inferior ratings desiring to go there at the expiration of their terms of enlistment, or as soon thereafter as may be, unless, in his opinion, the detention of such persons for a longer period should be essential to the public interests, in which case he may detain them, or any of them, until the vessel to which they belong shall return to such Atlantic or Pacific port. All persons enlisted without the limits of the United States may be discharged, on the expiration of their enlistment, either in a foreign port or in a port of the United States, or they may be detained as above provided beyond the term of their enlistment; and that all persons sent home, or detained by a commanding officer, according to the provisions of this act, shall be subject in all respects to the laws and regulations for the government of the Navy until their return to an Atlantic or Pacific port and their regular discharge; and all persons so detained by such officer, or re-entering to serve until the return to an Atlantic or Pacific port of the vessel to which they belong, shall in no case be held in service more than thirty days after their arrival in said port; and that all persons who shall be so detained beyond their terms of enlistment or who shall, after the termination of their enlistment, voluntarily re-enter to serve until the return to an Atlantic or Pacific port of the vessel to which they belong, and their regular discharge therefrom, shall receive for the time during which they are so detained, or shall so serve beyond their original terms of enlistment, an addition of one-fourth of their former pay. * * *

The act of August 29, 1916, 39 Stat. 600, provided that—

Whenever, in time of war, the Coast Guard operates as a part of the Navy in accordance with law, the personnel of that service shall be subject to the laws prescribed for the government of the Navy.

And the act approved May 22, 1917, 40 Stat. 87, provided for enlisted men of the Coast Guard the same rates of pay prescribed for corresponding ratings and length of service of enlisted men in the Navy. Thus the enlisted men of the Coast Guard during the period in question were entitled to benefits accorded enlisted men of the Navy under section 1422, Revised Statutes.

Section 1422, Revised Statutes, as amended imposes on the commanding officer the duty of sending an enlisted man to a port of the United States for discharge at expiration of enlistment with the exception that he may detain the man when his services are very "essential to the public interests." The statute recognizes the man's right to a discharge upon expiration of his term of enlistment and provides that only in case the public interests demand it shall he be held longer in the service against his will, and when so held provides additional compensation for such extra period of service. Its primary purpose is in the interest of and for the protection of the man. In any case where the man's detention beyond the term of his enlistment, against his will, when serving under the conditions prescribed in the statute is essential to the public interest, he is entitled to the one-fourth additional pay. 26 Comp. Dec. 128 and 1050; 2 Comp. Gen. 177.

In this case the records show that Sweeney enlisted in the Coast Guard January 12, 1917, for one year, and was honorably discharged September 30, 1918. The Acting Commandant of the United States Coast Guard in a letter dated November 20, 1923, states that—

2. Due to the fact that the *Ossipee*, the vessel on which he was serving was on foreign service and the country was at war, Sweeney's enlistment was extended from January 12, 1918, to September 20, 1918, inclusive, when he was given an honorable discharge. * * *

The pay and allotment officer, United States Coast Guard, in a letter dated July 21, 1924, states that the log of the *Ossipee* contains the following entry under date of January 11, 1918:

Enlistments of E. R. Hurne, ordinary seaman; W. D. Sweeney, boy, first-class; D. P. Sweeney, boy, first-class, and C. A. Logan, coal heaver, expired this day; enlistments extended until further orders of Squadron Commander.

It is apparent from the record that Sweeney's retention in the service beyond date of expiration of his enlistment on January 11, 1918, by the commanding officer because the country was at war was a detention in the public interest as contemplated by section 1422, Revised Statutes, and that he is entitled to additional pay as provided therein during the period of such detention. See *Healey* v. *United States*, 58 Ct. Cls. 466.

(A-4109)

PURCHASES—FURNITURE

Furniture for use in offices of sugar samplers, inspectors, etc., in various customs quarters, on docks and other points in the New York customs district, is a field expense, and may be purchased without regard to the act of June 17, 1910, 36 Stat. 531, it appearing that the General Supply Committee contracts do not include and were not intended to provide for furniture for this field service.

Comptroller General McCarl to the Secretary of the Treasury, August 4, 1924:

I have your letter dated July 16, 1924, requesting decision of a question therein stated as follows:

There is transmitted herewith a letter of the 8th instant from the collector of customs at New York, submitting the estimated cost of certain furniture required in various customs quarters, based on competitive proposals received, which, if purchased locally, will cost $1,040.53. Similar furniture purchased from the general supply contractors will cost, according to the prices in the schedule, $2.014.40.

The furniture covered by the proposals secured locally is not of as high a grade and quality as that on the general supply contracts. This furniture, however, is for use in offices of sugar samplers, inspectors, etc., on docks and other points, and the lower grade of furniture will answer the purpose for which it is required equally as well as that of the better quality.

It is the department's practice to make such purchases locally when it results in a saving of money for the Government, and in this instance the collector would be authorized to accept the local bids were it not for the fact that the General Accounting Office questions and suspends the accounts covering purchases of this character made otherwise than from the contractors on the general supply schedule. The collector in his letter refers to such a suspension. Numerous similar suspensions have appeared in the accounts of other collectors of customs.

The department is not aware of any law or regulation which makes the purchase of furniture for the customs service from the General Supply Committee contractors mandatory. The General Accounting Office, however, appears to take an opposite view.

Your opinion, therefore, is requested as to whether the department may purchase the furniture in question at the lower cost of $1,040.53, or whether purchase must be made at the higher figure of $2,014.40 under the general supply schedule. In purchasing locally the department not only saves the difference in cost of $973.87, but, as the local bidders will deliver the furniture at the points where it is desired without additional cost, the transportation and drayage charges are saved in addition.

The act of June 17, 1910, 36 Stat. 531, requiring all supplies for executive departments and other Government establishments in Washington to be contracted for and purchased through the General Supply Committee is not exclusively applicable to the field service unless provision for the field service of the particular department has been included in the contracts for the fiscal year in question. 20 Comp. Dec. 42; 26 *id.* 918; 3 Comp. Gen. 748.

It is understood from your submission that these articles of furniture for use in offices of sugar samplers, inspectors, etc., in various customs quarters, on docks, and other points in the New York customs district, which is clearly a field service, were not included in or intended to be provided for under the General Supply Committee contracts. Therefore assuming that the purchase of the furniture referred to is necessary to the proper performance of official duties in connection with collecting the customs in the New York district, I have to advise that the purchase under separate contract, after proper advertising, instead of under General Supply Committee contracts, is authorized.

The question submitted is answered accordingly.

(A–4243)

CLASSIFICATION OF CIVILIAN EMPLOYEES—CHANGES FROM A HIGHER TO A LOWER GRADE

"Reductions" from one grade to a lower grade under the provisions of section 9 of the classification act of March 4, 1923, 42 Stat. 1490, can be made only for inefficiency and subject to the approval of the Personnel Classification Board.

Changes from a higher to a lower grade in accordance with the civil service rules and regulations and the provisions of the classification act, not for inefficiency, but at the request of the employee, are not considered as "reductions" within the meaning of section 9 of the classification act, but as "transfers" and controlled by section 10 of the classification act and the average provision appearing in the appropriation acts.

Subject to the rules and regulations of the Civil Service Commission and the provisions of the classification act transfers may be made from a higher grade to a vacant position in a lower grade at a salary not in excess of the salary of the position from which transferred, provided the proper average in the lower grade to which transferred is not exceeded.

As long as the average of the total number of salaries in grade one in the custodial service under the office of the Superintendent of State, War, and Navy Department Buildings, is in excess of the mathematical average of the salary rates prescribed therefor, all transfers to that grade from grade two of the same service must be at the minimum of the salary rate of that grade.

Comptroller General McCarl to the Chairman, Commission in Charge, State, War, and Navy Department Buildings, August 4, 1924:

I have your letter dated July 16, 1924, as follows:

In the organization of the office of the Superintendent State, War, and Navy Department Buildings, there are a number of positions of lavatory attendant, classified in custodial grade one under the classification act of 1923. The duties being lighter, and the hours more favorable, these positions are considered by many of the night female laborers as preferable to those which they now hold, although the night laborers are classified in custodial grade two, and consequently receive a higher rate of pay.

It is proposed to permit the female night laborers who stand at the top of the efficiency list to fill vacancies in the preferred grade with the lower range of pay rates. On July 1, 1924, under the provisions of section 6 of the classification act of 1923 (Public 516, 67th Congress) and section 2 of the act approved June 7, 1924 (Public 214, 68th Congress) making appropriations for the Executive office and sundry independent executive bureaus, boards, commissions, and offices, for the fiscal year ending June 30, 1925, the average pay of employees in custodial grade one was greater than the average rate of pay for the grade fixed by the basic act.

It will be noted that these employees are to be reduced in grade, not for unsatisfactory service, but as a reward for efficient service in more arduous duties, and it is desired to pay them the maximum legal rate in the lower grade. No regulations of the United States Bureau of Efficiency heretofore published contemplate such a change in grade. General Circular No. 6 of that bureau, dated September 25, 1922, in paragraph 75 (a), fixed the maximum rate to be paid an employee reduced in grade for inefficiency at not more than the standard of the lower grade. No regulation of the Personnel Classification Board has been received which bears upon the question here involved, and a decision is requested as to what rate of pay in custodial grade one is the highest rate which can be legally paid to employees whose duties are changed as herein contemplated.

The change from grade 2 to grade 1 of the custodial service under the conditions you set forth is in effect transfer at the request of the employee granted as a reward for merit and not a "reduction" in grade in the sense of a demotion, as the term "reduction" is usually understood. "Reductions" are provided for under section 9 of the classification act only for inefficiency, and are subject to the approval of the Personnel Classification Board. Hence the change in grade here contemplated is authorized only as a "transfer" from a higher grade to a lower grade, and as such is controlled by the civil service rules and regulations, the provisions of the classification act, and the "average" provision appearing in the appropriation act of June 7, 1924, 43 Stat. 533.

Section 10 of the classification act does not in express terms provide for transfers from a higher to a lower grade, but it was recognized in decision of June 26, 1924, question 14, 3 Comp. Gen. 1001, that in so far as the rate of compensation was concerned, but subject to the rules and regulations of the Civil Service Commission and the provisions of the classification act, an employee could be transferred from a higher grade to a position in a lower grade at a salary not in excess of the salary of the position from which transferred. That ruling was made on the assumption that the mathematical average of the lower grade to which transferred was not already exceeded or would not be exceeded by the transfer.

In the case here presented you state that the mathematical average of grade 1 of the custodial service in your office has already been exceeded by reason of the proper allocation of positions held June 30, 1924, and within the exceptions expressed in the average provision of the appropriation act. In decision of July 19, 1924, 4 Comp. Gen. 79, the following rule was announced with respect to new adjustment subsequent to July 1, 1924, in grades in which the average has already been exceeded:

* * * Considering the transfer provision in connection with the average provision, the rule will be that any new adjustment of salaries by transfer, reinstatements, etc., in a grade in which the average has already been exceeded due to the exceptions expressed in the average provision of the appropriation act, must tend to reduce the excess average so that eventually the average will not be exceeded, and this can be accomplished most expeditiously by requiring the transfers, reinstatements, etc., to be at the minimum rate of salary of the grade.

Accordingly, as long as the average of the total number of salaries in grade 1 of the custodial service of your office is excessive, transfers thereto from grade 2 must be made at the minimum salary rate of the grade, viz, $600.

Your question is answered accordingly.

(A-2481)

TELEPHONE SERVICE—INCREASED RATES

Where a contract for telephone service is "for the term beginning with establishment of the service and ending one month from the first day of the month following its establishment, and thereafter until terminated by 10 days' notice in writing by either party to the other," publication in newspapers in the city where the service is rendered of an increase of rates authorized by the State commission does not operate to terminate the contract with the United States, or to make it liable for the increase in rates, in the absence of any contract provision for an increase in rates.

Where a contract for telephone service provides for certain specified facilities, without making any provision for additional facilities, the latter when ordered and furnished subsequent to the date of the contract and apparently without reference to the contract may be paid for at the increased rate as established by the State commission.

Decision by Comptroller General McCarl, August 5, 1924:

The Attorney General, by letter dated April 26, 1924, requested a review of settlements per certificates No. 013135-J, dated March 3, 1924, and No. 016041-J, dated March 13, 1924, of claims (No. 04375) of the Southern Bell Telephone & Telegraph Co., Atlanta, Ga., for $120.65 and $74.90, respectively, for telephone service rendered the Bureau of Investigation, Department of Justice, at Atlanta, Ga., covering periods, respectively, from September, 1922, to March, 1923, both months inclusive, and from August 1 to October 31, 1923. Included in the total charge for services for the first-named period was a charge of $13.75 per month for exchange service

"as per contract," amounting to $96.25, and in that for the latter period $13.25 per month ("rate on main exchange being decreased from $13.75 to $13.25 per month, effective May 1, 1923, per authority of Georgia Railway Commission, no copy of contract available"), amounting to $39.75.

In settlement 013135–J there was allowed $85.65, representing $120.65 less $35 deducted as amount claimed in excess of exchange rate contracted for, the contract of January 8, 1920, calling for a total monthly rate of $8.75 instead of $13.75, as claimed; and in settlement 016041–J there was allowed $61.40, representing $74.90 less $13.50 deducted as amount claimed in excess of contract rate.

Contract dated January 8, 1920, for telephone service, was entered into between the Southern Bell Telephone & Telegraph Co. and United States Bureau of Investigation, Department of Justice, by Lewis J. Bailey, superintendent. Said contract (company's Form S–1301, October, 1919) reads in part:

> The subscriber hereby requests the Southern Bell Telephone and Telegraph Company (herein styled the Company) to furnish, for the use of subscriber, subscriber's agents and representatives only, telephone service as follows:
> Class of service (business, flat rate, special line) * * * at (street or office address) 309 Post Office Building in the city of Atlanta, Ga., for the term beginning with establishment of the service and ending one month from the first day of the month following its establishment, and thereafter until terminated by ten days' notice in writing by either party to the other, and agrees to pay at the office of the company, monthly, in advance, for the telephone facilities furnished hereunder and for local messages from the station or stations covered by this contract the rates specified under "Rate memorandum," on the back hereof; * * * all facilities and service furnished hereunder to be in accordance with the terms and conditions of the company's schedules of rates and regulations, and subject to the terms and conditions hereinafter expressed, and to the rules and regulations from time to time adopted by the company.

The "Rate memorandum" provides for payment of a total monthly rate of $8.75 ($7.50 for initial station, $1 for one extension station, and 25 cents for one extra listing). "Monthly rate on annual basis."

Paragraph 12 of the "terms and conditions" reads in part:

> This request becomes a binding contract when accepted by the company's manager, by his signature hereto, or by establishing the said service. * * *

The provision for payment "monthly, in advance," is void as against the United States in view of the provision of section 3648, Revised Statutes, that "in all cases of contracts for the performance of any service, * * * for the use of the United States, payment shall not exceed the value of the service rendered * * * previously to such payment."

The Railroad Commission of Georgia, by order dated February 4, 1921, authorized maximum rates effective March 1, 1921, to be charged by the claimant company, the business flat-rate service for

Atlanta being fixed at $10.50 per month for one party line and at $1.50 per month for an extension, wall, or desk.

Affidavits have been submitted showing that the increase of rates granted and authorized by the said railroad commission, effective March 1, 1921, were published February 6, 1921, in two newspapers in Atlanta, Ga.

It is stated that the Government was given the same notice, under the same form of contract, as the general public, and that it would appear that this notice, given more than 10 days prior to the date the new rates were to become effective, by publication rather than by personal service, complies with the terms of the contract.

It is stated also that July 1, 1921, the department endeavored to secure a new contract covering the increased rates, but the company refused to sign one, and no formal contract has been entered into since the one dated January 8, 1920.

The general rule under a contract for the furnishing of service to the United States by a public utility is that an increase in maximum rates granted to the utility does not operate to increase the liability for the rates specified in the contract. 24 Comp. Dec. 280. An exception to the general rule exists where the contract, as to rates, is on a month to month basis, subject to change without notice by a duly authorized body. Decision of September 28, 1923, 25 MS. Comp. Gen. 991.

The contract of January 8, 1920, is "for the term beginning with establishment of the service and ending one month from the first day of the month following its establishment, and thereafter until terminated by 10 days' notice in writing by either party to the other." In other words, the contract term is first for a period of less than or not to exceed two months, and then it becomes continuous and indefinite, terminable upon notice as stated. The contract is not a monthly agreement as to rates, nor does it contain any provision for increase of rates for exchange service. The publication in the Atlanta newspapers of the increase of rates granted and authorized by the State Commission of Georgia, though made more than 10 days prior to the date the increase became effective, did not operate to terminate the contract with the United States nor to make it liable for the increased rates. Said contract not having been terminated in accordance with its provisions, it continues in force and effect while there is an appropriation available for payment of the service contracted for, and payment for the exchange service specified may be made only at the rate provided therein.

It appears, however, that included in the monthly rate of $13.75 for exchange service for the period September, 1922, to March, 1923, and of $13.25 for period August 1 to October 31, 1923, there is included a charge of $1.50 for a second extension that was installed

on March 1, 1921, by order of the Bureau of Investigation, and that the change in the monthly rate from $13.75 to $13.25 was due to a reduction from $10.50 to $10 for one-party line.

As the contract of January 8, 1920, provides for only one extension, without making provision for additional facilities, charge for the second extension may be allowed for as outside the contract and at the rate of $1.50.

Upon review differences are certified due the company as follows:

In settlement per certificate No. 013135–J, $10.50, covering second extension at $1.50 per month for seven months, September, 1922, to March, 1923, inclusive.

In settlement per certificate No. 016041–J, $4.50, covering second extension at $1.50 per month for three months, August 1 to October 31, 1923.

(A–3727)

VETERANS' BUREAU—INSURANCE PREMIUMS

The amount of insurance premiums deducted from the pay of an enlisted man of the Navy, subsequent to the period covered by his allotment authorizing the deduction, may not be paid to the Veterans' Bureau in the absence of affirmative action by the enlisted man authorizing the application of the amount deducted as insurance premiums.

Decision by Comptroller General McCarl, August 5, 1924:

The United States Veterans' Bureau has requested review of settlement 026762, dated May 31, 1924, disallowing its claim for amount of $6.60, deducted as insurance premiums from the pay of William H. Frondorf, A. S. E. R., U. S. Navy, for November and December, 1923, and January, 1924, at the rate of $2.20 per month.

The allotment division, Bureau of Supplies and Accounts, Navy Department, has reported that William H. Frondorf, executed an allotment for $2.20 per month for 34 months, first payment January, 1921, in favor of the Bureau of War Risk Insurance, to cover premiums for converted insurance, and that this allotment was paid in full, terminating with the expiration of the allotment October 31, 1923. Notwithstanding the termination of the allotment, premiums were deducted from the pay of the enlisted man for the months of November and December, 1923, and January, 1924. He was honorably discharged January 18, 1924. The United States Veterans' Bureau is contending that as the insured received insurance protection subsequent to the termination of the allotment and during the period the premiums were actually deducted from his pay, the bureau is entitled to reimbursement of the amount deducted, namely, $6.60.

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Section 4065, Regulations United States Veterans' Bureau, 1923, issued in pursuance of sections 400 and 402 of the war risk insurance act, provides as follows:

When an insured provides for the payment of premiums by an allotment of his pay, any previous authorization for deduction from his pay or deposit for the payment of premiums shall be deemed to be revoked and his insurance shall lapse and terminate at the end of the grace period after the allotment of his pay expires, unless the insured registers a new allotment of his pay or executes an authorization for deductions from his pay or deposit, or otherwise makes payment of said premiums in order that each premium shall be paid upon the date it is due or within the grace period of 31 days, as provided by regulations and the terms of the United States Government life insurance policy. (T. D. 48 W. T., September 29, 1919, as modified by T. D. 66 W. R., June 2, 1921, which also modifies T. D. 49–A. This supersedes T. D. 44, which superseded parts of T. D. 32 and T. D. 33.)

Accordingly the checkage of the insurance premiums subsequent to October 31, 1923, was unauthorized. Decision of July 10, 1924, 4 Comp. Gen. 36. In the absence of affirmative action by the enlisted man authorizing the application of the amount deducted from his pay as insurance premiums there exists no proper basis for a settlement by this office in favor of the Veterans' Bureau of the amount deducted. The payment of insurance premiums is a matter of contract between the Veterans' Bureau and the insured and necessitates an authorization by the enlisted man before any amount deducted from the pay of the enlisted man may be applied as premiums.

Upon review the settlement is sustained.

(A–4417)

TRANSPORTATION OF DEPENDENTS—NAVAL RESERVE FORCE (FLEET) ENLISTED MAN

The permanent separation of a member of the Fleet Naval Reserve on active duty from the U. S. S. *Scorpion* at Constantinople, Turkey, and his transfer to the U. S. S. *Brazos*, for further transfer to the nearest receiving ship at a port of arrival in the United States for release from active duty, constituted a permanent change of station within the purview of the act of May 18, 1920, 41 Stat. 604, and entitled him to reimbursement of the cost of transportation of his dependents from Constantinople, Turkey, to New York, N. Y., not in excess of what it would have cost the Government to have furnished them transportation.

Decision by Comptroller General McCarl, August 5, 1924:

William Earl Peterson, C. B. M., F. N. R., applied January 11, 1924, for review of settlement No. N–30122, dated May 19, 1923, disallowing his claim for reimbursement of cost of transportation of dependents from Constantinople, Turkey, to New York, for travel performed in November, 1922.

Settlement disallowed reimbursement because claimant was not ordered to make a permanent change of station.

It appears that Peterson was transferred to the Fleet Naval Reserve on July 22, 1922, and that by orders dated October 31, 1922,

he was directed to proceed to the U. S. S. *Brazos* and report to the commanding officer for further transfer to the nearest receiving ship at port of arrival in the United States for release from active service. These orders were carried out, and on December 18, 1922, the commanding officer of the receiving ship barracks at Hampton Roads, Va., ordered claimant to proceed to Philadelphia, Pa., and upon arrival there to consider himself as placed on inactive duty. Prior to leaving Constantinople claimant made request, on October 27, 1922, for transportation of his wife and two children from Constantinople, Turkey, to New York, under provisions of the act of May 18, 1920. This was not obtained, and by indorsement of January 30, 1923, on said application the Bureau of Navigation recommended reimbursement to claimant, stating that "Government transportation for dependents was not available and commercial transportation was not furnished."

In reply to a request for the naval history of Peterson on May 9, 1923, the Bureau of Navigation stated that he was released from active duty on December 18, 1922; again in letter dated October 6, 1923, the bureau stated that Peterson was released from active duty on October 30, 1922, the date of his transfer to the U. S. S. *Brazos* for passage home. Apparently that conclusion is based on instructions in Alnav 29, of July 3, 1922, as follows:

> Outside the continental limits of the United States government transportation shall be used whenever practicable and men may be retained on active duty only until transferred to Government vessel for passage home.

Said "Alnav 29," however, was only instructions relative to the transfer of chief petty officers to the Fleet Naval Reserve, which in general terms instructed commanding officers upon receipt of approved applications to transfer men concerned and place them on inactive duty. Such general instructions are not to be construed as contravening specific instructions and orders relative to such transfers. The commanding officer's authority for the transfer of claimant was radio message "Stanav 76" of October 26, 1922, directing that "all discharges for expiration of enlistments prior to November 1 to be transferred to *Brazos*. Also * * * transfers to Fleet Naval Reserve." Pursuant to said dispatch the commanding officer of the U. S. S. *Scorpion*, on October 31, 1922, wrote the commanding officer of the U. S. S. *Brazos* as follows:

> * * * The following-named man is transferred to the vessel under your command for further transfer to the nearest receiving ship at port of arrival in the United States for release from active duty.
> Peterson, William Earl, C.B.M. U. S. F. N. R. C.–1c.

A transferred member of the Fleet Naval Reserve on active duty has an assimilated status to an enlisted man. Unless requested it is not the practice of the Navy Department to discharge an enlisted

man in a foreign port, the Navy Regulations prohibiting discharges outside the United States where the enlistment occurred within the United States except on written request. Considering the orders and instructions relative to claimant's transfer and release from active duty in the light of the department's practice regarding enlisted men it is concluded that he was not placed on inactive duty until December 18, 1922, as stated in his orders of that date, and that until so released he was on active duty and entitled to active duty pay.

The act of May 18, 1920, 41 Stat. 604, provides:

> That hereafter when any commissioned officer, * * * warrant officer, chief petty officer, or petty officer (first class), having a wife or dependent child or children, is ordered to make a permanent change of station, the United States shall furnish transportation in kind * * * to his new station for the wife and dependent child or children: *Provided*, That for persons in the naval service the term "permanent station," as used in this section, shall be interpreted to mean a shore station or the home yard of the vessel to which the person concerned may be ordered; * * *

The purpose of that act was to relieve the personnel therein mentioned when ordered to change duty stations, of the personal expense incident to moving their dependents to the new station or post of duty. When the travel performed accomplishes the purpose of the act transportation is authorized. Upon a temporary change in which case it is known that the officer will return to his permanent station, or after a brief period proceed to another station, no necessity for moving dependents to such temporary station usually exists and on such change the act does not contemplate that transportation shall be furnished. However, where the change involves a permanent separation from the old station, and requires duty at a new post or station, the transfer is permanent within the meaning of the act. Decision January 25, 1922, Review 637, 5 MS. Comp. Gen., 1356; decision dated January 31, 1923, 17 *id.*, 1390; 1 Comp. Gen., 227.

Although claimant's orders of October 31, 1922, recite that his transfer is for the purpose of release from active service yet they were not release orders nor were release orders issued until December 18, 1922, and until released from active service he remained in a duty status so as to entitle to transportation of dependents in connection with his orders to return to the United States.

Claimant is entitled to what it would have cost the Government to have furnished transportation for his dependents, wife and two children, ages 18 months and 5 months, from Constantinople to New York.

Upon review the settlement is modified and $210.82 certified due claimant.

(A-3592)

CONTRACTS—FORMAL—INFORMAL—INTERIOR DEPARTMENT

Under the act of June 5, 1924, 43 Stat. 392, the purchase of supplies and equipment or the procurement of services for the Department of the Interior may be made in open market without compliance with sections 3709 and 3744, Revised Statutes, in the manner common among business men, when the aggregate amount of the purchase or service does not exceed $100 in any instance.

The purchase of supplies by the Department of the Interior by proposal and acceptance, when the aggregate amount of the purchase is in excess of $100 in any one instance, must be by formal contract under section 3744, Revised Statutes, except in those cases in which the thing purchased and the money in payment therefor pass between the vendor and the vendee at the same time.

The question of whether it is more economical, etc., to make a succession of independent purchases of the same class of supplies, etc., rather than to enter into a contract for a given period providing for the furnishing of such supplies as required and ordered, is one for administrative determination.

Comptroller General McCarl to the Secretary of the Interior, August 6, 1924:

The following letter, dated June 11, 1924, has been received from the Superintendent, Mission Indian Agency, Riverside, Calif.:

Reference is made to the various regulations covering immediate delivery and payment and continuous service, and the necessity for contracts.

A rather peculiar condition exists at this unit, and the following is submitted with the hope that your office can relieve the situation:

The headquarters for the Mission Indian Agency are in the town of Riverside, California, and the 31 reservations under this jurisdiction range from 35 to 200 miles distant. There are five day schools and a hospital. The hospital is located 35 miles away, and the day schools from 60 to 150 miles. These day schools are isolated, situated in the back country, and are for the Indian children who can not attend public schools and are too young to be sent to nonreservation schools. Most of these children are in need of nourishing foods, such as fresh meats, vegetables, etc. These can only be obtained from local stores adjacent to the reservations. As each school is isolated, there are naturally but few stores. At Pala there is only one store; at Mesa Grande there is but one store, ½ mile distant; and at Santa Ysabel there is but one store. The Volcan School trades at the Santa Ysabel store, which is 4 miles from the school. At Campo there is but one store, and that is 10 miles from the school. The vegetables and meats, etc., needed for the children must be purchased from these stores. There is no other source from which they can be obtained, as the Indians do not have a surplus to sell; and they can not be purchased from the surrounding towns, especially in the warm weather. These purchases range from 80¢ to $5.00 per week per school; the amounts are all small and not of sufficient importance to warrant a storekeeper to execute a contract covering delivery of such. In fact, it has already been intimated that no contract will be entered into, the storekeepers well realizing that the Government must purchase from them or else go without. As the supplies are necessary for the children, it is impossible to do without them; and as the traders are disinclined to enter into a contract, it complicates matters for this agency.

There has been considerable delay in settling bills within the 15-day limit. This is due to the fact that the dealers are also negligent in this respect and despite repeated urgings continue to send in the bills monthly, and even quarterly. They have been following this practice for years, and as they have always received their money heretofore they can not understand the necessity for haste nor understand why a contract must be entered into for the small amounts purchased by this office. In fact, they rather resent our urgings both for the contract and prompt submissal of bills. In this section, back-country merchants consider 30 days as "cash"; they have always done so, and do not care to change at this time.

When bills are received here they are vouchered and returned to the teacher or employee who made the purchase, with the request that he sign and send

to the merchant with instructions for him to sign and send to this office. Although a check is kept here, it is not unusual for a storekeeper to keep a voucher for a month or six weeks, although this office has frequently written asking for its return. In a few instances it has been necessary to write an employee asking him to go to the store and mail the voucher personally. Most of our purchases are made by mail or phone, and frequently the supplies are "sent up" by an Indian or a white man who is "going that way."

The same is also true in regard to ration purchases. Indians are given orders on stores in their immediate neighborhood, and as the Indians live in the remote sections, there is usually but one store. Only a few months ago we received a bill for seven months' rations, and I doubt that the storekeeper would have sent it in then had not the rationer died. Part of this bill reverted to the previous fiscal year and it was necessary to send it in as a claim.

At the Soboba Hospital much the same condition prevails, although the hospital is much better located than the day schools. It is 4 miles from San Jacinto and 5 miles from Hemet, Calif., both small towns. The merchants here are not inclined to enter into contracts for meats, vegetables, fruits, etc., required for the patients, because the amounts required vary with the needs of the institution. It was only after considerable correspondence and personal visits that a dairyman at San Jacinto consented to enter into a contract to furnish milk, and then he insisted upon a minimum of 10 quarts a day before he would sign it. These merchants are also lax in submitting bills despite our urgings, and unless payment is made to them within a reasonable length of time they will withdraw credit from the institution.

As matters now stand, it is impossible in many instances to comply with the regulations requiring payment within 15 days from date of delivery and continuous service, and I would appreciate advice from your office as to what method to pursue to avoid exceptions to accounts.

A disbursing officer is entitled under the law to a decision only on a question specifically involved in a voucher which is properly before him for payment, 25 Comp. Dec., 653; however, the matters submitted appearing such as to which the superintendent should be advised, it is deemed proper and necessary to bring them to your attention and in so doing to state generally the law and procedure applicable.

The act of June 5, 1924, 43 Stat. 392, provides:

> The purchase of supplies and equipment or the procurement of services for the Department of the Interior, the bureaus and offices thereof, including Howard University and the Columbia Institution for the Deaf, at the seat of government, as well as those located in the field outside of the District of Columbia, may be made in open market without compliance with sections 3709 and 3744, of the Revised Statutes of the United States, in the manner, common among business men, when the aggregate amount of the purchase or the service does not exceed $100 in any instance.

In construing the $50 purchase provision of the Indian Office, 39 Stat. 126, it was said in decision of November 14, 1923, that:

> Section 3744, Revised Statutes, provides:
>
> "It shall be the duty of the Secretary of War, of the Secretary of the Navy, and of the Secretary of the Interior to cause and require every contract made by them severally on behalf of the Government, or by their officers under them appointed to make such contracts, to be reduced to writing and signed by the contracting parties with their names at the end thereof; * * *."
>
> The word "continuous" is not outlined in section 3744, Revised Statutes, but in the application of that section it frequently has been used to describe a series of daily purchases of supplies, etc., or intermittent purchases thereof, over a given period.
>
> The matter of whether it is more economical, etc., to make a succession of independent purchases of the same classes of supplies, etc., rather than to enter into a contract for a given period providing for the furnishing of such supplies as required and ordered, is administrative. * * *

What was said in the decision quoted, *supra*, is applicable here. Where it is practicable and more economical to enter into a contract for a given period providing for the furnishing of the supplies, as required and ordered during such period, it is necessary to have the contract reduced to writing and signed by the parties with their names at the end thereof, as required by section 3744, Revised Statutes, provided the expenditures over the period of the contract are estimated to exceed $100. For instance, if a contract for pasturage or storage is entered into for a given period, to wit, six months, and the rate per month is such as not to require expenditures in excess of $100 for the entire period, such a contract, though for a continuous service, is not required to be reduced to writing and signed in the manner prescribed in section 3744, Revised Statutes, and the situation is the same whether it involves the procurement of nonpersonal services, such as pasturage, storage, etc., or the purchase of supplies.

In the case of single purchases or procurements in excess of $100, the requirements of section 3744, Revised Statutes, must be complied with unless the thing purchased or procured and the money in payment therefor pass between vendor and vendee at the same time, as in the case of an ordinary purchase over the counter of a dealer. 3 Comp. Gen. 314. In those instances where the thing purchased and the money in payment do not pass between the vendor and vendee at the same time and there has been no contract as required by section 3744, Revised Statutes, the disbursing officer should not make payment, but claims arising therefrom should be forwarded with administrative action and recommendation to the General Accounting Office for direct settlement. In this connection attention is invited to decision of April 24, 1924, on a submission by Charles M. Donohue, surveyor general and disbursing officer, General Land Office, and letter of June 11, 1924, to you relative to the matter.

(A-4006)

LEAVE OF ABSENCE—ANNUAL—INDIAN SERVICE EMPLOYEE

A leave of absence with pay granted an employee of the Indian field service by her immediate superior officer, effective on the date of the superior officer's termination of office, having been subsequently disapproved by the Commissioner of Indian Affairs, payment of salary for said leave period is not authorized, no services having been performed.

Decision by Comptroller General McCarl, August 6, 1924:

Mrs. Ada M. Elliott, formerly a clerk to the examiner of inheritance, Yakima, Wash., requested July 7, 1924, review of settlement No. 019471, dated June 17, 1924, wherein was disallowed her claim

for $72.83 as salary alleged to be due as clerk to examiner of inheritance, Indian Affairs, Yakima, Wash., from December 8 to 31, 1923.

The disallowance was made upon the theory that this clerk's services automatically terminated December 7, 1923, the date that the examiner of inheritance to whom she was clerk went out of office.

In her request for review Mrs. Elliott states:

It is important that I call attention at this time to the fact that I entered upon the duties of clerk to the examiner of inheritance upon June 1, 1920, and was continuously employed in that capacity until the date of my resignation or upon December 31, 1923.

That during the year 1923 I had earned 30 days' annual leave and had up until December 7, 1923, taken but 9½ days of this leave. * * *.

That Stuart H. Elliott, the examiner of inheritance was the "officer in charge" and that upon December 5, 1923, he granted me 19 days annual leave or from December 8, 1923, to December 31, 1923, and reported this to the Indian Office on the form prescribed for that purpose in accordance with the rules and regulations of the Indian Office. * * *.

* * * * * * *

I know of no clause in these rules and regulations which so aptly fits my case even in the light that the Indian office has placed my resignation. In this connection attention is invited to the fact that I voluntarily submitted my resignation to take effect December 31, 1923, at the expiration of my annual leave that I had earned for the calendar year 1923, and that had I not resigned I would no doubt have been assigned to another similar position in the Indian field service.

The commissioner, Bureau of Indian Affairs, addressed a letter to Mrs. Elliott on December 20, 1923, as follows:

Your resignation dated December 10, 1923, from the position of clerk at $900 a year under the jurisdiction of Stuart H. Elliott, examiner of inheritance, is hereby accepted, effective at the close of December 7, 1923. As Mr. Elliott's services in the Indian Service terminated that date you can not be allowed leave up to December 31, 1923.

On March 8, 1924, the Commissioner of Indian Affairs informed this office as follows:

Receipt is acknowledged of your letter of February 23, 1924, inclosing the claim of Mrs. Ada M. Elliott for salary as stenographer at $900 a year under the jurisdiction of Stuart H. Elliott, former examiner of inheritance.

It is noted that you request to be advised of the date Mr. Elliott was appointed as examiner of inheritance and whether or not the office over which he had charge was discontinued the date his bond expired.

Mr. Elliott was appointed examiner of inheritance on April 13, 1914, and continued in that capacity up to and including December 7, 1923, the date his services terminated. He was instructed to close his final accounts on that date under his bond and to deposit all funds to his official credit. As his services and his bond terminaated on December 7, the position held by Mr. Elliott expired on that date.

Under date of April 5, 1924, the same officer stated:

Your inquiry is noted as to whether the office over which Mr. Elliott had supervision was abolished at the time his services terminated.

When the services of an examiner of inheritance terminate, his position and those which had been authorized under his supervision automatically cease. Therefore this office holds that Mr. Elliott's office was automatically abolished. With reference to the question as to whether Mr. Elliott had authority to grant leave and whether the leave granted by him was subject to the approval of the central office before it became effective, you are advised that officers in

charge have authority to grant leave of absence to employees under their jurisdiction, but such leave is always subject to the approval of this office and leave may be terminated when such action seems advisable.

On May 19, 1924, the commissioner wrote:

Answering your first inquiry as to whether Mr. Elliott's office at Yakima, Washington, was abolished, you are advised that examiners of inheritance in the Indian Service are bonded as individuals and that certain positions are authorized under their supervision. Usually these positions consist of one clerical position and one employee who does the interpreting. After being given an appointment as examiner of inheritance in the Indian service at large the examiners are assigned to various districts, and Mr. Elliott was assigned to the district in which Yakima, Washington, was his headquarters. This office maintains that when Mr. Elliott's services as examiner were terminated he was required, under the rules governing bonded officials, to deposit all moneys to the credit of the United States. The positions authorized under "Stuart H. Elliott, Examiner of Inheritance," would also automatically cease upon the date upon which his services terminated under the bond. Victor L. Dodge, examiner of inheritance, is now assigned to the district in which Mr. Elliott performed service, but he is serving under an individual appointment and bond issued to him under the title of examiner of inheritance in the Indian service at large. He also has certain positions authorized under him by the Secretary of the Interior. These positions are payable only by him and will cease when his services terminate under his bond.

Referring to your inquiry as to whether the leave of Mrs. Elliott was ever disapproved by this office, the following is quoted from her letter of February 6, 1924:

"Under date of December 27, 1923, the Indian Office for the first time informs the examiner that:

As your services as examiner of inheritance terminates December 7, 1923, it will be necessary for you to close your final accounts as of that date, depositing to the credit of the United States all funds in your hands.

In view of this fact, no leave can be allowed Mrs. Elliott after December 7, and her resignation has been accepted, effective that date."

The Civil Service Commission advised this office on June 9, 1924, as follows:

In compliance with your request of June 4, for information as to the former service of Ada M. Elliott, employed as clerk to examiner of inheritance at Yakima, Washington, you are advised that the records show she was appointed as an Indian, without competitive examination, under Schedule B, Subdivision I, section 1, to the position of assistant clerk in the Indian Service February 3, 1913, and afterward passed a bookkeeping examination with an average of 72.28. She did not receive a classified competitive status, however, and resigned as assistant clerk December 7, 1923.

The appropriation act of January 24, 1923, 42 Stat. 1185, from which it is proposed to pay this claim, provides:

For the purpose of determining the heirs of deceased Indian allottees having right, title, or interest in any trust or restricted property, under regulations prescribed by the Secretary of the Interior, * * *.

The rule governing leave of absence of employees of the Indian Service provides that:

Leave of absence with pay can not be claimed as a right, but may be granted not to exceed thirty days in any calendar year. * * *

The leave which had been granted the claimant in this case by her immediate superior was subject to approval, disapproval, or modification by the Commissioner of Indian Affairs, and that office disapproved any leave subsequent to December 7, 1923, the date on

which the examiner under whom she worked went out of office, and likewise the date upon which her position was (automatically) abolished. Consequently, Mrs. Elliott is not entitled to pay for any part of the period from December 8 to 31, 1923.

Upon review the disallowance is sustained.

(A-3317)

SEAMEN, DESTITUTE AMERICAN—MEDICAL TREATMENT DURING TRANSPORTATION TO THE UNITED STATES

Special medical treatment furnished destitute American seamen on board vessels, while being transported back to the United States at Government expense, is a matter between the Government and the transportation company, and there exists no privity of contract between the Government and a physician employed by the transportation company entitling the physician to payment for special medical treatment furnished the destitute seamen during the voyage, under an alleged arrangement or agreement between the transportation company and the physician that the physician would be authorized to make certain charges for treatment of specified diseases.

Decision by Comptroller General McCarl, August 8, 1924:

Dr. J. Edward Stubbert has requested review of settlement 030138 dated May 13, 1924, disallowing his claim for $315 for professional services rendered several destitute American seamen who were returned to the United States on ships belonging to the Admiral Oriental Line during fiscal years 1923 and 1924.

It appears that claimant was employed by the steamship company to serve as a physician on its vessels for the purpose of treating the crew and certain of the passengers, and that he was authorized to charge fees in some cases for treatment of specified diseases over and above his regular salary. He is contending that there is due, on the basis of this arrangement or agreement, from the Government the amount claimed representing fees charged for the treatment of these destitute seamen.

The rate of transportation of destitute American seamen from foreign ports to the United States is controlled by section 4578, Revised Statutes, as amended by section 9 of the act of June 26, 1884, 23 Stat. 55; section 18 of the act of June 9, 1886, 24 Stat. 83; and the act of January 3, 1923, 42 Stat. 1072. The rate thus fixed, when the transportation is by steamship, is such rate as may be agreed upon not in excess of the lowest passenger rate and not in excess of 2 cents per mile. 3 Comp. Gen. 742. Section 4578 as amended by section 9 of the act of June 26, 1884, *supra*, provides as follows:

* * * If any such destitute seaman is so disabled or ill as to be unable to perform duty, the consular officer shall so certify in the certificate of transportation, and such additional compensation shall be paid as the First Comptroller of the Treasury shall deem proper * * *.

In the present record there appear copies of the consular officers' certificates of transportation of only two of the seamen claimed to have been treated, namely, Peter Nelson and A. Kolaski, who were certified as having dementia and synovitis of the knee, respectively. There is no evidence except the statement of claimant that the other seamen were disabled or in need of special treatment during the voyage. The transportation company is making no claim for special treatment of any of the seamen and presumably it has been paid the amount agreed upon for the transportation of all of the destitute seamen involved.

Under the cited statutes the transportation and special care of disabled destitute seamen back to the United States is a matter between the Government and the transportation company owning or operating vessels on which the consular officer places seamen, and there is no privity between the Government and a physician employed by the transportation company on which may be based a claim by the physician for reimbursement for special medical treatment given destitute seamen during the voyage. Whatever arrangement or agreement may have been made between the physician and his employers for treatment of passengers is a matter with which the Government is not concerned and does not obligate the Government to pay the physician any fees alleged to have been his right to collect from passengers under such an arrangement or agreement with the transportation company.

Upon review the settlement is sustained.

(A–4176)

PAY ROLL SIGNATURES—MARRIED WOMEN EMPLOYEES

When a woman employee in the Government service marries her legal surname becomes that of her husband and such surname is to be used by her in signing the pay roll instead of her maiden surname.

Comptroller General McCarl to the Secretary of the Interior, August 8, 1924:

By your reference dated July 17, 1924, decision is requested whether a woman employee who has married and continues in the service may be carried on the pay roll under her maiden name or whether the surname of her husband must be shown on the pay roll.

It appears that an employee of St. Elizabeths Hospital, Dr. Marjorie M. Jarvis, notified the superintendent that she was to be married to a Mr. Hutson on May 24, 1924, and that she was so married. Accordingly the employee's name was changed on the pay roll from Jarvis to Hutson. The employee has since refused to sign her married name on the pay roll and her attorney has notified the superintendent that the employee desires to retain her maiden name.

In volume 21, American and English Encyclopedia of Law, 312, the following rule is laid down: "Married women.—By custom a woman at marriage loses her own surname and acquires that of her husband." In volume 29, Cyc. 264, on the subject of husband and wife, it is stated that "at marriage the wife takes the husband's surname."

The following quotation is taken from volume 1, pages 66 and 67 of Schouler's work on Domestic Relations:

> Marriage at our law does not change the man's name, but it confers his surname upon the woman. Until a decree of divorce giving a married woman leave to resume her maiden name goes into full effect, or widowhood is succeeded by a new marriage and another husband, she goes by her former husband's surname. * * *

In discussing the same subject Schouler says this is the law of England and America and it would appear a wife can only obtain another name by separation. The foregoing rules of law are sustained by the following authorities:

Carroll v. *State*, 53 Nebr. 431; *Ratcliffe* v. *McDonald*, 123 Va. 97; *Uihlein* v. *Gladeaux*, 74 Ohio, 232–247; *Freeman* v. *Hawkins*, 77 Texas, 498; *Peterson* v. *Little*, 74 Iowa, 223; *Ansley* v. *Green*, 82 Ga. 181; *Fendall* v. *Goldsmid*, 2 P. D. 263.

In the Ohio and Texas cases, *supra*, the courts expressly held that "the law confers upon a wife the surname of her husband upon marriage."

It is universal rule of practice in the courts of this country that on granting a decree of divorce, the court *may* by decree restore the maiden name of the wife. This is also the law of the District of Columbia. Section 979 of the District Code reads as follows:

> *Maiden name of wife restored.*—In granting a divorce from the bond of marriage the court may restore to the wife her maiden or other previous name.

It is apparent from this language that the law presumes the name of the woman is changed to that of the husband on contracting the marital relation, and the court has the option under section 979, on granting a decree of divorce, to either restore the maiden name or the name of a deceased husband. She must have lost her maiden name, otherwise it could not be restored.

It is true our law has been liberalized by the passage of the so-called married women's acts in most of the States of the Union, but these acts have to do largely with the property rights of the wife. At common law the husband not only became liable for the support of his wife but took title to her property as a sort of compensation for the marital responsibility. While the married women's acts recognized the wife in the married state as a *femme sole*, capable of suing and being sued, and these acts in some States give her the right to alienate her individual property without being joined by

her husband, yet the old rule of marital unity is still preserved. All law writers agree that marriage is a civil contract, and most law writers agree that it is more than a mere contract. So far as the legal status of man and wife is concerned their relation is contractual, but marriage is an institution contemplating homes and families. Each family is a unit in the body politic, and it can hardly be imagined of husbands, wives, and children composing the same family bearing different names. The law in this country that the wife takes the surname of the husband is as well settled as that the domicile of the wife merges in the domicile of the husband. A wife might reside apart from her husband, but so long as she remains his lawful wife she has but one legal domicile, and that is the domicile of the husband. So it is with the name. She may have an assumed name, but she has but one legal name. The separate legal entity of the wife is not so generally recognized as to accept the maiden name rather than the surname of the husband. It is to-day the main distinction between a single woman and a married woman, and such fact has in the past appeared upon the pay rolls. There appears no valid reason why it should not so continue and the pay roll should state the fact accordingly.

The correspondence attached to the superintendent's letter is returned.

(A–4263)

CLASSIFICATION OF CIVILIAN EMPLOYEES—UNIT OF APPROPRIATION

All persons employed in the District of Columbia by the Bureau of Plant Industry, Department of Agriculture, and paid from any of the appropriation items provided under the major heading "Bureau of Plant Industry," act of June 5, 1924, 43 Stat. 440, may be considered as being in one "bureau, office, or other appropriation unit" within the meaning of the "average" provision contained in the act of June 5, 1924, restricting the payment of compensation under the classification act of March 4, 1923, 42 Stat. 1488.

Comptroller General McCarl to the Secretary of Agriculture, August 8, 1924:

I have your letter of July 21, 1924, requesting decision as to the meaning of the term "bureau, office, or other appropriation unit" appearing in the act of June 5,.1924, 43 Stat. 432, providing appropriations for the Department of Agriculture for the fiscal year ending June 30, 1925, as follows:

* * * That in expending appropriations or portions of appropriations, contained in this Act, for the payment for personal services in the District of Columbia in accordance with "The Classification Act of 1923," the average of the salaries of the total number of persons under any grade or class thereof in any bureau, office, or other appropriation unit, shall not at any time exceed the average of the compensation rates specified for the grade by such Act: *Provided*, That this restriction shall not apply (1) to grades, 1, 2, 3, and 4 of the clerical-mechanical service, or (2) to require the reduction in salary of any person whose compensation is fixed, as of July 1, 1924, in accordance with the rules of section 6 of such Act, or (3) to prevent the payment of a salary under

any grade at a rate higher than the maximum rate of the grade when such higher rate is permitted by "The Classification Act of 1923," and is specifically authorized by other law.

In decision of June 26, 1924, 3 Comp. Gen. 1001, in answer to question one the following was stated:

* * * If a bureau or office is operating under one appropriation the unit is the bureau or office, whereas if the bureau or office is operating under two or more appropriations the unit is the appropriation. If there be an instance of two or more bureaus or offices operating under one appropriation, the unit would be the bureau or office.

This quoted statement was and is intended merely as a general rule subject to amplification upon submission of specific cases. It may be said that the statement "if the bureau or office is operating under two or more appropriations the unit is the appropriation" was intended to relate more particularly to a bureau or office in which there are dissimilar or unrelated activities provided for under separate appropriations.

You submit the following for consideration:

Taking as a typical bureau appropriation group those for the Bureau of Plant Industry, agricultural act for 1925, "Salaries, Bureau of Plant Industry," and "General expenses, Bureau of Plant Industry;" do these two appropriations combined constitute the bureau unit or is each a separate unit?

Considering the type of appropriation "General expenses, Bureau of Plant Industry," is each of the so-called subheads of appropriations, for instance, "For investigation of plant diseases and pathological collections, including maintenance of a plant-disease survey, $81,000," to be considered a separate unit?

The act of June 5, 1924, 43 Stat 440, provides under the major or general heading, "Bureau of Plant Industry," the two minor or subheadings "Salaries" and "General expenses, Bureau of Plant Industry," and under the latter appear several items in separate paragraphs, the first of which is for $81,000 which you have mentioned. The entire amount provided under the major heading of "Bureau of Plant Industry" is for related activities and the same classes of personnel employed thereunder are understood to be doing similar work. Accordingly, all persons employed in the District of Columbia and paid from any of the items thereunder may be considered as being in one "bureau, office, or other appropriation unit" within the meaning of the "average" provision of the appropriation act.

(A-4282)

UNITED STATES MARSHALS—SERVICE OF PROCESS FOR RAILROAD LABOR BOARD

A United States marshal, who is called upon to serve process for the United States Railroad Labor Board, is not entitled to a fee in addition to his regular compensation as marshal and is only entitled, while in a travel status, to his actual transportation expenses and a per diem in lieu of subsistence not exceeding $4; i. e., the same limitations and restrictions being applicable as when serving process issued by a United States commissioner or by a clerk of a United States court.

Comptroller General McCarl to Earl U. Gray, Disbursing Officer, United States Railroad Labor Board, August 9, 1924:

There has been received your letter of July 21, 1924, submitting with request for decision whether payment thereon is authorized a voucher in favor of I. K. Parshall, United States marshal, Kansas City, Mo., for $9.67 covering fees, per diem and expenses in connection with the serving of subpœnas issued by the United States Railroad Labor Board.

By section 9 of the act of May 28, 1896, 29 Stat. 181, and subsequent legislation, the compensation of United States marshals was fixed on an annual salary basis and therefore they are precluded by section 1765 of the Revised Statutes from receiving any additional pay, extra allowance, or compensation, in any form whatever, unless the same is authorized by law and the appropriation therefor explicitly states that it is for such additional pay, extra allowance, or compensation. The act approved July 1, 1918, 40 Stat. 683, provides a per diem not to exceed $4 in lieu of subsistence instead of, but under the conditions prescribed for, actual expenses or subsistence while on official business away from their regular post of duty. Therefore, United States marshals when absent from their official station engaged upon official business are entitled only to the salary fixed by law, actual transportation expenses and a per diem in lieu of subsistence not to exceed $4.

While the appropriation under the control of the United States Railroad Labor Board is available to pay any necessary expense incident to the service of process issued by its members, there is no authority for paying a United States marshal a fee for such service or traveling allowances in excess of those authorized by the law and regulations applicable to United States marshals.

You are not authorized to pay the voucher as submitted, which is returned herewith.

(A-2598)

OPERA AND CONCERT TICKETS—ARMY MUSIC SCHOOL

Section 27 of the act of June 3, 1916, 39 Stat. 186, authorizing the training of enlisted men of the Army in "industrial, commercial, and general business occupations" by Army officers assisted by civilian teachers "employed" for that purpose, does not authorize the issuance of regulations for the purchase at public expense of grand opera and symphony concert tickets for the use of members of the faculty, band leaders, and certain students of the Army Music School.

The appropriations for "Incidental expenses of the Army" and "Contingencies of the Army," not specifically authorizing the purchase of grand opera and symphony concert tickets for the use of members of the faculty, band leaders, and certain students of the Army Music School, are not available for that purpose.

Comptroller General McCarl to the Secretary of War, August 11, 1924:

There has been received your request dated April 29, 1924, for decision whether under section 27 of the act of June 3, 1916, 39 Stat. 186, and paragraph 16 (b), Army Regulations 350–1400, grand opera and symphony concert tickets may be purchased in the immediate vicinity of the Army Music School for the members of the faculty and all band leaders and soloist students of said school and charged against the appropriations for "Incidental expenses of the Army" or for "Contingencies of the Army."

Section 27 of the act of June 3, 1916, 39 Stat. 186, provides that in addition to military training:

> * * * soldiers while in the active service shall hereafter be given the opportunity to study and receive instruction upon educational lines of such character as to increase their military efficiency and enable them to return to civil life better equipped for industrial, commercial, and general business occupations. Civilian teachers may be employed to aid the Army officers in giving such instruction, and part of this instruction may consist of vocational education either in agriculture or the mechanic arts. The Secretary of War with the approval of the President, shall prescribe rules and regulations for conducting the instruction herein provided for, and the Secretary of War shall have the power at all times to suspend, increase, or decrease the amount of such instruction offered as may in his judgment be consistent with the requirements of military instruction and service of the soldiers.

This statute not only directs that an opportunity be afforded soldiers, enlisted men of the Army, to study in order that they may be better equipped after their discharge for "industrial, commercial, and general business occupations," including agriculture or mechanic arts, but specifically provides that "civilian teachers may be employed to aid the Army officers in giving such instruction." It is unnecessary to decide whether musical training is training for industrial, commercial, or general business occupations, for the statute provides that the training shall be by Army officers, assisted where necessary by civilian teachers employed for that purpose. The Secretary of War is authorized to prescribe rules and regulations for conducting the instructions of enlisted men in the industrial, commercial, and general business occupations, but he is not authorized to issue regulations providing that such instruction may be given by other than Army officers or civilian teachers employed for that purpose. The purchase of tickets to a grand opera or symphony concert can not be said to be an employment of the cast for the purpose of giving instruction to the enlisted men, and the fact that they may be attending the Army Music School is immaterial.

When the matter was before this office, in 2 Comp. Gen. 519, the Army regulations did not purport to provide that grand opera and symphony concert tickets could be purchased at the expense of the United States and issued to members of the faculty, band leaders, and soloist students at the Army Music School. It was, thus, unnec-

essary to decide whether the law authorized the issuance of such regulations. Since the regulations have now been amended to specifically provide for such purchases, it is necessary to determine whether the law authorizes the issuance of such regulations, and for the reasons hereinbefore stated it must be held that it does not.

The attendance at grand opera and symphony concert performances is not so essentially a part of the authorized training or operation of the Army as to justify regarding the expense thereof as an incidental or contingent expense of the Army; and as neither the appropriations for "Incidental expenses of the Army" nor for "Contingencies of the Army" specifically authorize the purchase of grand opera or symphony concert tickets for the members of the Army Music School, and as such authorization is not contained in any permanent law, it must be held that such purchase at the expense of the United States has not been authorized by law.

The question submitted is answered in the negative.

(A-3374)

WAR RISK DISABILITY COMPENSATION—DESERTERS

A veteran of the World War is not barred, under the provisions of section 29 of the war risk insurance act, as amended, from receipt of disability compensation for a disability incurred in an enlistment served during the World War from which honorably discharged, by reason of a desertion prior to the World War, where it is shown that the military authorities held the veteran to his World War enlistment with knowledge of his prior desertion, said action constituting a condonation of the prior desertion.

Comptroller General McCarl to the Director, United States Veterans' Bureau, August 12, 1924:

I have your letter without date received August 1, 1924, requesting decision whether you are authorized to make payments of war risk disability compensation to Bryan J. Roberts whose military record is reported by The Adjutant General of the Army to be as follows:

1. The records on file in this office show that Bryan J. Roberts enlisted in the Regular Army at Vancouver Barracks, Washington, December 24, 1913; that he was reported as having deserted the service at Hachita, N. M., May 30, 1914, a private, Company I, Signal Corps; that he surrendered to the military authorities at Presidio of San Francisco, California, December 14, 1914; that he was tried for desertion and found guilty of absence without leave only, and sentenced to perform hard labor for three months and to forfeit two-thirds pay per month for a like period (G. C. M. O. #192, Hq., Western Dept., dated April 2, 1915); that while serving sentence as promulgated in the above general court-martial order, at Fort Mason, California, May 6, 1915, he absented himself without leave; and that he was later reported as having deserted on the last mentioned date.

2. While so absent he again enlisted in the National Army, January 21, 1918, at Fort McDowell, California, and about February 19, 1918, confessed to

the military authorities that he enlisted without a discharge from his prior enlistment. Upon the advice of his commanding officer, he applied to this office for restoration to duty and under date of March 5, 1918, the Commanding General, Southern Department, was instructed by the War Department to hold Private Roberts to service under his enlistment of January 21, 1918. He was later honorably discharged on August 28, 1918, from his enlistment of January 21, 1918, by reason of physical disability.

3. Since his surrender, about February 19, 1918, the War Department has not considered Private Roberts as a deserter at large from his enlistment of December 24, 1913. He was furnished with a discharge certificate April 24, 1924, by reason of desertion in order to complete the records of his first enlistment. This discharge in no way affects his enlistment of January 21, 1918, which was terminated by honorable discharge because of physical disability.

It is understood that payments of compensation have been heretofore disallowed in this case by application of decision of this office dated February 2, 1924, 3 Comp. Gen. 465, which involved the case of Daniel F. Plummer, whose military record showed a mark of desertion from an enlistment entered into subsequent to a World War enlistment in which the disability was incurred for which compensation was claimed. The mark of desertion had never been removed, and the claimant was carried as an unapprehended deserter at large. It was determined that under the specific language of section 29 of the war risk insurance act as first enacted June 25, 1918, and as later amended August 9, 1921, and March 4, 1923, 42 Stat. 1521, "the discharge or dismissal of a person from any enlistment in the military or naval forces on the ground that he is a deserter bars all right to any compensation on account of service in said enlistment or any other enlistment prior or subsequent thereto," and that it is the act of desertion rather than any formal certificate or order of discharge or dismissal that is the bar to receipt of compensation.

In the present case the desertion was from a service prior to the World War; that is, prior to April 6, 1917. On its disclosure by him it was specifically directed that the soldier be held to his World War enlistment, and he was given an honorable discharge therefrom. The formal discharge for desertion from the prior enlistment was given subsequent to the World War service mainly for the purpose of completing the record of the prior enlistment, so that the soldier in this case is not carried as a deserter at large.

The accepted effect of holding of soldier to subsequent enlistment with knowledge of prior desertion is a condonation of the desertion and no disabilities arise therefrom. Such rule is properly followed in the present case, the record showing honorable service under the World War enlistment. See 19 Comp. Dec. 490.

You are advised that Bryan J. Roberts is not barred from the receipt of disability compensation by reason of the reported desertion.

(A-4198)

APPROPRIATIONS—SPECIFIC v. GENERAL

When a specific appropriation to which an expense is properly chargeable has been exhausted another appropriation can not be used.

The appropriation of $60,000 for the erection and equipment of a post-office garage at First and G Streets NE., Washington, D. C., is exclusive for that purpose and the total sum appropriated having been exhausted, the Post Office Department appropriation, "Vehicle service, 1924," act of February 14, 1923, 42 Stat. 1255, is not available for the installation of bathing facilities in said garage. (Reversed by 4 Comp. Gen. 471.)

Decision by Comptroller General McCarl, August 12, 1924:

This office has for consideration the question of the appropriation available in connection with a certain voucher in favor of the Biggs Engineering Co., 1310 Fourteenth Street NW., Washington, D. C., in the sum of $392, paid by the postmaster, Washington, D. C., as an expenditure chargeable under the appropriation, "Vehicle service, 1924," in his postal account for the June quarter, 1924.

It appears from the voucher and accompanying copy of advertisement and bid that the expenditure was for the purchase and installation of a hot-water tank, with all necessary valves, fittings, and connections for furnishing a supply of hot water for bathing purposes in the post-office garage located at First and G Streets NE., Washington, D. C.

The appropriation act of February 14, 1923, 42 Stat. 1255, under which the voucher was paid, provides:

> For vehicle allowance, the hiring of drivers, the rental of vehicles, and the purchase and exchange and maintenance, including stable and garage facilities, of wagons or automobiles for, and the operation of, screen-wagon and city delivery and collection service, $14,500,000: *Provided*, That the Postmaster General may, in his disbursement of this appropriation, apply a part thereof to the leasing of quarters for the housing of Government-owned automobiles at a reasonable annual rental for a term not exceeding ten years.

It must be noted in this connection that the appropriation act of February 28, 1919, 40 Stat. 1193, which provided for the building of the garage at First and G Streets NE., appropriated not to exceed $60,000 for its "erection and equipment." The bathing facility which has been installed is clearly a building equipment which if not installed in connection with the appropriation of $60,000 must be the matter of obtaining specific appropriation therefor.

There is nothing in the appropriation for "Vehicle service, 1924," *supra*, that could be construed as authorizing its use in equipping the garage with bathing facilities, nor does there appear any other appropriation of the field service, Post Office Department, available for this expense.

Action in the disbursing account should be taken accordingly.

(A-4375)

CLASSIFICATION OF CIVILIAN EMPLOYEES—PROMOTION

Employees authorized by Executive order of June 19, 1924, to remain, subsequent to July 1, 1924, in positions the duties of which they were performing prior to July 1, 1924, although they had never qualified for such positions in accordance with the civil service rules and regulations, are entitled only to the initial rate of compensation of the position as allocated as of July 1, 1924, and they may not be promoted either within the grade or between grades until they have properly qualified for the position in accordance with the civil service rules and regulations.

Comptroller General McCarl to the Secretary of the Treasury, August 13, 1924:

I have your letter of July 23, 1924, as follows:

Executive order of June 19, 1924, provides that "Employees will be permitted to remain in the positions to which they have been allocated in accordance with the classification act of 1923 and receive the compensation attaching to such allocations, although contrary to existing provisions of the civil service rules, but shall not thereby be given any different status for promotion or transfer than they had acquired under the civil service rules prior to such allocation."

Your decision is requested as to whether employees so allocated may be promoted to a higher rate in the grade to which they were allocated.

It is understood that the quoted paragraph from Executive order No. 4030, dated June 19, 1924, refers to persons assigned to duties for which they had not qualified in accordance with civil service laws, rules, and regulations. For instance, an employee who qualified and was appointed as a messenger boy, which is a nonapportioned position, being assigned to the duties of messenger, or one who qualified and was appointed as a skilled laborer, which is a nonapportioned position, being assigned to the duties of clerk. The Executive order entitles such persons to remain in the "positions" the duties of which they were performing on June 30, 1924, on and after July 1, 1924, by reason of their previous irregular assignment and to receive the compensation attached to the "positions" as allocated under the classification act of 1923.

The principle of the classification act is that the "position" is allocated on the basis of the duties performed, not on the basis of title or designation of the particular employee as it appeared on the pay roll June 30, 1924. This is primarily what the Executive order recognized.

In addition the Executive order makes a restriction on the promotion and transfer of the persons allocated July 1, 1924, in positions for which they had not properly qualified in accordance with the civil service rules and regulations prior to July 1, 1924, by use of the words "but shall not thereby be given any different status for promotion or transfer than they had acquired under the civil service rules prior to such allocation." Prior to July 1 such employees

could not have been promoted except on the basis of their civil service status under the examinations actually passed or qualifications actually attained. For instance, a messenger boy, although performing the duties of messenger, or a skilled laborer, although performing the duties of a clerk, could be promoted only as a messenger boy or skilled laborer, respectively, and not as a messenger or clerk, respectively.

Accordingly it must be held that the Executive order, while authorizing a person to hold a position the duties of which he was actually performing June 30, 1924, under an irregular assignment, thereby entitling the employee to the initial rate of compensation of the position in accordance with his allocation as of July 1, 1924, prohibits any promotion whatever, either in the grade or between grades, until the incumbent has properly qualified for the position in accordance with civil service rules and regulations.

The question submitted is answered in the negative.

(A–3913)

MEDICAL TREATMENT—NAVAL ENLISTED MEN ON LEAVE OF ABSENCE

Enlisted men of the Navy are not entitled to medical treatment at Government expense while on a leave of absence prior to a termination of the leave status by appropriate action by authorized officers bringing the enlisted man under naval jurisdiction.

The provision for civilian medical treatment in the appropriation, "Care of hospital patients," act of June 4, 1920, 41 Stat. 823, is not available for payment of civilian physicians attending an enlisted man of the Navy ill at his home.

Decision by Comptroller General McCarl, August 14, 1924:

Review has been requested of the action of this office in settlement No. M–1736–N, dated June 30, 1923, wherein were disallowed two claims, public bills Nos. 5182 and 162, first quarter, 1923, accounts of Commander C. G. Mayo (S. C.), U. S. N., as follows:

No. 5182. Dr. H. A. Price:
Dec. 21, 1920, to Feb. 5, 1921. For professional services rendered Lawrence Poticher, fireman, U. S. Navy, U. S. S. *Nevada*_____ $275.00

No. 162. Dr. P. Ray Meikrantz, 207 Manhantongo St., Pottsville, Pa.:
Feb. 9, 1921, to Apr. 30, 1921. For professional services rendered to Lawrence Poticher, fireman, U. S. Navy_____ 166.00

These bills have been approved administratively as payable from the appropriation "Contingent M. & S., 1921," 41 Stat., 823. Each has written thereon indorsements, as follows:

The above services were authorized by the medical officer at the Navy recruiting station, Philadelphia, Pennsylvania.

The services of a naval medical officer or naval hospital facilities were not available.

The disallowance was made upon the theory that Fireman Poticher was on leave of absence during the illness, which, if true, relieved the Government from any obligation for medical treatment.

Payment under "Contingent, Bureau of Medicine and Surgery, 1921," was obviously improper. The provision for civilian medical treatment is made under "Care of hospital patients" in the same act, June 4, 1920, 41 Stat. 823, as follows:

> For the care, maintenance, and treatment of patients including supernumeraries, in naval and in other than naval hospitals, $100,000.

Aside from the question of the appropriation, the question in this case is whether the enlisted man was in a leave status when the expenses were incurred or whether he was on a duty status, either actual or constructive, as the United States is not responsible for the medical expenses of enlisted men of the Navy on leave of absence or furlough. 19 Comp. Dec. 382; 1 Comp. Gen. 732.

It is stated that Lawrence Poticher, fireman, third class, United States Navy, was on authorized leave of absence from the U. S. S. *Nevada*, stationed at the navy yard, Philadelphia, period not stated, and copy of leave order, if one was issued, not furnished. While on such leave of absence and at his home, Port Carbon, Pa., he became ill December 18, 1920. Apparently Poticher reported he was unable to return to duty at expiration of leave, and the matter being brought to the attention of the Bureau of Medicine and Surgery, that bureau recommended January 24, 1921, that an officer of the Medical Corps of the Navy "be ordered to investigate this case and report all the circumstances in connection therewith." When the medical officer reached Port Carbon and made his investigation does not appear. As the result of his investigation he recommended that the man be allowed to remain at home in charge of Dr. H. R. Price, Port Carbon, Pa., for about two weeks longer and that if Poticher's condition then permitted he be transferred to the U. S. naval hospital, League Island. Approval of this recommendation was suggested by the Bureau of Medicine and Surgery February 3, and it was approved by the Bureau of Navigation February 10, 1921.

The medical officer, it is stated, reported "that he instructed the physician in charge of the case 'not to spare any expenses, and that the Navy Department would pay the bills.'" His authority to make such a request or statement is not submitted. His orders were to investigate and report respecting the illness of Poticher. The visit and investigation of the medical officer was not an exercise of naval jurisdiction over the man terminating his leave, and the medical officer's recommendation was not approved by the final authority

until February 10, 1921. Action by the Bureau of Navigation may be construed as terminating the leave status and placing the man under naval supervision.

Doctor Price's bill is for the period December 21, 1920, to February 5, 1921, during the entire period of which the Government was not responsible for the medical expenses of Poticher.

The medical officer recommended that Poticher remain at home in charge of Dr. H. R. Price. No authority is shown for the employment of Dr. P. Ray Meikrantz, February 9 to April 30, 1921, and, no authorized official having directed his employment, payment may not be made for his services.

It is to be observed in this connection that the appropriation under which payment of the claim is asked is limited to " care, maintenance, and treatment of patients * * * in naval and in other than naval hospitals." This patient was treated by civilian physicians at his home and not in a naval hospital nor in any other than naval hospital.

Upon review the settlement is sustained.

(A–3942)

ACCOUNTING—SET-OFF—CONTRACTS

The United States has a common-law right to set off against amounts due a contractor any indebtedness of the contractor to the United States, regardless of the lapse of time between transactions.

Where, through an error in calculating the value of coal furnished the Government under a contract, the contractor was overpaid by a disbursing officer, the amount thus overpaid may be properly set off against an amount due the contractor for furnishing ice to another department of the Government, and the fact that several years have elapsed since the overpayment was made is immaterial.

Decision by Comptroller General McCarl, August 14, 1924:

The Export Fuel & Ice Co. requested, July 7, 1924, review of that part of settlement No. 032988, dated June 19, 1924, wherein the sum of $29.70, of the amount of $75.15 allowed in payment for ice furnished the postoffice and courthouse at Pensacola during January, February, and March, 1924, was set off to apply against an overpayment made for coal on voucher 58, accounts of Capt. J. E. Wyke, A. Q. M., for the month of April, 1917.

The overpayment in question arose by reason of the failure of Captain Wyke to make proper deduction from a payment made for coal furnished Fort Barrancas, Fla., under contract dated June 15, 1916, for supplying coal to said post during the fiscal year ending June 30, 1917. Under said contract the contractor agreed to deliver bituminous lump coal to Fort Barrancas at $3.20 per ton, guaranteed

to contain, as shown by analysis, B.t.u. 14,650, ash not to exceed 5 per cent, and moisture not to exceed 2 per cent. Adjustments were to be made for variations in the coal delivered above or below a certain percentage of the guaranty.

On account of an error in calculating the amount due by reason of a deficiency in B. t. u. contents in 210.25 tons delivered March 12, 1917, the contractor was overpaid the sum of $29.70, which amount was withheld in the settlement in question to which objection has been made.

In connection with this matter, the contractor in letter dated July 5, 1924, states:

> This delivery was made on a contract for twelve months, this company was under contract and bond for the faithful performance of the requirements of said contract. Nothing was said about any penalty until late in the year of 1923, about six years after the matter was history. Our bond is invalid, the mines from which we purchased the coal are closed and this company is owned by different capital, so it seems utterly rediculous to come to us today, seven years after the car of coal was delivered and ask us to make payment for an error made by the War Department representative.

When the voucher was received for audit in the latter part of 1917 the Auditor for the War Department (now the Military Division of this office) suspended credit for the amount of the overpayment in the disbursing officer's accounts, and whether attempt was made by the disbursing officer to rectify the mistake by securing a refund or otherwise immediately after receipt of notice that credit for the overpayment had been withheld is not shown by the evidence on file. The record does show, however, that in January, 1924, the contractor was requested by the War Department to refund the amount thus overpaid, but it refused to do so on the ground that "if any error of extension was made in the office of the post quartermaster and was not discovered by anyone for a period of nearly seven years, we do not feel that it is incumbent on us to make the department any payment at this time."

The question of whether or not any demand requesting a refund of the amount of the overpayment was made on the contractor shortly after the overpayment was discovered is not material. Under the terms of the contract the contractor was liable for any deficiency in the heating value of the coal below that specified, and the overpayment was occasioned by reason of an erroneous calculation of the value of B. t. u. contents of the coal delivered. It is no excuse for the contractor to contend that no demand having been made for a refund for nearly seven years that it is not now liable for the overpayment. The United States has at any time the common-law right to set off against amounts due creditors the amounts of debts due to the Government from said creditors and the contention can not be accepted to defeat this right. The action taken in setting

off the amount of $27.70 against the amount found due the company for ice furnished the Government appears to have been proper and upon review the settlement is sustained.

(A-3951)

APPROPRIATIONS, SPECIFIC—PURCHASE OF QUARANTINE STATIONS OF TEXAS

The act of June 5, 1920, 41 Stat. 875, authorizing the purchase of Texas quarantine stations provided for the transfer and purchase of all stations then established and constituting the quarantine system of Texas, and if the State of Texas is unable to furnish a clear title to each individual station to the United States within the valuation agreed upon, there is no authority for the use of any portion of the appropriation for acquiring title to only such stations as can be conveyed at this time.

Comptroller General McCarl to the Secretary of the Treasury, August 14, 1924:

I have your letter of July 10, 1924, as follows:

Your attention is respectfully invited to the provisions contained in the sundry civil act approved June 5, 1920, 41 Stat. 875, appropriating $90,071 to purchase Texas quarantine stations, land, buildings, equipment, and all other property used in connection therewith. The acts approved February 15, 1893, 27 Stat. 449, and June 19, 1906, 34 Stat. 299, provided for the acquisition of State quarantine stations, etc., and the operation of the same by the Government.

The Legislature of the State of Texas in its thirty-sixth session passed a bill known as House bill No. 27, providing for the appointment of a commission, composed of the governor of the State, the attorney general, and the State health officer, in connection with a representative of the United States Government, to make a survey and appraise the value of quarantine properties owned and used by the State of Texas, for the purpose of transferring the same to the Government. This appraisal was made by said commission on August 16, 1919, the Government being represented by the senior surgeon and a construction engineer of the United States Public Health Service. A copy of the report is inclosed herewith.

Under date of September 1, 1919, a lease (copy inclosed) of said properties to the Government of the United States was entered into by representatives of the State of Texas and the Secretary of the Treasury. Under one of the provisions of this lease it was agreed that the value fixed by the commission above referred to, viz, $90,071, should be held as the true purchase value of the property, and at such time as the Congress of the United States should appropriate this amount to pay for said property, upon approval of the title of the same by the Attorney General of the United States, it would be conveyed to the Government by appropriate deeds, etc. The sundry civil act approved June 5, 1920, 41 Stat. 875, appropriated the amount referred to for the purchase of the Texas quarantine stations, etc.

In accordance with the terms of the legislation steps were taken to acquire the properties from the State, and after considerable correspondence the Assistant Attorney General for the State of Texas advised the Public Health Service that certain difficulties had been encountered with the preparation of deeds of conveyance for the property, due principally to the fact that the commission had listed and valued as belonging to the State certain land, which as a matter of fact the State did not own; that this fact was evidently not known either to the State Commission nor to the officials representing the United States Government.

Under date of July 5, 1924, the Surgeon General of the Public Health Service transmitted to the Surveyor General of Real Estate a communication which he had received from the Attorney General for the State of Texas, and copies of this communication and that of the Surgeon General are herewith inclosed.

As will be seen from these papers it is the desire of both the Texas authorities and the Public Health Service to transfer such properties as the State can properly convey to the Government.

Your decision is requested as to whether under the terms of existing legislation steps can be taken to acquire only such properties as can be conveyed at this time, and not, therefore, all of the so-called quarantine stations of the State of Texas; the price paid for the same being such an amount as may be agreed upon, and an appropriate deduction accordingly made from the total appropriation provided by Congress in the Sundry Civil Act of June 5, 1920.

Section 3 of the act of February 15, 1893, 27 Stat. 449, provided for general supervision of all State quarantine stations by the United States Government and authorized the Secretary of the Treasury to issue rules and regulations for their control. Sections 5 and 6 of the act of June 19, 1906, 34 Stat. 301, provide as follows:

SEC. 5. That in any place where a quarantine station and plant is already established by State or local authorities it shall be the duty of the Secretary of the Treasury, before selecting and designating a quarantine station and grounds and anchorage for vessels, to examine such established stations and plants, with a view of obtaining a transfer of the site and plants to the United States, and whenever the proper authorities shall be ready to transfer the same or surrender the use thereof to the United States, the Secretary of the Treasury is authorized to obtain title thereto or possession and use thereof, and to pay a reasonable compensation therefore, if, in his opinion, such purchase or use will be necessary to the United States for quarantine purposes and the quarantine stations established by authority of this Act shall, when so established, be used to prevent the introduction of all quarantinable diseases.

SEC. 6. That whenever any established station, or any land or water, or any part thereof, shall be acquired by the United States under the provisions of this act, jurisdiction over the same shall be ceded to the United States by any State in which the same is situated before any compensation therefor shall be paid.

The act of June 5, 1920, 41 Stat. 875, providing for the sundry civil expenses for the fiscal year 1921, contained an item under the heading "Quarantine stations" as follows:

For transfer and purchase of Texas quarantine stations, $90,071.

This constitutes a permanent specific appropriation for the purchase of public buildings which did not lapse to the surplus fund June 30, 1923, act of August 24, 1912, 37 Stat. 487.

The intendment of the appropriation was to purchase the Texas quarantine properties for $90,071. It was not an appropriation for any particular purchase, but for the Texas stations generally, including all stations then established as they constituted a quarantine system. There were five in number leased by Texas to the United States in 1919. The amount appropriated was based on a valuation agreed upon for these five stations as constituting the quarantine system of Texas, on the basis that the State of Texas could provide a clear title to each and every one of the five stations. Accordingly it becomes incumbent on the State of Texas to acquire the title for the United States within the valuation agreed upon for each station, pending which there is no authority for the use of any portion of the appropriation for acquiring the title to any of the stations.

The question as submitted is answered in the negative.

(A-1231)

PANAMA CANAL—PAY FOR LEAVE NOT TAKEN BY NAVAL OFFICERS

Naval appropriations may not be used for the payment to naval officers, serving as appointees of the Panama Canal under the act of August 24, 1912, 37 Stat. 561, of pay for leave accrued but not granted or taken.

Comptroller General McCarl to the Secretary of the Navy, August 15, 1924:

I have you request for decision of a question presented in letter of Commander R. S. Culp, United States Navy, of February 19, 1924, in the matter of the right of naval officers appointed or employed by the Panama Canal to receive pay for leave not taken under the same conditions as employees of the canal who are other than military or naval officers.

Section 4 of the act of August 24, 1912, 37 Stat. 561, which is the authority for the appointment or employment by the Panama Canal of naval officers, provides:

* * * If any of the persons appointed or employed as aforesaid shall be persons in the military or naval service of the United States, the amount of the official salary paid to any such persons shall be deducted from the amount of salary or compensation provided by or which shall be fixed under the terms of this Act. * * *

This provision recognizes that in the payment by the Panama Canal to officers of the Navy of their canal compensation such an amount as is measured by their official salaries as naval officers but for such employment shall be paid from funds appropriated for the Navy. Such official salaries in turn do not include any additional amount for leave accrued but not granted or taken and naval funds may not be used for such payments.

In the particular case of Commander Culp he has been serving since October 17, 1922, under a canal appointment as captain of the port of Cristobal, Canal Zone, and is still so serving. No question of the payment to him of leave pay for any period of his service under such canal appointment appears now in controversy or has been presented by the canal authorities. See, in this connection, section 8, act of July 31, 1894, 28 Stat. 208, and section 304 of budget and accounting act of June 10, 1921, 42 Stat. 24.

(A-4081)

COAST GUARD PAY—EFFECTIVE DATE

An enlisted man of the Coast Guard, who passed the required physical examination and signed the enlistment contract at the naval recruiting station at Kansas City, Mo., on June 11, 1924, but who did not subscribe to the oath of allegiance until after his arrival at Hampton Roads, Va., on June 14, 1924, is only entitled to pay from the date he subscribed to the oath.

Comptroller General McCarl to W. H. Webb, pay and allotment officer, United States Coast Guard, August 15, 1924:

There has been received your letter dated July 11, 1924, requesting decision whether payment is authorized of a duly certified and approved voucher for pay of R. E. Dexter, fireman, second class, United States Coast Guard, for the period June 11 to 13, 1924, inclusive.

It is stated that Dexter was accepted for enlistment in the United States Coast Guard on June 11, 1924, and signed enlistment contract and record on that date at the naval recruiting station, Kansas City, Mo., but that he did not subscribe and swear to the oath of allegiance until June 14, 1924, at Hampton Roads, Va.

Articles 319 and 320, Regulations for the United States Coast Guard, 1916, provide:

> 319. The enlistment contract shall be read aloud to the applicant, and the main facts pertaining to pay, uniform outfit, clothing, and other allowances, discharges, and the requirements of war and service with the Navy, shall be explained to him by the enlisting officer prior to his signing the agreement and contract.
>
> 320. The full name of each person enlisted shall be written in the enlistment contract and record and entered in the log of the ship or station. Each person shall, upon originally enlisting, sign his own name in the places provided therefor on the enlistment contract and record and shall take and subscribe the oath of allegiance. A commissioned, warrant, or acting warrant officer in responsible charge of a unit is authorized to administer this oath. * * *

The act of January 28, 1915, 38 Stat. 800, establishing the United States Coast Guard, provides that the Coast Guard "shall constitute a part of the military forces of the United States." The question is accordingly presented as to when Dexter's status changed from that of a civilian to that of a member of the military force.

It was held, *in re Grimley*, 137 U. S. 147–156, that "the taking of the oath of allegiance is the pivotal fact which changes the status from that of civilian to that of soldier," and in 19 Comp. Dec. 367 it was held that the date from which an enlisted man is entitled to pay is the date of the final act which completes the enlistment contract and changes his status from that of a civilian to that of a soldier, which act is almost invariably the taking of the oath of allegiance.

In *United States* v. *Union Pacific R. R. Co.*, 249 U. S. 354–359, the court held that applicants for enlistment are not "troops of the United States."

Upon the passage of the act of April 21, 1924, 43 Stat. 105, authorizing temporary increases in the Coast Guard in officer and enlisted strength, the Secretary of the Navy tendered the services of the naval recruiting service to the Coast Guard to assist the latter service in securing enlistments. It is learned by this office that under this arrangement an applicant for enlistment would be given a physical examination at the naval recruiting station and that the enlistment

contract would be executed, the Navy recruiting officer acting as the party representing the United States, but that the Navy Department ruled that an officer of the Navy, in the absence of specific authority of law, could not administer the oath of allegiance for the Coast Guard.

In order to become a fully enlisted man, the party must first sign the prescribed application, and he must then be accepted and sworn into the service by the proper officer. See *Union Pacific R. R.*, 52 Ct. Cls. 226–233.

As Dexter did not take the oath of allegiance until June 14, 1924, payment of the voucher for pay as a fireman, second class, in the Coast Guard for the period June 11 to 13, 1924, inclusive, is not authorized. The voucher is returned herewith.

(A–4257)

COMPENSATION, OVERTIME—CUSTOMS SERVICE EMPLOYEES

The authorized overtime pay provided in the act of February 13, 1911, 36 Stat. 899, as amended, for inspectors, storekeepers, weighers, and other customs officers and employees is based upon the personal duty status during a unit period which begins at 5 p. m. one day and ends at 8 a. m. the following day.

In computing the overtime service of inspectors, storekeepers, weighers, and other customs officers and employees, the hours of waiting time or actual service rendered by each individual during a unit period should be combined in all cases, but the duty status during one night unit can not be combined with the duty status during another night unit.

Decision by Comptroller General McCarl, August 15, 1924:

In connection with the settlement of the accounts of disbursing officers of the United States customs service, there are for consideration and decision, two questions as follows: (1) Whether in computing the overtime of inspectors, storekeepers, weighers, and other customs officers and employees, time served before 8 a. m. on any given day may be combined with the time served after 5 p. m. on said day to aggregate the minimum period required by law for overtime pay; and (2) if so, whether overtime service must be so combined in all instances even though the time served before 8 a. m. and after 5 p. m., respectively, may exceed one hour.

The act of February 13, 1911, 36 Stat. 899, as amended by the act of February 7, 1920, 41 Stat. 402, provides as follows:

SEC. 5. That the Secretary of the Treasury shall fix a reasonable rate of extra compensation for overtime services of inspectors, storekeepers, weighers, and other customs officers and employees who may be required to remain on duty between the hours of five o'clock postmeridian and eight o'clock antemeridian, or on Sundays or holidays, to perform services in connection with the lading or unlading of cargo, * * * such rates to be fixed on the basis of one-half day's additional pay for each two hours or fraction thereof of at least one hour that the overtime extends beyond five o'clock postmeridian (but not to exceed two and one-half days' pay for the full period from five o'clock postmeridian to eight o'clock antemeridian), and two additional days' pay for

Sunday or holiday duty. The said extra compensation shall be paid by the master, owner, agent, or consignee of such vessel or other conveyance whenever such special license or permit for immediate lading or unlading or for lading or unlading at night or on Sundays or holidays shall be granted to the collector of customs, who shall pay the same to the several customs officers and employees entitled thereto according to the rates fixed therefor by the Secretary of the Treasury: *Provided*, That such extra compensation shall be paid if such officers or employees have been ordered to report for duty and have so reported, whether the actual lading, unlading, receiving, delivery, or examination takes place or not. * * * *Provided further*, That in those ports where customary working hours are other than those hereinabove mentioned, the Collector of Customs is vested with authority to regulate the hours of customs employees so as to agree with prevailing working hours in said ports, but nothing contained in this proviso shall be construed in any manner to affect or alter the length of a working day for customs employees or the overtime pay herein fixed.

Under the provisions of this statute and the regulations made in pursuance thereof the unit for consideration in each instance is the period which begins at 5 p. m. one day and ends at 8 a. m. the next day. For the purpose of arriving at the compensation due each employee thereunder the hours of waiting time or actual service rendered within each such unit should be combined in all instances, regardless of whether the service is continuous or in broken periods (see T. D. 38429 of June 4, 1920), but the service rendered during one night unit, as herein defined, can not be combined with the service of another night unit in any case.

The settlement of accounts involving overtime payments under the said act of February 7, 1920, must be made accordingly.

(A-3961)

CONTRACT ASSIGNMENTS—CORPORATION MERGERS—CHANGE IN CORPORATE NAME

The merger of a corporation or the change of the corporate name does not operate to annul existing contracts between such corporations and the Government and is not of itself a change in the contract responsibility.

In cases where contracting corporations or individuals have changed their corporate names or merged their interests, including Government contracts, and the Government desires to acknowledge the mergers, etc., the same may be accomplished in the form of a supplemental agreement. Such a supplemental agreement, however, does not constitute an assignment of a claim against the United States such as is prohibited by section 3737, Revised Statutes.

Comptroller General McCarl to the Secretary of the Treasury, August 16, 1924:

I have your letter of July 10, 1924, relative to the assignment of certain contracts and requesting a decision whether or not the Treasury Department may continue to use the forms of assignment which have heretofore been recognized by the General Accounting Office, when used in connection with changes of name and ownership.

As indicated in office letter of June 24, 1924, in regard to the contracts of the Birmingham Railway, Light & Power Co., and the

Eastern Wisconsin Power Co., the defect in the so-called assignment was that nothing appeared showing that the action taken was because of changes in the corporate names. Where the form of so-called assignment is used to take care of changes in the names of contractors it would seem advisable to show the facts as to the purpose of the action, which, in reality, does not require an assignment or a transfer.

In regard to the transfer of contracts to which the Government is a party, section 3737, Revised Statutes, provides:

> No contract or order, or any interest therein, shall be transferred by the party to whom such contract or order is given to any other party, and any such transfer shall cause the annulment of the contract or order transferred, so far as the United States are concerned. All rights of action, however, for any breach of such contract by the contracting parties are reserved to the United States.

This statute has often been the subject of construction and it has been uniformly held that its purpose is the protection of the United States. The transfer or assignment of a contract so as to enable the assignee to perform the service and claim the compensation stipulated is forbidden and the United States can not be held liable to the assignee, as such, for the service. The merger of a corporation or the change of the corporate name does not operate to annul its existing contracts with the Government, and is not of itself a change in the contract responsibility. If it were to be held that the assignment or transfer of a contract would operate to avoid the contract it would have a serious effect on all Government contracts, in that the party making the contract with the United States could release himself from his contractual obligation by transferring or assigning his interest therein.

In cases where contracting corporations or individuals have changed their corporate names or merged their interests with another, including Government contracts, and the Government desires to acknowledge the mergers, etc., by recording the changes in names, instead of using the form of so-called certificate of assignment that has heretofore been used, it would seem that the purpose could be more effectively accomplished in the form of a supplemental agreement, reciting briefly the facts connected with the changes and the reasons therefor, the parties agreeing therein to assume their mutual responsibilities and the Government accepting the changes in service, etc., but reserving all rights existing or arising under the original agreement as against the original and new parties.

Such transactions are not to be considered assignments or transfers and are not to be so denominated. In cases where contractors have been adjudicated bankrupt or there has been a voluntary or involuntary dissolution by act of the parties or transfer by operation of

law, proper documentary evidence thereof should accompany and be made a part of the supplemental agreement.

(A-4366)

COMPENSATION—EXTRADITION AGENT

As the Department of State is charged with the duty of bringing home from foreign countries persons charged with crime, the compensation of a Secret Service operative who was appointed by the Department of State as an extradition agent and who was dropped from the rolls of the Treasury Department temporarily is not payable from any appropriation under the control of the Department of Justice.

Comptroller General McCarl to the Attorney General, August 16, 1924:

There has been received your letter of July 25, 1924, as follows:

I beg to advise you that on or about April 9, 1924, Mr. Harold C. Keyes, a Secret Service operative, Treasury Department, #746 Customhouse Building, New York City, was given an appointment by the State Department as an extradition agent to execute a presidential warrant for the purpose of extraditing one Milem Raitchevitch from France. The said Raitchevitch was charged with the utterance of forged or falsified official acts of the Government, to wit, the selling and possession of various washed and restored documentary internal-revenue stamps.

It is understood that Mr. Keyes was dropped from the pay roll of the Treasury Department during the period from April 9 to May 23, 1924, during which time he was engaged in executing the extradition warrant in the case above mentioned. Upon his return he submitted a claim to this department for transmission to the Department of State covering his compensation and expenses incident to the execution of said warrant. This department assumed that the account was properly payable from the appropriation under the control of the Secretary of State for "bringing home from foreign countries persons charged with crime," 42 Stat. 1078. The amount claimed for salary was, however, disapproved by the State Department and the claimant was informed by that department that the matter of his salary was "for the attention of the disbursing officer of the Department of Justice."

It is the practice for the U. S. attorney, in each case, to recommend to this department the name of the person who, in his judgment, would be a suitable extradition agent. This department then submits its recommendation to the Secretary of State, and the appointment is made by that department and a presidential warrant is placed in the hands of the extradition agent for service. In this connection your attention is invited to sections 5275 and 5276, R. S., and to Article I of the extradition convention between the United States and France, of 1843, under which it is provided that, "The high contracting parties shall, on requisition made in their name, through the medium of their respective diplomatic agents, deliver up to justice persons who, being accused of the crimes enumerated in the next following article, committed within the jurisdiction of the requiring party, shall seek an asylum, or shall be found within the territories of the other."

This department is not advised as to the method of compensating such agents in the past, but they have not been paid from any appropriation under the control of this department.

Your decision is respectfully requested whether the compensation of an extradition agent, whose expenses are paid by the State Department from the appropriation for bringing home criminals, may properly be paid from an appropriation under the control of this department.

In answer to the question submitted you are advised that I find no appropriation under the control of your department available for payment of the salary of an employee appointed by and serving under the direction and control of the Secretary of State.

(A-4325)

PUBLIC BUILDINGS—REPAIRS AND ALTERATIONS—JURISDICTION OF THE PUBLIC BUILDINGS COMMISSION

A specific appropriation having been provided for repairs and alterations of public buildings under the jurisdiction and control of the superintendent State, War, and Navy Department Buildings, the provisions appearing in various appropriations for projects under the control of the district engineer, United States Army, are not available for the cost of extensive repairs and alterations to the National Research Building at Nineteenth and B Streets NW., Washington, D. C., to provide sufficient floor space for occupancy as the office of the district engineer.

The Public Buildings Commission may not grant authority for the alteration or repair of a public building in the District of Columbia, the allotment of space in which is under its control.

Comptroller General McCarl to the Secretary of War, August 18, 1924:

I have your letter of July 23, 1924, requesting decision whether three appropriations: "Increasing water supply, District of Columbia"; Washington Aqueduct, D. C., 1925," and "Reclamation of Anacostia River flats, D. C.," provided in the act of June 7, 1924, 43 Stat. 574, 575, and 572, respectively, for the fiscal year 1923, are available for modification and alterations, costing approximately $15,000, to the National Research Building at Nineteenth and B Streets NW., Washington, D. C., to make it suitable for occupancy as the office of the district engineer, United States Engineer Office, Washington, D. C.

The district engineer's office was notified by the Public Buildings Commission to vacate its present quarters in the Old Land Office Building and has been assigned to quarters in the National Research Building. The district engineer states as follows:

2. The Research Building at Nineteenth and B Streets will be suitable for the needs of this office after some remodeling work has been done, which will include rearrangement of the partitions on the first and second floors, the addition of a third floor, new heating arrangements, changes in the plumbing, painting, etc. After remodeling 5,144 square feet will be available for office space as against 4,611 square feet now available in this office. Without the addition of the third floor there would be a sacrifice of over 1,000 square feet, which would unduly crowd the personnel and files.

3. By conference with the superintendent State, War, and Navy Department Buildings, Colonel Sherrill has agreed to take care of all of this work provided this office pays a portion of the cost, which is not within the scope of work usually performed by his office in preparing public quarters for occupancy. The approximate cost to this office will be $15,000, and it is proposed to transfer to the superintendent State, War, and Navy Department Buildings, from appropriations under the charge of this office, such sum as may be required. Every effort will be made to vacate the old Land Office Building as soon after June 25 as practicable.

The premises in question were acquired for the United States under authority of the act of June 12, 1922, 42 Stat. 646, which placed the control thereof under the superintendent of the State, War, and Navy Department Buildings. The act of June 7, 1924, 43 Stat. 529, under the heading "State, War, and Navy Department Buildings"

contains an item for "repairs," and in the Budget, 1925, page 70, containing the itemization of the total appropriations for the State, War, and Navy Department Buildings, appears the item "Repairs and alterations," with a subheading "Buildings, $27,800." This constitutes a specific appropriation for repairs and alterations to all buildings under the control of the superintendent of the State, War, and Navy Department Buildings, and is exclusive of appropriations in general terms which, but for the specific appropriation, might have been applicable. 1 Comp. Gen. 312, and cases therein cited. See also 3 Comp. Gen. 328.

Furthermore, the three appropriations mentioned by you as possibly available, and in addition the appropriation "Preservation and maintenance of existing river and harbor works," act of June 7, 1924, 43 Stat. 515, which the district engineer suggests as possibly available, have been carefully examined and there is no expression used in the language making the appropriations that might reasonably be construed as authorizing the expenditure of the estimated amount for such extensive modifications and alterations to a public building in the District of Columbia under the jurisdiction and control of the superintendent of the State, War, and Navy Department Buildings.

It is suggested that the provision in the act of July 25, 1912, 37 Stat. 206, authorizing the local officer in charge of the river and harbor improvements in the District of Columbia to rent quarters when no public building is available, is sufficient to authorize the proposed expenditure in altering a public building to meet the needs of the office in lieu of renting a privately-owned building. There is no merit in this suggestion. The authority to rent could not possibly be construed to authorize repairs and alterations to a public building.

Under date of June 25, 1924, the Public Buildings Commission through its acting chairman advised the district engineer as follows:

> In view of the fact that there is no other Government owned building available and also in view of the fact that rental of adequate space for your office in a privately owned building would cost between $10,000 and $15,000 a year, you are hereby authorized to make the necessary alterations to the National Research Building at 19th and B Streets, in order to fit it for your occupancy.

The Public Buildings Commission was created and its duties defined by the act of March 1, 1919, 40 Stat. 1269. No provision appears in that act whereunder the commission may grant authority for the alteration or remodeling of a public building, the allotment of space in which is under its control, to meet the needs of a particular office, space for which has been assigned by it in such building, and such action can not in any manner obligate appropriations not

otherwise available for the repairs or alterations. While the Public Buildings Commission had authority to require the removal of the office of the district engineer from the Old Land Office Building to the National Research Building, it could not authorize the proposed alterations in the latter building to meet the needs of the office.

Accordingly, the question submitted is answered in the negative.

(A-1641)

ACCOUNTING—SET-OFF—ASSIGNMENT OF A SYNDICATE'S INTERESTS

Where a syndicate was formed for the purchase of an Army camp and an erroneous payment had been made to the manager of the syndicate and thereafter the syndicate had bought out the interest of the manager and assumed all of the debts and liabilities which might have been chargeable either in whole or in part to the former manager of the syndicate, the amount erroneously paid can not be set off against any sums subsequently accruing to a corporation organized by the former manager of the syndicate and others for the purchase of another Army camp.

Decision by Comptroller General McCarl, August 19, 1924:

Rose Bros. Co. (Inc.) requested June 16, 1924, allowance of $490 as the balance of an advance payment of $600 made to be applied at the rate of $10 a day for each day of delay beyond a stipulated date in removing certain buildings purchased from the United States and located at Camp Humphreys, Va. Repayment of the unused balance of $490 has been withheld on the ground that Rose Bros. & Co. were indebted to the United States in the sum of $600 by reason of an erroneous refund made by an Army disbursing officer on April 12, 1922, of a part of the purchase price of certain cots purchased "as is" and "where is" at Camp Gordon, Ga.

It now appears that, pursuant to an agreement dated October 26, 1921, a syndicate was formed with capital of approximately $223,500, of which Louis S. Rose subscribed $5,000, for the financing, etc., of the purchase from the War Department of Camp Gordon, Ga. The Ruel Wrecking Co. (Inc.) and the Cleveland Wrecking & Contracting Co., a copartnership owned by Louis S. Rose and others, were employed to wreck the camp and sell the material, each receiving 25 per cent of the net profits. The balance of the profits was to be divided among the subscribers in proportion to their subscriptions. Subsequently, under an agreement dated April 28, 1922, between other members of the syndicate and Louis S. Rose and the Cleveland Wrecking & Contracting Co., Louis S. Rose was paid his subscription of $5,000 to the syndicate and his copartnership, the Cleveland Wrecking & Contracting Co. received $10,000 as estimated 25 per

cent of the profits and withdrew from further activities in the wrecking and sale of Camp Gordon. In the withdrawal agreement it was stipulated that the:

> First parties hereby agree to indemnify and hold harmless said Cleveland Wrecking & Contracting Company, and said Louis S. Rose, personally, against any claims, damages, or costs, hereafter suffered by said Cleveland Wrecking & Contracting Company, or said Rose, by reason of any joint liability that may be established against said contributors and persons interested in the profits of said joint venture, under said contract dated October 26th, 1921.

The agreement was expressly ratified May, 1922, by an agreement between certain other members of the syndicate and the members who signed the agreement of April 28, 1922, and in said agreement Bismark Feilchenfeld was appointed as their "true and lawful agent for us, and in our name, place, and stead to negotiate all matters appertaining to the business conducted by us individually and as managers of the enterprise known as Rose Bros. & Co., not incorporated, at Camp Gordon, Georgia."

On or about January 1, 1923, Louis S. Rose and others not members of the syndicate formed a corporation under the name of Rose Bros. Co. and on September 5, 1923, said corporation purchased Camp Humphreys, Va., and agreed to remove the buildings, etc., within a certain period. The buildings were not all removed as agreed, and under a supplemental agreement dated December 10, 1923, the corporation posted $600, from which the United States was to deduct $10 a day for each and every day of delay in the removal. There was a delay of 11 days in removal, but the balance of $490 was withheld to apply on the erroneous refund of $600 made on April 12, 1922, to Rose Bros. & Co. at Camp Gordon, Ga.

It is now clear that Rose Bros. Co. (Inc.) is not chargeable with the erroneous refund made to Rose Bros. & Co., the syndicate in which one of the Rose brothers owned a comparatively small share and which released the Cleveland Wrecking & Contracting Co. and Louis S. Rose of all claims, damages, or costs by reason of the joint adventure subsequent to the date of the erroneous refund. In other words, it now appears, as it did not appear at the time of the decision of June 2, 1924, that Rose Bros. Co. was not incorporated by the same or similar parties doing business as Rose Bros. & Co., and that the syndicate assumed all claims, etc., growing out of the wrecking, etc., of Camp Gordon.

A settlement will be stated addressed to the disbursing officer under section 307 of the act of June 10, 1921, 42 Stat. 25, directing the disbursing officer to pay to Rose Bros. Co. (Inc.), the sum of $490 now held in his special deposit account. Collection of the $600 erroneously refunded will be proceeded with against the members of the syndicate as appears under the agreement of October 26, 1921.

(A-4505)

ADVERTISING—SALE OF VEHICLES SEIZED UNDER THE NATIONAL PROHIBITION ACT

When a seized vehicle is advertised and sold by a Federal prohibition officer who made the seizure under the provisions of section 26 of the act of October 28, 1919, 41 Stat. 315, it is competent for him, under such regulations as the Secretary of the Treasury may prescribe, to authorize publication of the advertisement.

When the sale of a vehicle seized under the provisions of section 26 of the act of October 28, 1919, 41 Stat. 315, is by order of a court after conviction of the owner or after the vehicle otherwise comes lawfully into the custody of an officer of a court, the publication of the advertisement should be authorized by the court. A court order to advertise, under such circumstances, would not be an "advertisement notice, or proposal, for any evecutive department of the Government," etc., within the intent and meaning of section 3828, Revised Statutes.

Comptroller General McCarl to the Secretary of the Treasury, August 19, 1924:

I have your letter of August 4, 1924, in which you quote section 26 of Title II of the national prohibition act of October 28, 1919, 41 Stat. 315 and 316, and request decision of a question presented as follows:

Federal prohibition officers surrender to the custody of United States marshals all vehicles seized by them for the illegal transportation of intoxicating liquor. In some jurisdictions, in cases where no person is found claiming the seized vehicles, in order to comply with the requirements of the statute, the officers of the courts call upon Federal prohibition directors, to whom the Secretary of the Treasury has delegated authority, to issue written authorizations for the publication of the advertisements of sales. Where this procedure prevails the confusion of authority and duty seems to arise from the efforts on the part of the officers of the courts and the prohibition officers to conform with the provisions of section 3828, Revised Statutes, which provides:

"No advertisement, notice, or proposal, for any executive department of the Government, or for any bureau thereof, or for any office therewith connected, shall be published in any newspaper whatever, except in pursuance of a written authority for such publication from the head of such department; and no bill for any such advertising, or publication, shall be paid unless there be presented, with such bill, a copy of such written authority."

In this connection it may be stated that it is the view of this department that whenever a vehicle which has been seized for the illegal transportation of intoxicating liquor has been surrendered to the custody of a United States marshal or other officer of the court by a Federal prohibition officer the latter is not charged with any further responsibility regarding it. After the vehicle is placed in the custody of the court or its officers it would seem that its retention, release, or sale is a matter for decision of the court, and any directions or orders respecting the disposition of the vehicle pertains to legal procedure that lies solely within the jurisdiction of the court or its officers.

Accordingly your decision is respectfully requested as to whether or not, whenever vehicles seized for the illegal transportation of intoxicating liquor are surrendered by Federal prohibition officers to the custody of United States marshals or other officers of the court, and there shall be no person claiming the same, and the sales thereof are to be advertised by publication in newspapers, such advertising must be by written authority as prescribed by section 3828, Revised Statutes, *supra*. If you hold in the affirmative, please state whether it is the duty of the Secretary of the Treasury, or his subordinate officers acting under his discretion, to issue the written authorizations for the advertising, or does this duty devolve upon the Attorney General or his subordinate officers acting under his authority?

Section 26 of Title II of the national prohibition act of October 28, 1919, 41 Stat. 315 and 316, provides:

When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this title in any court having competent jurisdiction; but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond, with sufficient sureties, in a sum double the value of the property, which said bond shall be approved by said officer and shall be conditioned to return said property to the custody of said officer on the day of trial to abide the judgment of the court. The court upon conviction of the person so arrested shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure, and the cost of the sale, shall pay all liens, according to their priorities, which are established, by intervention or otherwise at said hearing or in other proceeding brought for said purpose, as being bona fide and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor, and shall pay the balance of the proceeds into the Treasury of the United States as miscellaneous receipts. All liens against property sold under the provisions of this section shall be transferred from the property to the proceeds of the sale of the property. If, however, no one shall be found claiming the team, vehicle, water or air craft, or automobile, the taking of the same, with a description thereof, shall be advertised in some newspaper published in the city or county where taken or if there be no newspaper published in such city or county, in a newspaper having circulation in the county, once a week for two weeks and by handbills posted in three public places near the place of seizure, and if no claimant shall appear within ten days after the last publication of the advertisement, the property shall be sold and the proceeds after deducting the expenses and costs shall be paid into the Treasury of the United States as miscellaneous receipts.

In decision of March 25, 1924, 3 Comp. Gen. 682, it was said that the enactment presents three possible conditions with respect to the seizure, to wit:

1. The delivery of the thing seized to the owner upon execution of a bond.
2. No one found claiming and immediate sale after advertising.
3. Owner appearing but refusing to give bond.

As to 2, the enactment contemplates immediate advertising and sale by the officer making the seizure without waiting for conviction or any other action by the court; therefore, in such case, it is competent for the Federal prohibition agent making the seizure, under such regulations as the Secretary of the Treasury may prescribe, to authorize the advertisement of the seizure and a description of the thing seized, and after 10 days from the last publication of such advertisement to proceed with the sale as directed in the statute.

In case of sale after conviction of the owner, or in any other case of sale after the vehicle lawfully comes within the custody and jurisdiction of the court or an officer thereof, the matter then appears for the court to order the required advertisement, the expense thereof,

as in the case of advertisement and sale by the seizing officer, to be paid from the proceeds of sale. An order to advertise, issued by the court under such circumstances, would not be an "advertisement, notice, or proposal for any executive department of the Government," etc., within the intent and meaning of section 3828, Revised Statutes.

The questions submitted are answered accordingly.

(A-3889)

CONTRACTS—AUTHORITY TO SIGN—LEASES TRANSFERRED BY LESSOR BY VIRTUE OF SALE OF PROPERTY LEASED

The interests of the United States require that the authority of officers of corporations to bind such corporations should be affirmatively established in each instance, either by a certificate of the Government contracting officer when the amount involved does not exceed $500, to the effect that such officers are the same officers who are authorized to and do sign similar contracts on behalf of the corporation with the public generally; or, by written evidence of authority to bind the corporation attached to the agreements or contracts.

The transfer of title to premises leased by the Government is not within the scope of section 3737, Revised Statutes; however, the right of the grantee of the lessor to receive payment of rent provided in the lease is dependent upon the transfer of title from said lessor to said grantee, the best evidence of such transfer being the deed by which it was accomplished, or a properly authenticated copy thereof, which, for protection of paying officers, should be attached to the lease.

Comptroller General McCarl to the Secretary of the Treasury, August 20, 1924:

There has been received a letter dated June 23, 1924, from the chief clerk, Treasury Department, in reply to letter of May 21, 1924, wherein attention was invited to certain contracts filed in the General Accounting Office, the said contracts signed by officers or agents of corporations not being accompanied by an affirmative showing as to the authority of such officers or agents to bind such corporations. Attention was also invited to a lease entered into with the owners of certain property, the said owners having divested themselves of title thereto. In this latter connection the reply was as follows:

* * * The Utica Macaroni Manufacturing Company, the original owners, entered into this contract with the United States for itself, its heirs, executors, administrators, successors, or assigns to let and lease to the United States certain property during the period July 1, 1923, to June 30, 1924. When the property was sold to the Utica Partition Corporation it would appear that the latter corporation is bound by the lease, and, in fact, did consider itself so bound, as it continued the rental of the property to the customs service without objection.

In decision of July 10, 1924, 4 Comp. Gen. 38, which is equally applicable here, it was said:

Generally, as to the form of leases, etc., see Circular No. 109, issued June 1, 1923, by the Director Bureau of the Budget, "By Direction of the President."

As to the authority of corporate officers to sign contracts with the Government for and on behalf of the corporations, it was said in 3 Comp. Gen. 436, quoting from the syllabus, that:

"The authority of officers of corporations generally to sign contracts with the Government on behalf of the corporation must be affirmatively established in each instance, usually by filing with the contract extracts from the articles of incorporation, by-laws, or minutes of the board of directors, dutly certified by the custodian of such records under corporate seal.

"The authority of officers of public-service corporations, such as telegraph and telegraph companies, to sign contracts on behalf of the corporation may be established by a certificate by the contracting officer representing the Government to the effect that such officers are the same officers who are authorized to and do sign regular service contracts on behalf of the corporation with the public generally; when so certified the absence of the seal of the corporationo will not be objected to."

In 3 Comp. Gen. 467, quoting from the syllabus, it was said:

"The authority of officers of corporations to sign contracts with the Government on behalf of the corporation, in all cases where the amount is less than $500, may be established by a certificate by the contracting officer representing the Government to the effect that such officers are the same officers who are authorized to and do sign similar contracts on behalf of the corporation with the public generally."

The decisions of this office, cited, state the general rule to be followed—that formal written contracts involving in excess of $500 should be accompanied by a formal showing under corporate seal of the authority of the signing officers to contract; less formal contracts of the Department of Agriculture—which here may be classed as those involving expenditures not in excess of $500 such as usually are made by simple proposal and acceptance—should show the authority to contract by certificate of the contracting officer, unless the bidder sets forth such authority in the proposal. The requirement of a more formal showing of authority to contract in those minor matters, to wit, involving amounts under $500, may be considered as waived. It may be assumed that the General Supply Committee contracts contain a showing of the authority to contract, and purchases by the respective departments, etc., thereunder require no further showing of such authority.

There would appear to be no room for doubt that the interests of the United States require that the authority of officers of corporations to bind such corporations to Government contracts should "be affirmatively established in each instance," either by furnishing the certificate mentioned or by attaching to the agreement or contract the written evidence of authority to bind the corporation.

With respect to contracts heretofore filed, except as to those cases in which the information may be hereafter specifically requested, no further question need be raised as to the authority of the signing officers to bind their respective corporations.

The transfer of title to premises leased by the Government is not within the scope of section 3737, Revised Statutes; however, the right of the grantee of the lessor to receive payment from the Government of the rent provided in the lease is dependent upon the transfer of title from said lessor to said grantee, the best evidence of such transfer being the deed by which it was accomplished, or a properly authenticated copy thereof. 15 Comp. Dec. 195. To protect the payments already made and to be made by paying officers, a properly authenticated copy of the deed of transfer should be obtained and forwarded to this office for association with the lease therein filed.

(A-3106)

NATIONAL GUARD PAY—OFFICERS COMMANDING ORGANIZATIONS

A motor repair section, Quartermaster Corps, National Guard, is an organization within the meaning of section 14 of the act of June 10, 1922, 42 Stat. 631, and the officer in command thereof is entitled to the additional pay of $240 per annum for the faithful performance of the administrative duties connected therewith.

Decision by Comptroller General McCarl, August 21, 1924:

There is before this office for consideration the question as to whether a motor repair section, Quartermaster Corps, National Guard, is an organization within the meaning of section 14, act of June 10, 1922, 42 Stat. 631, which entitles the officer in command to additional pay at the rate of $240 per annum for the faithful performance of the administrative duties connected therewith.

Table No. 91-P, January 14, 1921, shows that the unit consists of 1 lieutenant and 18 enlisted men. While it is also shown by the table of organization as constituting a part of the larger organization designated as the "Division Train, Infantry Division, Quartermaster Corps," it exists and operates as an individual unit the same as does a company. Militia Bureau Circular Letter No. 69, dated December 11, 1923, which was issued subsequent to decision of June 12, 1923, 2 Comp. Gen. 795, defines it as an organization having administrative functions. It appears that the unit possesses all of the necessary requisites of an organization having administrative functions mentioned in that decision.

Vouchers showing payment of command pay to officers belonging to, and in command of, a motor repair section, Quartermaster Corps, National Guard, organized as herein indicated during the period July 1, 1922, to June 3, 1924, may be passed in disbursing officers' accounts, if otherwise correct.

Attention is invited, however, to the fact that on and after June 3, 1924, command pay will be governed by the provision of section 3, act of June 3, 1924, 43 Stat. 364, and regulations issued pursuant thereto. 36 MS. Comp. Gen. 360.

(A-4367)

NATURALIZATION FEES—PETITIONS OF ALIENS IN THE MILITARY SERVICE

The acts of May 9, 1918, 40 Stat. 542, and July 19, 1919, 41 Stat. 222, provided for the naturalization of aliens in the military service of the United States from May 9, 1918, to "one year after all the American troops are returned to the United States," without the charge of the fees required by the act of June 29, 1906, 34 Stat. 600, and permitted the petitioning for naturalization by such aliens when beyond the juris-

diction of any court authorized to naturalize aliens, without their appearing in person before the clerk of a court having jurisdiction.

Petitions for naturalization handed to designated representatives of the Bureau of Naturalization by overseas aliens in the military service of the United States were not "filed" within the intent of the naturalization laws of May 9, 1918, 40 Stat. 542, and July 19, 1919, 41 Stat. 222, such laws contemplating an actual filing of the petition with the clerk of a court having jurisdiction to naturalize by the petitioner himself after his return to the United States, or by representatives of the Bureau of Naturalization for and on his behalf, within the time limit; and where not so filed within the time limit, the fees provided by the act of June 29, 1906, are to be charged.

Comptroller General McCarl to the Secretary of Labor, August 21, 1924:

I have your letter of July 26, 1924, requesting decision as to the collection of fees by clerks of courts upon petitions for naturalization executed overseas by aliens who were in the military service of the United States during the World War.

The seventh subdivision, section 1, of the act of May 9, 1918, 40 Stat. 542, entitled, "An act to amend the naturalization laws and to repeal certain sections of the Revised Statutes of the United States and other laws relating to naturalization, and for other purposes," provided:

* * * Any alien, who, at the time of the passage of this act, is in the military service of the United States, who may not be within the jurisdiction of any court authorized to naturalize aliens, may file his petition for naturalization without appearing in person in the office of the clerk of the court and shall not be required to take the prescribed oath of allegiance in open court. The petition shall be verified by the affidavits of at least two credible witnesses who are citizens of the United States, and who shall prove in their affidavits the portion of the residence that they have personally known the applicant to have resided within the United States. The time of military service may be established by the affidavits of at least two other citizens of the United States, which, together with the oath of allegiance, may be taken in accordance with the terms of section seventeen hundred and fifty of the Revised Statutes of the United States after notice from and under regulations of the Bureau of Naturalization. Such affidavits and oath of allegiance shall be admitted in evidence in any original or appellate naturalization proceeding without proof of the genuineness of the seal or signature or of the official character of the officer before whom the affidavits and oath of allegiance were taken, and shall be filed by the representative of the Government from the Bureau of Naturalization at the hearing as provided by section eleven of the Act of June twenty-ninth, nineteen hundred and six. * * *

During the time when the United States is at war no clerk of a United States court shall charge or collect a naturalization fee from an alien in the military service of the United States for filing his petition or issuing the certificate of naturalization upon admission to citizenship, and no clerk of any State court shall charge or collect any fee for this service unless the laws of the State require such charge to be made, in which case nothing more than the portion of the fee required to be paid to the State shall be charged or collected. A full accounting for all of these transactions shall be made to the Bureau of Naturalization in the manner provided by section thirteen of the Act of June twenty-ninth, nineteen hundred and six.

The act of July 19, 1919, 41 Stat. 222, provides:

Any person of foreign birth who served in the military or naval forces of the United States during the present war, after final examination and acceptance by the said military or naval authorities, and shall have been honorably discharged after such acceptance and service, shall have the benefits of the seventh subdivision of section 4 of the Act of June 29, 1906, Thirty-fourth

Statutes at Large, part 1, page 596, as amended, and shall not be required to pay any fee therefor; and this provision shall continue for the period of one year after all of the American troops are returned to the United States.

It is understood that during the war applications for naturalization of those aliens in the military service who were stationed at camps and mobilization centers throughout the United States were received by representatives of the naturalization service who furnished the applicants the required forms, assisted them in the preparation thereof, and gave them, and the witnesses who vouched for their character, etc., the necessary preliminary examination, such petitions being filed at such camps, etc., at improvised offices established therein for the clerks of the courts having jurisdiction, the courts, on hearing days, adjourning to such camps, etc., for the purpose of naturalizing such aliens as were found eligible for naturalization.

Overseas, and without the jurisdiction of any court authorized to naturalize aliens, it was different, and necessarily so. Such aliens made their applications, were assisted in the preparation of their petitions for naturalization, and their petitions thus received, it is understood, were forwarded to the Bureau of Naturalization in Washington and were, and in some instances still are being, held awaiting further and necessary action to accomplish naturalization of the petitioners.

What the act of May 9, 1918, *supra*, contemplated being done by the aliens, or others in their behalf, with respect to petitions made overseas, and after the petitioners returned to the United States, is not altogether clear. Something affirmative was required to be done to accomplish naturalization which started with the making of the petitions overseas. The clerk of the eastern district of New York, Brooklyn, N. Y., in his letter of May 6, 1924, explains the matter thus:

The examiner of the Bureau of Naturalization has requested that papers, in the nature of petitions, be filed on behalf of certain men naturalized overseas under subdivision 7 of section 4 of the naturalization law.

Before the expiration of the general probation as to the naturalization of honorably discharged soldiers and sailors in March of this year, there had been some proceedings in court under which a so-called "overseas naturalization" was brought on in court without petition and an order was signed by the judge. As no fee was charged to soldiers the question of a fee could not be raised as to these men. Now that the limitation has gone into effect, and a fee must be charged, the question arises can such papers be filed as petitions without the payment of fees; should a fee be charged; or should these papers be filed apart from the usual naturalization proceedings and be taken care of as a matter before the judge without charge?

The act of June 29, 1906, 34 Stat. 600, provides as to fees for naturalization, that:

For making, filing, and docketing the petition of an alien for admission as a citizen of the United States and for the final hearing thereon, two dollars; and for entering the final order and the issuance of the certificate of citizenship thereunder, if granted, two dollars.

The act of May 9, 1918, *supra*, provided that the alien, without the jurisdiction of any court authorized to naturalize aliens, "may file his petition for naturalization without appearing in person in the office of the clerk of the court." That provision clearly contemplated a filing in the office of the clerk of a court having jurisdiction to naturalize; therefore a petition executed overseas and handed to a designated representative of the Bureau of Naturalization, but which has not been filed "in the office of the clerk of the court" having jurisdiction to naturalize aliens, has not been filed within the intent of the act of May 9, 1918.

Had the overseas petitioner, upon his return to the United States and within the time specified in the act of July 19, 1919, *supra*, taken the necessary steps to perfect his naturalization, or had such steps been taken for him by a filing of his petition with the clerk of a court having jurisdiction to naturalize aliens, he would have received his certificate of citizenship, if found to be eligible, without the payment of a fee either for filing and docketing the petition and for final hearing thereon or for the entering of the final order and the issuance of the certificate of naturalization thereunder; that is, unless the proceedings were in a State court and the laws of the particular State required that a fee be charged. Not having taken the necessary steps to perfect his naturalization within the time specified in the act of July 19, 1919, and the initial steps not having been taken for him within that time, no reason appears why he should be in a more favorable situation than the person of foreign birth who served in the military forces of the United States and who did not make his petition overseas. The former as well as the latter, after the time specified in the act of July 19, 1919, is required to pay the fees provided in the act of July 29, 1906, *supra*, and the decision is accordingly.

(A–4179)

COMPENSATION—HOLIDAYS—PER DIEM EMPLOYEES

Per diem employees of the engineer department at large who performed work on Saturday afternoons during the period from June 15 to September 15, 1923, are not entitled to extra pay therefor.

Per diem employees of the engineer department at large are entitled to their regular per diem rate of pay for work performed on a national holiday in addition to the gratuity pay allowed for national holidays by the act of January 6, 1885, 23 Stat. 516.

Decision by Comptroller General McCarl, August 22, 1924:

Col. C. W. Kutz, Corps of Engineers, has applied for review of settlement No. M–6926–W, dated April 30, 1924, in which were disallowed items totaling $92 covering payments to per diem employees of the engineer department at large for work performed on

Saturday afternoons during the period from June 15 to September 15, 1923.

The matter of such payments was considered in decision of May 10, 1924, A–2534, and it was determined such payments were not authorized.

There was also disallowed in said settlement credit for $8 covering payments to two per diem employees for work performed on the Fourth of July in addition to the gratuity pay for that day. It has been repeatedly held that a permanent per diem employee is entitled to his regular per diem rate of pay when required to work on a national holiday in addition to the gratuity pay allowed for national holidays by the act of January 6, 1885, 23 Stat. 516.

See 13 Comp. Dec. 40; 24 *id.* 529, and decision of the Comptroller General January 11, 1924, 3 Comp. Gen. 411.

Upon review the item of $8 is certified for credit in the officer's account.

(A–4444)

EMERGENCY PURCHASES—VOLUNTARY PAYMENTS

Reimbursement for the purchase from private funds of an employee of a partial supply of towels for use in a field office during the deferred receipt of a requisitioned quantity authorized upon subsequent administrative approval.

The purchase of a Brascolite fixture with lamps for installation in the office of the national bank examiners in the United States customhouse building in New York City (which is under control of the Treasury Department) does not comprise office equipment for which Federal reserve funds are available, but being essentially a building fixture such as becomes a part of the realty when attached, it is to be supplied by the Secretary of the Treasury, if deemed advisable, and charged to such appropriation as may be available under the control of that department.

Decision by Comptroller General McCarl, August 22, 1924:

Review has been requested of settlement 028305–T, dated May 10, 1924, disallowing the claim of Owen T. Reeves, chief national bank examiner, for reimbursement of amount expended by him from private funds for one dozen huck towels at $2.05, and one type AF 500-watt Brascolite with two 300 and 500 watt clear lamps at total price of $16.92, said articles having been purchased by him for use in his office in the United States customhouse building in New York.

In justification of the expenditure for towels, the agent explains that requisition was made for towels on January 16, but the same were not furnished until March 19, and that in the meantime it was necessary to obtain partial supply of such essential articles to meet existing requirements. As this temporary supply is shown to have been reasonably necessary and the purchase has subsequently been approved by the Comptroller of the Currency, the item will now be allowed as a proper charge against the appropriation "Salaries and expenses, national bank examiners, special fund."

With reference to the lighting fixtures, claimant in a letter to the Comptroller of the Currency, dated June 12, 1924, stated:

> On March 5 I wrote advising you that certain changes were being made in the office and it was necessary to obtain better lights. The building, under its regulations, could not install drop lights. I recommended that four Brascolite fixtures be furnished as early as possible. The lighting fixtures in the new quarters of the typing department were inadequate, and it was absolutely necessary under the conditions to furnish proper lighting facilities in that room. I received no acknowledgment of my recommendation until April 12, when it was stated that the request for the installation of lighting fixtures had been referred to the Comptroller General for his decision whether or not the fixtures could be paid for out of the general fund. In the meantime, in order to have the work of this office proceed, I purchased a Brascolite fixture at a forty per cent discount and the building mechanic installed it.
>
> Both of these items (i. e., towels and Brascolite) can be properly classified as necessary office equipment and property of the Government. * * *

It has been ascertained that Brascolites are not removable office equipment but are essentially building fixtures, and when once attached become a part of the realty and subject to the laws applicable to such fixtures. Therefore, in view of this situation, in response to a submission upon this subject the Comptroller of the Currency was advised by this office, in a letter dated April 9, 1924, that upon the understanding the offices of the bank examiners are in the customhouse building in New York, which is a public building under the control of the Treasury Department, any need for fixtures of the character referred to would be a question for consideration of the Secretary of the Treasury.

Accordingly, under the conditions disclosed, the special fund hereinbefore mentioned is not available for the purchase of this fixture and lamps, and upon the facts appearing reimbursement of the amount expended therefor by the chief national bank examiner is not authorized.

As indicated in the letter of this office, dated April 9, 1924, the matter appears to be proper for submission through official channels to the Secretary of the Treasury for consideration of the question of assuming this obligation as an expense of equipping, maintaining, or operating the public building, in connection with the installation of any additional fixtures which, it is asserted, are required.

Upon review a difference of $2.05 is certified due claimant.

(A-2051)

MOTOR VEHICLE ALLOWANCE—DISTRICT OF COLUMBIA PUBLIC SCHOOL OFFICIALS

The provision for "motor vehicle" allowance in the act of June 29, 1922, 42 Stat. 688, is not available for the payment for "garage" to the various school officials of the District of Columbia.

Evidence of ownership is not required on vouchers for motor vehicle allowance under the act of June 29, 1922, 42 Stat. 688, for public school officials of

the District of Columbia, but evidence of the use of a motor vehicle on official business and the amount of the expense incurred must be shown in the absence of a regulation or authorization prescribing a commuted allowance not in excess of the maximum prescribed in the law.

Decision by Comptroller General McCarl, August 25, 1924:

There is for consideration by this office the validity of payments made by J. R. Lusby, disbursing officer of the District of Columbia, upon vouchers stated to be "for garage for automobile" for various officials of the District of Columbia public schools, the vouchers covering the months of July and August, 1922, each voucher bearing a certificate reading:

I hereby certify that the above garage was furnished by me for the automobile used for official business.

The appropriation designated for payment of the vouchers is found in the act of June 29, 1922, 42 Stat. 688, in the following language:

For contingent expenses * * * including an allowance of not exceeding $312 per annum for a motor vehicle for each the superintendent of schools, the superintendent of janitors, the two assistant superintendents, the director of primary instruction, the school cabinet-maker, the supervising principal in charge of the white special schools, the chief medical and sanitary inspector of schools, and the supervising principal of the colored special schools * * *.

The appropriations for prior years (see act of February 22, 1921, 41 Stat. 1125) had provided an allowance "for garage" for each of the officials in question and the vouchers were evidently prepared following the language of the prior appropriations, overlooking the change in wording. The change in the language of the appropriation is disclosed by the hearing on the District appropriation bill for 1923, to have been made to conform the allowance to the facts, the allowance theretofore having been considered and used for maintenance of automobiles and not restricted to payment of garage rent. It is apparent from the terms of the provision and the legislative history of the enactment that the allowance was intended to enable the officials mentioned to use motor vehicles in the performance of their official duties as a means of transportation between the various and scattered school activities in the District. If any of the officials in question is not required to use and does not in fact use a motor vehicle for official business, the reason for the allowance is removed and the allowance is not payable. It is necessary, therefore, that the payments of such allowances be supported by evidence showing actual use by the respective officials of a motor vehicle during the month for which the allowance is claimed. Furthermore, the appropriation does not provide for the maximum allowance in all cases, but, by the use of the words "not exceeding," indicates that some restriction thereon was intended. While it is within the power of the Commissioners of the District of Columbia to provide in advance by regulation or by specific authorization in individual

cases for a commuted allowance not exceeding the maximum to the respective officers for each month they use an automobile on official business, such allowance to approximate the actual cost to the officers in question for maintaining their respective machines, having due regard to the make of the machine and the extent to which used for official purposes, in the absence of such a regulation or authorization there can be allowed under the law only the amount shown to have been actually expended by the respective officials in the maintenance, operation, or hire of a motor vehicle for use on official business. There is no requirement that the officer show that he is the owner of the vehicle used by him.

Payments on the vouchers as submitted were unauthorized and credit for such payments can not be allowed in the disbursing officer's accounts in the absence of additional evidence such as indicated herein.

(A-3619)

CLASSIFICATION OF CIVILIAN EMPLOYEES—GOVERNMENT PRINTING OFFICE

The act of June 7, 1924, 43 Stat. 658, entitled "An act to regulate and fix rates of pay for employees and officers of the Government Printing Office," supersedes the classification act of March 4, 1923, 42 Stat. 1488, in so far as it applied to personal services under the appropriation heading "Public printing and binding," but did not repeal or supersede the classification act of 1923 or the appropriation act of June 7, 1924, 43 Stat. 590, in so far as they relate to the administrative forces employed under the appropriations "Office of the Public Printer" and "Office of Superintendent of Documents."

Comptroller General McCarl to the Public Printer, August 25, 1924:

I have your letter of June 26, 1924, requesting decision whether, in view of the provisions of the act of June 7, 1924, 43 Stat. 658, you are authorized to fix rates of pay for all employees and officers of the Government Printing Office notwithstanding the provisions of the classification act of 1923.

The act of June 7, 1924, 43 Stat. 658, provides as follows:

That on and after July 1, 1924, the Public Printer may employ, at such rates of wages and salaries, including compensation for night and overtime work, as he may deem for the interest of the Government and just to the persons employed, except as otherwise provided herein, such journeymen, apprentices, laborers, and other persons as may be necessary for the work of the Government Printing Office; but he shall not, at any time, employ more persons than the necessities of the public work may require or more than two hundred apprentices at any one time: *Provided*, That on and after July 1, 1924, the minimum pay of all journeymen printers, pressmen, and bookbinders employed in the Government Printing Office shall be at the rate of 90 cents an hour for the time actually employed: *Provided further*, That except as hereinbefore provided, the rates of wages, including compensation for night and overtime work, for more than ten employees of the same occupation shall be determined by a conference between the Public Printer and a committee selected by the trades affected, and the rates and compensation so agreed upon shall become effective upon approval by the Joint Committee on Printing; if the Public

Printer and the committee representing any trade fail to agree as to wages, salaries, and compensation either party is hereby granted the right of appeal to the Joint Committee on Printing, and the decision of said committee shall be final; the wages, salaries, and compensation determined as provided herein shall not be subject to change oftener than once a year thereafter: *Provided further*, That employees and officers of the Government Printing Office, unless otherwise herein fixed, shall continue to be paid at the rates of wages, salaries, and compensation (including night rate) now authorized by law until such time as their wages, salaries, and compensation shall be determined as hereinbefore provided.

Sec. 2. All Acts or parts of Acts in conflict with the provisions of this Act are hereby repealed.

Section 2 of the classification act of March 4, 1923, 42 Stat. 1488, expressly includes the Government Printing Office, and under the clerical-mechanical service of that act there is included—

* * * all classes of positions which are not in a recognized trade or craft and which are located in the Government Printing Office * * *.

The act of June 7, 1924, 43 Stat. 590, making appropriations for the legislative branch of the Government for the fiscal year ending June 30, 1925, provides, under the major heading of "Government Printing Office," three subheadings, viz, "Office of Public Printer," "Public printing and binding," and "Office of Superintendent of Documents." Under the first subheading is the following:

Salaries: Public Printer, $6,000; Deputy Public Printer, $4,500; for personal services in accordance with "The Classification Act of 1923," $147,380; in all $157,880.

Under the second subheading is provided the working capital for the execution of printing, binding, lithographing, engraving, and other authorized work of the Government Printing Office for the various branches of the Government, including provision for salaries, compensation, and wages.

Under the third subheading is the following:

For the Superintendent of Documents, assistant superintendent, and other personal services in accordance with "The Classification Act of 1923," $339,960.

As Public No. 276, 43 Stat. 658, and Public No. 225, 43 Stat. 590, were approved the same day, June 7, 1924, it is necessary, if possible, to so construe their provisions as to give effect to both.

Public No. 276 deals with employment of "journeymen apprentices, laborers, and other persons as may be necessary for the work of the Government Printing Office." It fixes the minimum pay on and after July 1, 1924, of "all journeymen printers, pressmen, and bookbinders." It provides for adjustment in the rates of pay, including night and overtime work, on the basis of a conference between a committee appointed by the "trades affected" and the Public Printer, subject to the approval of the Joint Committee on Printing. The entire tenor of the act indicates that it is dealing with

the various tradesmen, laborers, etc., employed in the actual execution of printing, binding, etc., constituting the work of the Government Printing Office for the various branches of the Government service, under the appropriation heading "Public printing and binding." Its purpose was to enable the Public Printer, subject to the approval of the Joint Committee on Printing, to adjust wages in conference with tradesmen employed in the work of the Government Printing Office similar to the practice in private printing establishments. I find nothing in the act to indicate that it was intended to have any application to the administrative forces, such as clerks, stenographers, cataloguers, etc., appropriated for under the headings "Office of the Public Printer," and "Office of Superintendent of Documents," particularly in view of the express provision in the appropriations that such personal services shall be in accordance with the classification act of 1923. Accordingly, you are advised that the classification act is applicable to the administrative force employed under authority of the appropriations made under the subheadings "Office of Public Printer" and "Office of Superintendent of Documents" and the act of June 7, 1924, 43 Stat. 658, relates only to personal services employed under the authority of the appropriation "Public printing and binding," and, to that extent only, supersedes the classification act of 1923.

(A-4470)

CONTRACTS—CANCELLATION—ACCEPTANCE OF WAREHOUSE RECEIPTS

Where, upon the cancellation of a contract, the contractor placed certain public property for which he was accountable in a public warehouse pending settlement of the canceled contract, the indorsement over to the United States of the negotiable warehouse receipts for the stored property upon settlement of the contract does not relieve the contractor from any shortage found in the property upon delivery, and the United States is not obliged to proceed against the warehouseman, as no officer of the United States is authorized to accept assignment of choses in action in discharge of obligations to the Government.

Decision by Comptroller General McCarl, August 25, 1924:

Edison Phonograph Works (Inc.) requested, July 26, 1923, review of settlement No. 038292-W, dated July 21, 1924, offsetting against its Dent Act (March 2, 1919, 40 Stat. 1272) claim for $1,761.72, the sum of $1,403.23, as the value of property not accounted for in the settlement of a contract dated July 6, 1918, for the manufacture of projector shear wire pistols. The shortage of property appears to be admittied but it is contended the legal responsibility therefore is that of a warehouseman.

Pursuant to the contract of July 6, 1918, the United States agreed to furnish certain material for use in the manufacture of the wire pistols which were to remain the property of the United States, and the contractor agreed to

> account for all materials and component parts furnished by the United States, * * * Upon final delivery of the articles, and prior to final payment thereof, the Contractor shall deliver to the Chief of Ordnance a sworn statement, in form satisfactory to him, of the quantity of such unused material or component parts remaining in the contractor's possession.

The contract was canceled following the armistice of November 11, 1918, and prior to final completion. The contractor placed certain unused material in the warehouses of the McGann Co. and obtained therefor negotiable warehouse receipts dated March 25, 1919.

Subsequent thereto and on December 3, 1919, an agreement was entered into terminating liability by reason of the cancellation of the contract of July 6, 1918, and thereunder the United States became entitled to certain unused material, including brass rods. The contractor delivered to the United States the warehouse receipts dated March 25, 1919, and on or about December 30, 1920, the warehouse company delivered a part of the material to the United States. It was then discovered that there was a shortage of 5,767 pounds of brass rods valued at $1,403.23, the amount deducted in the settlement of which review is requested.

Payment of the Dent Act award of $1,761.72 in settlement of an informal agreement dated April 17, 1918, was withheld by the administrative officers of the War Department pending consent of the contractor to deduction of $1,403.23 as the value of the material not accounted for in the settlement of the contract of July 6, 1918. Finally, by indorsement dated December 21, 1923, the papers were referred to this office for settlement. With the papers was a copy of an opinion dated September 24, 1923, of the Judge Advocate General of the Army to the effect that if the United States had in fact paid or assumed liability for the storage charges on any of the material, such payment or assumption of storage charges would appear to be ratification of the action of the contractor in storing the property and that the United States should proceed against the warehouseman, the McGann Co., for the shortage.

As to the matter of payment of the storage charges, the commanding officer of the Frankford Arsenal, under whose jurisdiction the transaction occurred, reported June 26, 1924, that no payment of the storage charges has been made by the United States and that:

> No agreement was entered into between the representatives of the salvage board and the Edison Phonograph Works as to the responsibility for storage, which fact is substantiated and acknowledged in letter dated January 11, 1924, accompanying the claim submitted by the Edison Phonograph Works for reimbursement of storage charges paid to the McGann Company. There is no

authority, written or implied, that the Ordnance Department authorized the Edison Phonograph Works to place Government owned material remaining on hand at the suspension of their contract in a public warehouse. * * *

Whatever may be the liability of the United States to the contractor for reimbursement of the storage charges paid to the warehouseman, which is not now decided, the United States is not required to seek payment from the warehouseman for the shortage of brass valued at $1,403.23. While it appears to be true that under the uniform warehouse receipts law of New Jersey, pages 5776, *et seq*, volume 4, Compiled Statutes of New Jersey, a person to whom a negotiable warehouse receipt has been indorsed acquires such title to the goods as the person negotiating the receipt had or had power to convey, it is also true that it does not appear whether the shortage did not in fact exist at the time the warehouse receipts were indorsed over to the United States. If the shortage then existed, the contractor could convey nothing more than an assignment of a chose in action and officers of the United States have no authority to take choses in action in discharge of obligations to the United States. See *Floyds Acceptances*, 7 Wall., 666; *Taggart* v. *United States*, 17 Ct. Cls. 322. The set-off was properly made and the United States is not required to proceed against the warehouseman.

Upon review the settlement is sustained.

(A-4483)

APPROPRIATIONS—AVAILABILITY FOR PAYMENT OF AWARDS FOR LAND ACQUIRED BY CONDEMNATION PROCEEDINGS

The request of the Secretary of the Navy of November 29, 1919, upon the Attorney General of the United States, to institute condemnation proceedings to acquire certain land, obligated the then current appropriation available for the acquisition of the land, to wit, "Engineering, Bureau of Steam Engineering, 1920," act of July 11, 1919, 41 Stat. 149, even though the petition in condemnation was not filed by the Attorney General until July 26, 1920.

Pursuant to the terms of the act of March 1, 1921, 41 Stat. 1169, the awards made by virtue of the condemnation proceedings for the acquisition of certain land for the Navy Department are payable from the "Naval supply account fund" by direct settlements by the General Accounting Office.

Comptroller General McCarl to the Secretary of the Navy, August 25, 1924:

I have your letter of August 2, 1924, requesting decision as to the availability of the appropriation for "Engineering, Bureau of Steam Engineering, 1920," act of July 11, 1919, 41 Stat. 149, for the payment of court awards pursuant to condemnation proceedings instituted to acquire title to 24½ acres, more or less, of land located at Heeia, on the island of Oahu, Hawaii, necessary for a radio shore station, the Acting Secretary of the Navy, by his letter of November 29, 1919, requesting of the Attorney General of the United States "that proper action be taken toward instituting condemnation proceedings for the

vesting of title in the United States," and petition in condemnation pursuant to such request being filed, but not until July 26, 1920.

Specifically, the matters submitted for decision are as follows:

(*a*) Was the original appropriation obligated by the request made upon the Attorney General to institute condemnation proceedings, irrespective of the fact that the petition was not filed until after the expiration of the fiscal year during which the appropriation was available for purposes of obligation?

(*b*) In the event the appropriation was obligated are there any funds now available under the cognizance of this department that may be used to defray the awards of the court in the condemnation proceedings? If so, what appropriation may be used for the purpose?

The appropriation for "Engineering, Bureau of Steam Engineering, 1920," cited, *supra*, provides:

For * * * the purchase of land as necessary for sites for radio shore stations; * * * *Provided further*, That the sum to be paid out of this appropriation for the purchase of land for a site for a radio shore station at Otter Cliffs, Maine, shall not exceed $32,500: *Provided further*, That no part of this appropriation shall be expended for the acquisition of radio stations in whole or in part used for the transmission or reception of commercial messages; in all, engineering, $30,000,000.

The act of March 1, 1921, 41 Stat. 1169, provides:

That deficiencies under appropriations for the naval establishment for the fiscal year 1920 and prior years shall be charged to a naval supply account fund, which is hereby established and to which shall be transferred the unexpended balances of annual appropriations for the naval establishment for the fiscal years 1919 and 1920, after two years from the expiration of the fiscal year for which made, and, out of any funds in the Treasury not otherwise appropriated, an amount equal to the value of all stores in the naval supply account on March 31, 1921, preliminary adjustments on account of stores to be made upon the certificate of the Secretary of the Navy that stores to the value certified are on hand; and from and after said date the naval supply account fund shall be charged with the cost of all stores procured for and credited with the value of all issues or sales made from the naval supply account, necessary adjustments being made on account of outstanding contracts or orders.

In a similar case, decision of October 5, 1921, it was said:

The appropriation was limited to the fiscal year 1921 and the question is whether an obligation was credited against it within that fiscal year.

The appropriation could be obligated only by the action of the department to which it was made. This action was taken well within the fiscal year by the request upon the Attorney General to begin the condemnation proceedings and by the allotment of the funds. It was the equivalent of an order issued for a purchase the delivery of which is delayed, but which order nevertheless is chargeable to the fiscal year in which issued.

In the instant case there was no allotment of funds to meet the cost of the acquisition, it being submitted that "no allotment of funds was made, as it was not known just what amount would be awarded by the jury and there was no limitation imposed by Congress upon the amount that might be expended for the acquisition of this particular site," but the appropriation for "Engineering, Bureau of Steam Engineering, 1920," was obligated by the action of the department to which it was made by its request of the Attorney General to begin the condemnation proceedings, and the failure to

make an allotment for the expense of the acquisition of the land in question does not alter the situation. 21 Comp. Dec. 870.

In specific answer to the questions submitted, you are advised as to (*a*) that the appropriation for "Engineering, Bureau of Steam Engineering, 1920," was obligated by the request upon the Attorney General to institute condemnation proceedings, irrespective of the fact that the petition in condemnation was not filed by the Attorney General until after the expiration of the fiscal year during which the appropriation was available for obligation, and, as to (*b*), that the fund now available to defray the awards of the court in the condemnation proceedings is the "Naval supply account fund," act of March 1, 1921, 41 Stat. 1169, such payments, however, to be made by direct settlements by this office.

(A-4554)

BONDS, SURETY—PUBLIC CONTRACTS

Under the act of August 13, 1894, as amended by the act of February 24, 1905, 33 Stat. 811, all persons who contract to construct, complete, or repair public buildings or public works are required before commencing work thereon to execute the usual penal bond with good and sufficient sureties.

Comptroller General McCarl to the Secretary of Agriculture, August 25, 1924:

I have your letter of August 7, 1924, requesting decision as to whether by amending the fiscal regulations of the Department of Agriculture you may dispense with the requirements of the act of August 13, 1894, as amended by the act of February 24, 1905, 33 Stat. 811.

You state in paragraph two of your letter that:

* * * Paragraph 73 of the Fiscal Regulations of the Department requires that "a formal contract and bond must be required for all construction work for which bids are accepted." It is now proposed to change the regulation by eliminating the words "formal" and "and bond," so that the sentence will read "a written contract must be required for all construction work for which bids are accepted," the purpose of the change being to eliminate the necessity of securing bonds to cover contracts in construction work where the amount involved is small. For instance, in the case of a contract for construction work involving an expenditure of $50, if a bond be required, the cost is automatically raised to $55, $50 the cost of the work, plus $5, the cost of the bond.

The statute as amended provides that any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work, or for repairs upon any public building, or public work, shall be required before commencing such work to execute the usual penal bond, with good and sufficient sureties with the additional obligation that such contractor or contractors shall promptly make payments to all persons supplying him or them with labor and

materials in the prosecution of the work provided for in such contract.

It seems clear that the statute, as amended, was enacted for the purpose of protecting those who furnish labor and material to public contractors in addition to providing security and indemnity to the United States.

Generally a contract which has for its purpose the construction of a public building, or the prosecution and completion or repair of any public work, comes within the requirement of the act as amended, and in such cases the contractor would be required to furnish a bond containing the conditions set out in the statute before commencing work under any such contract; therefore, departmental regulations dispensing with the requirements of the statute would not be authorized.

(A-4774)

GRATUITIES—$60 BONUS—ARMY ENLISTED MAN

Where the official records of the War Department show that a soldier inducted into the service was accepted at any Army camp for full military service, but was subsequently discharged on account of physical disability, he is entitled, under the act of February 24, 1919, 40 Stat. 1151, to payment of the $60 war-service gratuity.

Decision by Comptroller General McCarl, August 25, 1924:

Earl Groesbeck requested review of settlement No. 013152-W, February 11, 1924, which disallowed his claim for the $60 war-service gratuity, as provided by the act of February 24, 1919, 40 Stat. 1151, to all persons serving in the military forces of the United States during the interim April 6, 1917, to November 11, 1918, and who were honorably discharged therefrom.

The Adjutant General of the Army has reported that he was inducted October 5, 1917, by local board for Troy, N. Y., assigned to Company G, Three hundred and third Infantry, and was honorably discharged October 19, 1917, as a private. It is further reported that he was not discharged as a draftee but was accepted for full military service and was honorably discharged for physical disability on reexamination.

As the act of February 24, 1919, *supra*, contemplates those actually serving in the military and naval forces and as The Adjutant General of the Army has reported that Groesbeck was accepted for full military service, it must be concluded that he actually served in the military forces of the United States within the meaning of the act. Accordingly the settlement is revised and $60 is certified due him.

As there is no appropriation for the payment of this claim, it will be reported to Congress as early as practicable and paid when funds for the purpose become available.

(A-3351)

APPROPRIATIONS—PROHIBITION ENFORCEMENT—TRAVELING EXPENSES OF LOCAL STATE POLICE

Transportation or traveling expenses of other than officers or employees of the Federal Government are not generally chargeable to appropriations made for the Federal departments and establishments.

Police of the States, counties, districts, and municipalities attending and assisting Federal prohibition agents in servng search warrants and making raids under the national prohibition act should have their means of transportation provided by their respective States, etc., as the eighteenth amendment to the Constitution authorized and contemplated concurrent enforcement; but where payment of such transportation expenses under the Federal appropriation for enforcement of national prohibition is absolutely necessary to accomplish the purposes for which such appropriation is made no objection will be raised to the payment of such expenses from Federal funds if they are otherwise proper.

Comptroller General McCarl to the Secretary of Treasury, August 26, 1924:

I have your letter of August 11, 1924, reading:

Under date of June 9, 1924, you were advised that frequently it happens that Federal prohibition enforcement officers are accompanied by local police officers in serving search warrants in cases of violations of the national prohibition law in which local transportation expenses such as street-car fare, etc., are involved. Sometimes the local police officers refuse to bear their share of these expenses, in view of which your decision was requested as to whether the appropriation for "Enforcement of narcotic and national prohibition acts," 42 Stat. 1087, is available for this purpose.

In your reply made under date of July 14, 1924, A-3351, you assume that by "local police officers" the police department of the District of Columbia is referred to, and you hold that since the appropriation for "Miscellaneous and contingent expenses, Metropolitan police, D. C., 1925," act of June 7, 1924, Public No. 224, pages 23 and 24, provides for the purchase of car tickets, that appropriation appears available for payment of street-car fares, and it would appear that each class of officers should bear their own expenses such expenses to be charged under the appropriations of each, respectively. You further state that the appropriation under the control of the department is not available for expenses incurred by the local police (District of Columbia) in the absence of a satisfactory showing that such use is absolutely necessary to accomplish the purposes for which said appropriation is made.

In submitting the question to you it was not intended that it should be restricted to police officers of the District of Columbia. It was intended that the question apply to the local police officers of any and all cities where such officers cooperate with Federal prohibition officers in attending them when serving search warrants and conducting raids in cases of violations of the national prohibition act. Accordingly a further decision in the matter is requested.

The appropriation for "Enforcement of narcotic and national prohibition acts, 1925," act of April 4, 1924, 43 Stat. 71-72, provides:

For expenses to enforce the provisions of the National Prohibition Act * * * including * * * expenditures as may be necessary in the District of Columbia and the several field offices. * * *

Section 3, Title II, of the national prohibition act of October 28, 1919, 41 Stat. 308, provides:

No person shall on or after the date when the eighteenth amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor

except as authorized in this Act, and all the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented.

In the decision of July 14, 1924, referred to above, it was said:

It is understood that the search warrants here in question are actually served by the Federal prohibition enforcement officers, 1 Comp. Gen. 183; and that the assistance rendered by the police officers of the District of Columbia is pursuant to a cooperative arrangement between the Federal authorities and the authorities of the District of Columbia whereby each contributes a share of enforcement expenses, the District of Columbia assigning its police to aid the enforcement officers, and bearing other expenses.

It is not generally authorized to charge the transportation or traveling expenses of other than officers and employees of the Government under appropriations made for the Federal departments and establishments, and it would appear, since the eighteenth amendment to the Constitution of the United States authorizes and contemplates concurrent enforcement, that the States and the counties, districts, and municipalities thereof, cooperating with the Federal enforcement agencies, should provide their officers with the means of accomplishing their transportation. However, if payment of such transportation expenses under the appropriation for enforcement of national prohibition is absolutely necessary to accomplish the purposes for which such appropriation is made, and if that is clearly made to appear in connection with the vouchers, etc., supporting such payments as are made, no objection will be raised to such payments if they are otherwise proper.

(A-3957)

LEASES—RENT—RESTORATION OF PREMISES AT EXPIRATION OF LEASE

A lease providing for the return of the property in like good order and condition as when received, reasonable use and wear thereof and damage by fire or other unavoidable casualty excepted, does not render the United States liable for the cost of restoration, unless it is shown that the wear and tear were unreasonable.

The United States is not liable for unpaid rent under a lease prior to its effective date, in the absence of an affirmative showing that it was in actual possession or control of the property during the period.

Decision by Comptroller General McCarl, August 26, 1924:

James P. Donahue requested July 7, 1924, review of settlement No. M-14896, dated September 25, 1923, disallowing his claim in the sum of $500 as estimated cost of restoring the Colfax Springs Railway property leased by the United States Veterans' Bureau under a lease agreement dated September 24, 1921, and presents an additional claim for rental of the premises from May 1, 1921, to July 30, 1921. The claim for restoration of the premises was disallowed on the ground that the lease made no provision for damages.

Under date of September 24, 1921, an Assistant Secretary of the Treasury wrote the Colfax Springs Railway Co. (Inc.) that its proposal of July 1, 1921, as amended by proposal of September 12, 1921, to lease to the United States for the use of the Public Health Service the Colfax Springs Railway property had been accepted, including all its rights and interests in the right of way, road bed, track, rolling stock and equipment and paraphernalia of all kinds whatsoever necessary or useful in the successful operation of the railroad property for the transportation of persons or material or supplies of any kind from a point at or near the depot in Colfax, Iowa, to the grounds of Public Health Service Hospital No. 75, Colfax, Iowa, the length of the track so leased being 1¼ miles more or less, the term of the lease to run from the date such property is delivered into the possession of the lessee and terminating June 30, 1923, contingent, however, upon the availability of appropriations from which rent for said property may be paid after June 30, 1922. The acceptance became the lease agreement, and it was therein mutually understood and agreed that in event such appropriations were not so available the agreement was to automatically terminate as of June 30, 1922, and the parties to the agreement released as if the agreement had run its full term. The United States agreed to pay a rental of $2,000 per annum, payable in equal monthly installments, and to return the property leased in like good order and condition as when delivered into its possession, ordinary wear and tear excepted. The lease provides:

6. That the lessee, at its own expense and with the consent of the lessor, which consent is hereby expressly given, shall have the right to alter or remodel the present rolling stock leased hereby in such manner as best to serve its interests in the transportation of patients, personnel, or material to and from the hospital site, and also to lay new track, using therefor surplus material of the railway if available, or to relay track at present in place, within the area leased to the United States by one James P. Donahue, under date of March 26, 1921, known as the Colfax Hotel and Mineral Springs property, in manner best fitted to expedite the loading, unloading, or handling of fuel and other supplies transported to and from the hospital over the leased property.

7. That at the termination of this agreement, by lapse of time or otherwise, the lessee will quietly and peaceably quit, relinquish, and give up the said leased property in like good order and condition as when same was taken over by the lessee, except that the lessor, if it shall so elect, shall have the right to demand return of the property in the changed condition resulting from operation by the lessee of the rights reserved under article 6 hereof, ordinary and reasonable wear and tear excepted in any event, as well as damage by fire or other unavoidable casualties.

After the expiration of the lease and on two separate occasions at the direction of the Director of the United States Veterans' Bureau, employees of the bureau made an examination of the released and surrendered premises for the purpose of determining the ex-

tent of the damage thereto and recommended that the claimant be allowed $500 damages in lieu of restoration of the premises. The alleged cost of the restoration for which claim is made consists of the following:

Reconditioning electric railway and equipment:	
Repairs to controller and motor on passenger car	$75
General repairs to car	30
Setting two poles	35
Realigning track	150
Clearing waterways	75
Resurfacing	115
Cleaning track on pavement	20
Total	500

Under the terms of the lease on vacation of the premises the obligation of the United States was not to restore the property to the condition in which it was prior to the occupancy, but to return it in like good order and condition subject to reasonable use and wear thereof. The Government is not responsible for any damage by the reasonable use and ordinary wear and tear. It had the free and unrestricted right to use the property for any and all purposes contemplated in the lease agreement. Whatever damages would necessarily result from the use contemplated by the lease must fall upon the lessor.

The facts now in evidence and the statement of the alleged damages clearly show that the wear and tear suffered were not beyond the usual and ordinary wear and tear, etc., incident to such occupancy and proper use, and in the absence of evidence showing that the damages as alleged were beyond the usual ordinary wear and tear, there is no legal liability on the part of the United States for payment of cost of restoration nor a lump sum in lieu of the claimed estimated cost thereof, if at all.

With reference to the claim for unpaid rental for the period May 1, 1921, to July 30, 1921, it is not shown and it does not appear that the United States was in possession or control of the premises during such period for which rental is claimed, nor that possession, use, or control was exercised by any authorized officer or agent of the United States during said period. The agreement under which the property was leased to the United States is dated September 24, 1921, and would indicate that the Government did not occupy or assume control of the premises until after that date. In the absence of any affirmative showing that the premises were actually in possession of the United States during the period for which rental is now claimed, the claim must be and is disallowed.

Upon review no differences are found and the settlement is sustained.

(A-3881)

PUBLIC BUILDINGS—REPAIRS AND ALTERATIONS

Section 1136, Revised Statutes, limits the total amount to be expended for the construction of permanent barracks or quarters and buildings in the absence of specific legislative authority to not exceeding $20,000 for any one structure, and the expenditure of an amount in excess of this limitation for the purpose of remodeling a building at an Army post into officers' quarters and the charging of the expenditure to two fiscal-year appropriations is unauthorized.

Decision by Comptroller General McCarl, August 27, 1924:

Settlement M-584877-W, dated September 26, 1923, disallowed the claim of Crane & Co. for $3,936.34, for material furnished the War Department for a heating plant at Fort Sill, Okla., in connection with the remodeling of a certain building into an apartment for officers' quarters. The claim was disallowed for the reason that the material used in the building made the expenditure in excess of a statutory limit of $20,000 for a single building.

Under date of June 13, 1922, the Secretary of War approved the expenditure of $20,000 for remodeling a building, C-3, Fort Sill, Okla., into 18 sets of quarters for officer-instructors. The facts in the case are summarized by the Quartermaster General in letter of March 22, 1924, to The Adjutant General of the Army, as follows:

1. Under date of June 13, 1922, the Secretary of War approved an expenditure of $20,000 for remodeling building C-3, Fort Sill, into 18 sets of quarters for officer-instructors. Telegraphic notice of this approval was forwarded to the post under date of June 24, 1922. Funds available at Fort Sill were to be used for this remodeling. A letter confirming the approval of the Secretary of War was mailed to Fort Sill on June 30, 1924. In this letter it was requested that two copies of plans and specifications be returned for file in this office. In order that funds might be obligated before the close of the fiscal year 1922, the following purchases were immediately made:

Bricks	$4,697.58
Lumber	13,411.21
	18,098.79

2. On July 27, 1922, after the beginning of the fiscal year 1923, a request for additional funds for the completion of this project was received from the quartermaster, Fort Sill. In accordance with this request the Secretary of War was requested to approve an expenditure of $1,900, making a total of $20,000 for building C-3. At the same time a request was submitted for an expenditure of $12,000 for remodeling a small building adjacent to building C-3 to house a heating plant. Approval for this expenditure was obtained on August 7, 1922, and Fort Sill was notified by telegram of August 8, 1922. The additional allotment of $1,900 for building C-3 proper and $12,000 for the heating plant was allotted from 1923 funds. A total of $32,000 was approved and authorized for these two projects from the two fiscal years 1922 and 1923.

3. When a final report was made by the Quartermaster, Fort Sill, in an effort to settle several outstanding accounts covering work done on this project, it was found that the following amounts had been actually obligated in connection with the reconstruction of the building and the construction of the heating plant:

B. & Q.	$30,820.35
R. S.	10,106.50
W. & S.	3,374.30
	44,301.15

The overdraft under the appropriation "B. & Q." was taken care of from annual repair funds.

It appears that August 18, 1922, claimant quoted estimates for material for the complete installation of a low-pressure steam-heating system, which was required for the building in question, and a written order therefor issued, material being delivered in October, 1922, invoiced at $3,949.54, less credits of $13.20, or $3,936.34.

Section 1136, Revised Statutes, provides:

> Permanent barracks or quarters and buildings and structures of a permanent nature shall not be constructed unless detailed estimates shall have been previously submitted to Congress, and approved by a special appropriation for the same, except when constructed by the troops; and no such structures, the cost of which shall exceed twenty thousand dollars, shall be erected unless by special authority of Congress. * * *

From the facts presented it is reasonably inferred the Secretary of War authorized the expenditure of $20,000 pursuant to statute cited and was aware of the limit provided for therein, and that the expenditure in excess of $20,000 without the approval of Congress would be unauthorized. The fact that the expenditure of $20,000 was authorized to be paid out of the 1922 appropriation and that the statutory limit was not exceeded and that the other expenditures were allocated to the 1923 appropriation does not validate the payments or take the case from under the provisions of section 1136, Revised Statutes; otherwise the very purpose of the statute would be defeated and there could be carried on an extended and continued building program by allocating the amount to be expended over succeeding fiscal years.

The act of June 30, 1921, 42 Stat., 68, making appropriations for the Army for the fiscal year ending June 30, 1922, provided (p. 83) for an expenditure of $6,860,000, which was made available "For barracks, quarters, * * * administration and office buildings * * * necessary for the shelter of troops * * * and for administration purposes * * *; for constructing and repairing public buildings at military posts; * * *."

There was also available $2,000,000 (p. 81):

> * * * for procuring and introducing water to buildings and premises at such military posts and stations as from their situations require to be brought from a distance; for the installation and extension of plumbing within buildings where the same is not specifically provided for in other appropriations; for the purchase and repair of fire apparatus * * * for repairs to water and sewer systems and plumbing * * *.

A similar provision for barracks and quarters appears in the act of June 30, 1922, 42 Stat. 732, for the fiscal year ended June 30, 1923. The said act of June 30, 1922, contained (p. 732) the following provision:

> For the construction and enlargement at military posts of such buildings as in the judgment of the Secretary of War may be necessary, including all appurtenances thereto, $910,000, including $400,000 for continuing construction of post at Fort Benning, Georgia: *Provided*, That apartment buildings may be constructed out of this appropriation at a cost not to exceed $150,000 each, and to provide for not less than eighteen families each; $55,000 for construction

of one hospital ward at Letterman General Hospital, San Francisco, California; $262,000 for general construction at Edgewood Arsenal and Camp Lewis; and $198,000 for continuing construction and enlargement of barracks for guards at the United States disciplinary barracks, Fort Leavenworth, Kansas.

The provision of this act with reference to the construction of apartments was no authority for the remodeling of barracks or structures already erected. The payments in excess of $20,000 for the work in question were made in violation of section 1136, Revised Statutes.

There is no authority of law for payment of the claim presented. Upon review the settlement is sustained.

(A-2356)

SEAMEN, DISCHARGED AMERICAN—DISPOSITION OF EXTRA WAGES COLLECTED BY CONSULAR OFFICER

Where American seamen were discharged upon request of the master of the vessel who charged insubordination, etc., and the consular officer, being in doubt as to the innocence or guilt of the seamen, required the master to pay an amount representing one month's extra wages of the seamen, which was forwarded to the General Accounting Office and deposited in the special deposit account of the disbursing clerk, authorization may be granted for issuance of checks to the discharged seamen for the amount of the extra wages thus collected, upon certification by the Secretary of State that the seamen were not at fault, the checks to be delivered in care of the United States shipping commissioner of the proper port.

Comptroller General McCarl to the Secretary of State, August 28, 1924:

Reference is made to your letter of April 16, 1924 (C. O.-196.3/517), forwarding draft for $302.50, representing amount collected by the American consul at Alexandria, Egypt, as extra wages due three seamen—George Milne, William Lasche, and Jack McGrae—who were discharged from the steamship *Selma City* December 27, 1923, by the United States consul on the request of the master of the vessel.

The amount of the draft has been deposited to the credit of the special deposit account of the disbursing clerk of the General Accounting Office.

In your letter of May 29, 1924, you reported that the three seamen were discharged on December 27, 1923, on charges of insubordination and because of other complaints of the master of the vessel, and that when discharged the American consul collected one month's extra wages in behalf of each seaman.

Section 4581, Revised Statutes, as amended by section 16 of the act of December 21, 1898, 30 Stat. 759, requires the master of a vessel to provide discharged seamen with employment on another vessel

agreed to by the seamen or to provide one month's extra wages "if it shall be shown to the satisfaction of the consul that such seaman was not discharged for neglect of duty, incompetency, or injury incurred on the vessel."

This was a case, evidently, where the consul could not decide the innocence or guilt of the seamen or whether extra wages were or were not due the seamen. In such case paragraph 253, United States Consular Regulations, provides as follows:

Doubtful cases.—In cases of doubt, in which from any cause the consular officer is unable to decide to his satisfaction whether the extra wages should be collected or not, it will be the preferable and safer course for him to require their payment. The master or agent of the vessel should be permitted to make the payment under protest, if he shall see fit. A full statement of the facts should be promptly communicated to the Department of State, when the case will be examined, and restitution will be made if the circumstances are deemed to warrant it. A like report should also be made to the Auditor for the State and Other Departments to accompany the quarterly relief return to that officer.

Executive Order No. 3731, dated September 5, 1922, directed the substitution of the "Comptroller General of the United States" in lieu of "Auditor for the State and Other Departments."

In your letter of April 16, 1924, you certified due the three seamen the following amounts:

George Milne	$165.00
William Lasche	75.00
Jack McGrae	62.50
Total	302.50

In your letter of May 29, 1924, this action was explained as follows:

This action was taken in view of the fact that First Officer Milne, a licensed officer, was tried before the board of local inspectors, Steamboat Inspection Service, New York City, and acquitted of the charge of insubordination. Mr. Lasche and Mr. McGrae, whose cases were not within the jurisdiction of the inspection service, were not tried, but one of them appeared as witness in the case. Inasmuch as these two seamen were discharged on grounds similar to those on which the discharge of the first officer was effected, and since the first officer was exonerated upon trial, and no action apparently has been taken against the other seamen, the department expressed the opinion in its letter to you under reference that they as well as Mr. Milne were entitled to the month's extra wages, and requested that appropriate action be taken with a view to the settlement of the matter.

Accordingly the disbursing clerk of this office has this day been requested to issue checks to the three seamen in the amounts indicated, and the checks have been directed to be forwarded care of United States Shipping Commissioner, New York City.

(A-3858)

TRAVEL ALLOWANCE—ENLISTED MEN OF NAVY DISCHARGED

Where the Navy Department directs the discharge of enlisted men upon their request for the purpose of reducing the complement of enlisted men so as to keep the expenditures under "Pay of the Navy" within the amount appropriated by Congress, the primary purpose of discharge is "for the convenience of the Government" and the men so discharged are entitled to travel allowance.

Decision by Comptroller General McCarl, August 28, 1924:

Lieut. Robert C. Vasey (S. C.), United States Navy, applied July 5, 1924, for review of settlement No. N-3336-E dated November 16, 1922, wherein credit was disallowed for a total of $3,008.25; and suspended for a total of $4,441.65, which amounts represent travel allowances paid to various men discharged under honorable conditions between January 3 and March 24, 1922, and more than three months prior to expiration of enlistments or extended enlistments.

The discharges of the men in question were granted upon their requests, and are stated as being "for the convenience of the Government."

Credit for these payments was denied in the audit of the accounts on the ground that the demobilization of the Navy was complete, and that therefore these discharges were for the convenience of the men.

Whether a man is discharged for the convenience of the Government or for his own convenience is a matter of fact, and statements in the order of discharge are not controlling, 5 Comp. Dec. 939; 6 *id.*, 326.

On December 12, 1921, the commandant of the naval training station, San Francisco, Calif., announced the receipt of the following dispatch from the Bureau of Navigation:

6310. Discharge by special order Bureau of Navigation without refund as soon as possible one hundred fifty men who so request period. It is not desirable to discharge recruits or men under training period Radiomen and men under instruction or training will not be included in ratings so discharged under this order period All discharges authorized herein are for convenience of Government period Report by dispatch each Saturday night number men so discharged until quota completed 1440.

The Navy Department directed the discharge of these men upon their request for the stated purpose of reducing the complement of enlisted men so as to keep the expenditures under "Pay of the Navy" within the amount appropriated by Congress. A discharge "for the convenience of the Government" is consistent with the reasons stated. See in this connection the subsequent statutory requirement for the reduction of the enlisted personnel of the Navy, act of July 1, 1922, 42 Stat. 799, *et seq.*

Even though the men requested to be discharged, the fact that the applications for discharge were inspired by suggestion of the de-

partment because of necessity to keep down expenditures under the appropriation "Pay of the Navy," gives to the discharges a governmental or public interest and may in such circumstances be considered primarily "for the convenience of the Government." See 1 Comp. Gen. 157, and 3 MS. Comp. Gen. 1528, November 28, 1921; 25 *id.* 523, September 18, 1923; 25 *id.* 552, September 19, 1923; and 35 *id.* 638, July 16, 1924.

Upon review the settlement is modified, $3,008.25 is certified for credit in the account of Lieut. Robert C. Vasey, and the suspensions totaling $4,441.65 will be removed.

(A-4327)

APPROPRIATIONS AUTHORIZED OR MADE

No act of Congress may be construed as making an appropriation unless it specifically declares an appropriation to be made.

The act of June 28, 1921, 42 Stat. 67, authorizing the Secretary of the Navy to examine and appraise the value of the privately-owned rights of fishery in Pearl Harbor, island of Oahu, Territory of Hawaii, and to enter into negotiation for the purchase of said rights, authorizes a sum to be appropriated, to be immediately and continuously available until expended, and is an "authorization act" as distinguished from an "appropriation act," and no payment may be lawfully made from the Treasury until Congress makes an appropriation to carry out the intentions of the act.

Comptroller General McCarl to the Secretary of the Navy, August 28, 1924:

I have your letter of July 26, 1924, relative to the authority granted in the act of June 28, 1921, 42 Stat. 67, to examine and appraise privately-owned rights of fishery in Pearl Harbor, island of Oahu, Territory of Hawaii, and to make contracts for the purchase of same subject to future ratification and appropriation by Congress.

You state that after an investigation you have reached the decision that it is impracticable to make contracts for the purchase of these rights, and, consequently, have found it necessary to request the Attorney General to institute condemnation proceedings pursuant to the provisions of the act referred to, but because of certain expenses in connection with the work, you request to be advised whether there is an appropriation of funds available at this time to meet the expense.

The act of June 28, 1921, 42 Stat. 67 provides:

That the Secretary of the Navy is hereby authorized to examine and appraise the value of the privately owned rights of fishery in Pearl Harbor, island of Oahu, Territory of Hawaii, from an imaginary line from Kaak Point to Beckoning Point, both within said harbor, to the seaward, and the privately owned rights of fishery in and about the entrance channel to said harbor, and to enter into negotiations for the purchase of the said rights and, if in his judgment the price for such rights is reasonable and satisfactory, to make contracts for the purchase of same subject to future ratification and appropriation by Congress; or in the event of the inability of the Secretary of the Navy to make a satisfactory contract for the voluntary purchase of the said rights of fishery, he is hereby authorized and directed through the Attorney General

to institute and carry to completion proceedings for the condemnation of said rights of fishery, the acceptance of the award in said proceedings to be subject to the future ratification and appropriation by Congress. Such condemnation proceedings shall be instituted and conducted in, and jurisdiction of said proceedings is hereby given to the district court of the United States for the district of Hawaii, substantially as provided in "An Act to authorize condemnation of land for sites for public buildings, and for other purposes," approved August 1, 1888; and the sum of $5,000 is hereby authorized to be appropriated, to be immediately and continuously available until expended, to pay the necessary costs thereof and expenses in connection therewith. The Secretary of the Navy is further authorized and directed to report the proceedings hereunder to Congress.

Section 9 of article 1 of the Constitution of the United States provides that:

No money shall be withdrawn from the treasury, but in consequence of appropriations made by law * * *.

The act of July 1, 1902, 32 Stat. 560, provides:

Hereafter no Act of Congress shall be construed to make an appropriation out of the Treasury of the United States unless such Act shall, in specific terms, declare an appropriation to be made for the purpose or purposes specified in the Act.

The act of June 30, 1906, 34 Stat. 764, provides:

SEC. 9. No Act of Congress hereafter passed shall be construed to make an appropriation out of the Treasury of the United States, or to authorize the execution of a contract involving the payment of money in excess of appropriations made by law, unless such act shall in specific terms declare an appropriation to be made or that a contract may be executed.

The act of June 28, 1921, *supra*, authorizes an appropriation to be made, but does not in specific terms declare an appropriation to be made. In other words, it is an authorization act as distinguished from an appropriation act. In this connection see 20 Op. Atty. Gen. 147; 55 MS Comp. Dec. 1, October 1, 1910; *id.*, 907, November 29, 1910; 64 *id.*, 1374, March 20, 1913; 66 *id.*, 135, July 15, 1913; 67 *id.*, 201, October 15, 1913; 73 *id.*, 195, April 16, 1915.

You are advised, therefore, that no payment from the Treasury can lawfully be made under the act of June 28, 1921, *supra*, until Congress makes an appropriation to carry out its intentions as therein expressed.

(A-4355)

EFFECTIVE DATE OF PROMOTION OF A PUBLIC HEALTH SERVICE OFFICER

An oath taken by a commissioned officer of the Public Health Service prior to his appointment in a higher grade is not effective to entitle him to pay of the higher grade from the date of such oath.

A passed assistant surgeon of the Public Health Service promoted to surgeon by appointment confirmed by the Senate March 5, 1924, and commissioned March 7, 1924, is not entitled to pay under said appointment prior to his acceptance of the appointment after its issuance, and an oath taken January 16, 1924, does not entitle him to pay of the higher grade from that date.

Decision by Comptroller General McCarl, August 28, 1924:

There is for consideration the question whether Edward C. Ernst, surgeon (regular), Public Health Service, is entitled to pay as surgeon from January 16, 1924, date of oath, which was taken prior to appointment and commission as such.

It appears that a permanent commission dated March 7, 1924, issued appointing Passed Assistant Surgeon Edward C. Ernst as a surgeon in the United States Public Health Service (regular), to rank as such from January 15, 1924. The appointment had been transmitted to the White House February 6, 1924. The nomination made by the President was forwarded to the Senate on February 8, 1924, and there confirmed March 5, 1924.

The question is whether Surgeon Ernst is entitled to pay of a surgeon under that commission from and including January 16, 1924, date on which he is purported to have taken oath under said appointment, and which is the date of rank as stated in commission.

In 19 Comp. Dec. 632, it was held that a passed assistant surgeon of the Public Health Service who has passed the examination for promotion to surgeon and been nominated, confirmed, and commissioned as such, is not entitled to be paid as surgeon until he has taken the oath required by the act of May 13, 1884, 23 Stat. 22, and prescribed by section 1757, Revised Statutes, as follows:

SEC. 1757. Whenever any person who is not rendered ineligible to office by the provisions of the fourteenth amendment to the Constitution is elected or appointed to any office of honor or trust under the Government of the United States, and is not able, on account of his participation in the late rebellion, to take the oath prescribed in the preceding section, he shall, before entering upon the duties of his office, take and subscribe in lieu of that oath the following oath: "I, A B, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God."

The same principle was held in 2 Comp. Gen. 697, in the case of an assistant surgeon promoted to passed assistant surgeon. In that case Assistant Surgeon John F. Steele was issued a commission as passed assistant surgeon, dated October 16, 1922, to be effective on October 19, 1922. Doctor Steele took oath under that commission on October 28, 1922, but made no further formal acknowledgment of acceptance of the commission. The question was whether in order to render the promotion effective so as to entitle him to the pay of the higher grade any further formal acknowledgment of acceptance of commission was necessary, and the answer was that Doctor Steele was entitled to the pay of a passed assistant surgeon on and after date he executed oath of office; that is, the execution of the oath was sufficient evidence of acceptance of the office, and upon accept-

ing office and entering on its duties right to the emoluments thereof accrued.

The law makes no provision for giving retroactive effect to the commission nor can it be made retroactive by taking oath in anticipation of the commission being issued. Apparently, in this case, Doctor Ernst in anticipation that commission would issue, took the oath on January 16, 1924. He could not have become invested with the office of surgeon prior to issue of appointment to that grade. The oath taken prior to appointment was not an oath in recognition of the appointment and therefore was not an oath within the requirement of the statute. The rate of pay attaches to the office and pay does not accrue until the officer becomes legally invested with the office, notwithstanding the date of rank as stated in the commission may antedate the commission.

Accordingly, the oath taken by Doctor Ernst on January 16, 1924, is not effective so as to entitle him to pay under his commission as surgeon issued March 7, 1924, nor is it effective to authorize pay of the higher grade from January 16, 1924.

(A-4756)

APPROPRIATIONS—VETERANS' BUREAU

Section 15 of the act of June 7, 1924, 43 Stat. 611, authorizing sums heretofore appropriated for carrying out the provisions of the War Risk Insurance Act and amendments thereto "to be expended in such manner as the director deems necessary" does not appropriate additional funds, but like section 8 of the act of August 9, 1921, 42 Stat. 149, merely imposes upon the director the duty of and authority to expend the then current and subsequent appropriations with fiscal year limitations, and the other appropriations without fiscal year limitations, which appropriations theretofore had been authorized to be expended by others.

Current appropriations of the Veterans' Bureau are available only for payment of obligations properly incurred thereunder, and unpaid vouchers otherwise properly chargeable under the appropriation for "Vocational Rehabilitation, 1923," are payable under that appropriation, to the extent that the balance thereunder is sufficient to pay them, the items in excess of such balance being in the status of deficiency items.

Comptroller General McCarl to the Director, United States Veterans' Bureau, August 28, 1924:

I have your letter of August 13, 1924, reading:

At the present time there are a great many unpaid vouchers in this Bureau properly chargeable to the appropriation, "Vocational Rehabilitation, 1923," which has been exhausted. It has occurred to me that the legislation contained in Section 15 of the World War Veterans' Act, 1924, might be construed to permit payment from the current year's appropriation under this title of expenses which would ordinarily be payable only from the appropriation for the fiscal year 1923.

It has also been suggested that Section 15 might be held to make available appropriations made for prior fiscal years where unexpended. If the unpaid bills referred to and others which may be submitted from time to time could be paid under any funds made available by Section 15, it would greatly relieve

the Bureau in permitting settlement without the delay incident to obtaining another deficiency appropriation.

It will be appreciated if you will advise me whether the course proposed to take care of these outstanding obligations is available so that they can be paid by the Bureau as suggested.

Section 4, Title I, of the act of June 7, 1924, cited as the "World War Veterans' Act, 1924," 43 Stat. 608, provides:

There is established an independent bureau under the President to be known as the United States Veterans' Bureau, the director of which shall be appointed by the President by and with the advice and consent of the Senate. The Director of the United States Veterans' Bureau shall receive a salary of $10,000 per annum, payable monthly.

Section 15, Title I, of the same act, 43 Stat. 611, provides:

All sums heretofore appropriated for carrying out the provisions of the War Risk Insurance Act and amendments thereto and to carry out the provisions of the Act entitled "An Act to provide for vocational rehabilitation and return to civil employment of disabled persons discharged from the military or naval forces of the United States, and for other purposes," approved June 27, 1918, and amendments thereto, and all sums heretofore appropriated for carrying out the provisions of the Act entitled "An Act to establish a Veterans' Bureau and to improve the facilities and service of such bureau, and further to amend and modify the War Risk Insurance Act," approved August 9, 1921, and amendments thereto shall, where unexpended, be made available for the bureau and may be expended in such manner as the director deems necessary in carrying out the purposes of this Act.

Section 1, Title I, of the act of August 9, 1921, 42 Stat. 147, entitled "An act to establish a Veterans' Bureau and to improve the facilities and service of such bureau, and further to amend and modify the War Risk Insurance Act," provides:

There is hereby established an independent bureau under the President to be known as the Veterans' Bureau, the director of which shall be appointed by the President, by and with the advice and consent of the Senate. The director of the Veterans' Bureau shall receive a salary of $10,000 per annum, payable monthly.

Section 8, Title I, of the same, provides:

All sums heretofore appropriated for carrying out the provisions of the War Risk Insurance Act and amendments thereto, and to carry out the provisions of the Act entitled "An Act to provide for vocational rehabilitation and return to civil employment of disabled persons discharged from the military or naval forces of the United States, and for other purposes," approved June 27, 1918, and amendments thereto, shall, where unexpended, be made available for the Veterans' Bureau, and may be expended in such manner as the director deems necessary in carrying out the purposes of this Act, with the restrictions heretofore imposed as to number of persons that may be employed at stated salaries.

The apparent purpose of section 8 of Title I of the act of August 9, 1921, was to impose and confer upon the director of the newly created bureau, "to be known as the Veterans' Bureau," the duty of and authority to expend the then current and subsequent appropriations with fiscal year limitations and the other appropriations without fiscal year limitations, which appropriations theretofore had been authorized to be expended by others. The duty and authority imposed and conferred by section 15 of the act of

June 7, 1924, appears the same, there appearing no purpose to provide additional appropriations to supply deficiencies in prior appropriations, or to reappropriate for current obligation unexpended balances of appropriations no longer available for obligation, or otherwise.

Current appropriations of the United States Veterans' Bureau are available only for payment of obligations properly incurred thereunder, and unpaid vouchers otherwise properly chargeable under the appropriation for "Vocational Rehabilitation, 1923," are payable under that appropriation, to the extent that the balance thereunder is sufficient. The items represented by the vouchers in question, to the extent that the balance under the appropriation in question is insufficient, are in the status of deficiency items, and there appears nothing in section 15 of the act of June 7, 1924, warranting their payment either under current or otherwise inapplicable appropriations. The decision is accordingly.

(A-3099)

PATENTS—PAYMENT OF ROYALTIES

The right to royalty rests upon the existence of a patented invention, and in the absence of a patent grant there exists no consideration such as would support a contract providing for the United States to pay a stipulated sum for the right to have airplanes of a certain design constructed by others.

Where the claimant company and the manufacturers of a particular type of aircraft for the United States were associate members of the Manufacturers' Aircraft Association, having reciprocal rights to use all patents owned by each member, the use by one member of any patent feature asserted to be owned by the claimant company in contracts entered into with the United States for the manufacture of airplanes would not render the United States liable for the payment of royalty.

A contract stipulating that after 100 of a particular type of airplane had been constructed by the claimant company or an allied corporation the payment of royalty would be thereafter waived, the right to such royalty is barred where it appeared that 266 such craft of that type had been constructed by claimant company and an allied corporation.

Decision by Comptroller General McCarl, August 29, 1924:

Thomas-Morse Aircraft Corporation requested May 23, 1924, review of settlement No. W-023261, dated May 7, 1924, disallowing its claim for $10,000 representing an assertion to the right of royalty in that sum at the rate of $200 each on 50 airplanes of a total of 200 airplanes which the Government had manufactured by the Boeing Airplane Co., under a contract dated April 8, 1921. The claim was disallowed on the ground that there was no legal liability on the United States for royalty by reason of the manufacture of these particular airplanes.

As the grounds for review, claimant states that the reasons given in the disallowance are not a true interpretation of the Boeing con-

tract No. 365, dated April 8, 1921, particularly in connection with paragraph (1) of Article VI, which it is urged states that the Boeing Co. protects the Government against rights owned or enjoyed by them and patents covered by the cross-license agreement, but that paragraph (2) of Article VI of the contract provides that the Government will hold the contractor (the Boeing Co.) harmless against all other such claims, and cites decision dated January 31, 1924, review 5842—The Ordnance Engineering Corporation.

The basis of this claim is a contract between the Government and claimant dated November 4, 1918, whereby the claimant agreed to construct for the Government:

Four (4) experimental Thomas-Morse, MB–3, single-seater fighter airplanes, designed and built around the 300 H. P. Hispano-Suiza engine; to be constructed in conformity with the contractor's designs and specifications, approved by the Airplane Engineering Division, and subject to such major changes as may be made by the chief of engineering of said division; that said designs and specifications and changes when made, being incorporated herein by reference, and forming a part of this contract.

It is further provided in this contract, Article I, that:

It is expressly understood and agreed between the parties hereto that should the above design be approved and adopted by the United States or its allies, the complete right and license to manufacture, to cause to be manufactured, and to use, articles similar to the articles contracted for herein, shall be given by the contractor to the Government for itself and its allies under a supplemental agreement to be hereafter entered into, under such terms and conditions as may be prescribed by the Director of Aircraft Production.

The first three airplanes constructed hereunder shall be similar, except that the first one, built without engine, armament, instruments, or standard accessories, shall be for sand test; the second, third, and fourth airplanes fully equipped, for flight-test purposes; all tests to be conducted by the Government. The fourth airplane constructed hereunder shall be built with double ailerons, unless changed as above set forth.

ARTICLE II

* * * * * * *

The Government will furnish or cause to be furnished to the contractor motors, instruments, armament, and standard accessories to be installed in the airplanes to be constructed under this contract. Also, if requested, the Government may, under an act approved July 9, 1918 (Public Act No. 193, 65th Congress), and letter of the Secretary of War to the Director of Aircraft Production of August 9, 1918, sell the contractor equipment, materials, supplies, or parts: *Provided*, That the contracting officer may permit the cost of such equipment, materials, supplies, or parts to be deducted from the amount to be paid under Article IV hereof, but in no event shall more than two-thirds of the total contract price be deducted on account of any such equipment, materials, supplies, or parts which may be furnished.

* * * * * * *

ARTICLE III

Whenever requested so to do, the contractor will furnish to the contracting officer a full statement and report of the progress of the work up to and including the date of the receipt of the request, together with an itemized statement of the expense incurred up to such date, and a statement of the total progress made.

ARTICLE IV

The price to be paid by the Government to the contractor for the proper performance of this contract is the sum of sixty-six thousand dollars ($66,000.00), which sum shall include all labor, material, overhead, and other general and incidental charges, and whatever experimental work and charges therefor have accrued or may hereafter accrue in connection with the experimental or other work necessary to the construction of the above articles; said sum shall be payable in the manner set forth in Article V hereof and on the following basis:

Upon delivery to and acceptance by the Government of the first airplane, $26,000; upon delivery to and acceptance by the Government of the second airplane, $14,000; upon delivery to and acceptance by the Government of the third airplane, $14,000; upon delivery to and acceptance by the Government of the fourth airplane, $12,000.

By a supplemental agreement to the foregoing contract dated December 13, 1919, entered into to adjust some differences of payments arising out of the aforesaid contract, it is provided relative to the stipulations in the former contract concerning the right of the Government to have manufactured additional planes to those built under that contract, as follows:

Provided, The Government may, if it so desires, put said Thomas-Morse MB–3 airplane into production without restriction and free from any claims or demands of the Thomas-Morse Aircraft Corporation, its assigns, representatives, employees, or other cooperators, if it shall pay to said corporation a royalty fee of $200.00 for each such airplane so produced: *Provided further*, That all payment of royalty fees shall cease when said corporation shall have received therefrom a total of $20,000.00, it being understood, however, that should said corporation, or a subsidiary or allied corporation, produce one hundred or more of such airplanes for the Government, then and in that event said Thomas-Morse Aircraft Corporation waives the payment of all royalty fees: *And provided further*, That should the Government put said airplanes into production without paying said royalty fee, said Thomas-Morse Aircraft Corporation does not, in such event, waive any rights it may have to seek recovery from the Government.

It is noted that Article I of the contract of November 4, 1918, gives the United States the complete right and license to manufacture, to cause to be manufactured, and to use, without restriction, the Thomas-Morse MB–3, single-seater, fighting airplane, or any part thereof, "under such terms and conditions as may be prescribed by the Director of Aircraft Production." The supplemental agreement of December 13, 1919, undertakes to prescribe the terms of such license to so manufacture and use that design of aircraft but there is no indication that the terms there agreed upon were prescribed by the Director of Aircraft Production. Said supplemental agreement is not signed or approved by the director or his successor. Whether or not an officer or agent of the United States may prescribe terms prejudicial to the United States is a question of much doubt and it would seem that the weight of authority is in favor of holding that such officer or agent must prescribe terms least expensive to his principal. Waiving for the present any question as to the validity of the undertaking as to "royalty," the powers and duties of the officer or agent, the existence of prescribed terms, or whether the Government is otherwise entitled to an unrestricted use of the design

in question, the specific sum claimed is asserted under a contract entered into by the Government with the Boeing Airplane Co., dated April 8, 1921, for—

Two hundred (200) type MB–3 single-seater pursuit airplanes, each built around a 300-H. P. Wright H., H–2, or H–3 aeronautical engine, and each constructed in accordance with the sample airplane hereinafter mentioned, in accordance with all of the changes enumerated in paragraph 2 of Section II of the attached specification, and also in accordance with said specification, attached hereto and hereby made a part hereof, in so far as said specification is not otherwise inconsistent with the said sample airplane; provided the said specification shall always govern with respect to materials and workmanship in all cases where the quality of materials or workmanship in the sample airplane is inferior to the requirements of the specification.

It was the apparent intention to have manufactured through the medium of this contract 200 airplanes designated MB–3, similar to those built for the Government by the claimant company under contract dated November 4, 1918, and presumably to guard against possible complications that might arise from constructing these additional airplanes in accordance with that model, the following reciprocal provisions were incorporated in the Boeing contract, viz:

ARTICLE VI

(1) The contractor will hold and save the Government, its representatives, and all other persons acting for it as agent, contractor, or otherwise, harmless from all demands or liabilities for alleged use of any patented or unpatented invention, secret process, or suggestion in, or in the making or supplying of, the articles and/or spare parts herein contracted for, and for alleged use of any patented invention in using such articles and/or spare parts for the purpose for which they are made or supplied, where the demand or liability is based on patents that are owned or controlled by, or under which and to the extent that rights are enjoyed by, the contractor, its officers or employees, or persons in privity with the contractor, or is based on patents or rights that are enjoyed by members of the Manufacturers' Aircraft Association, or on patents or rights that are cross-licensed under the so-called cross-license agreement and/or its supplements, under which the members of said association are entitled to the use of certain patents; and if and when required, will discharge and secure the Government from all demand or liability on account thereof by proper release from the patentees or claimants; but if such release is not practicable, then by bond or otherwise, and to the satisfaction of the Chief of Air Service.

(2) The Government will, without limitation to the time of completion of this contract in other respects, hold and save the contractor harmless from all demands or liabilities for alleged use of any patented or unpatented invention, secret process, or suggestion in, or in making or supplying, the articles and/or spare parts herein contracted for, and for alleged use of any patented invention in using such articles and/or spare parts for the purpose for which they are made or supplied, where the demand or liability is based on patents that are not owned or controlled by or under which rights are not enjoyed by the contractor, its officers or employees, or persons in privity with the contractor, or is based on patents that are not enjoyed by members of the Manufacturers' Aircraft Association, or patents or rights that are not cross-licensed under the said cross-license agreement or any supplements thereto, provided immediate notice of any such demand or liability and of any legal proceedings connected therewith is given in writing by the contractor to the contracting officer, and provided further, that the Government may intervene in any such demand or proceeding and in its discretion may defend the same or make settlement thereof, and the contractor shall furnish all information in its possession and all assistance of its employees requested by the Government.

The specific purpose of these two provisions is understood to be that the contractor, the Boeing Airplane Co., is to protect the Government from all liability that might arise from the use in the execution of this contract for constructing MB–3 airplanes, of any patent rights owned or enjoyed by it, the manufacturers' aircraft association or rights that are cross licensed under the so-called cross-license agreement and its supplements, and the Government is to protect the Boeing Airplane Co., from liability arising from the use of any patents not owned by it or the aircraft association or cross licensed between such membership.

While the action here taken deals primarily with the contractual rights of claimant to royalty on the airplanes it should be observed that no evidence has been furnished showing that any of the airplanes manufactured by or for the United States of the MB–3 type are of claimant's design, it not appearing that claimant is the originator of the MB–3 airplane or if it is the originator thereof that the type originally designed was approved and adopted with reference to the total of 266 airplanes of that description manufactured. If claimant were otherwise entitled it would be incumbent upon it to furnish such evidence in advance of favorable consideration. It must also show that it is the original inventor of new and useful improvements which have not been dedicated to the public.

It is not sufficient that claimant design an airplane manufactured for the Government but that such design be new and useful, and before claimant is entitled to a royalty for the use of its invention it must meet the requirements of the several statutes under which it may be entitled to a patent granting a monopoly on the invention. It is not entitled to the exclusive use thereof until a patent is granted and a patent is prospective only and carries with it no retroactive rights. There is no obligation upon the Government to pay a royalty on the use of the invention prior to the granting of a patent therefor. It does not follow, however, that the granting of a patent is conclusive evidence of patentee's rights, for it is competent for the Government to show that the use of the patented invention was not an infringement thereof. Act of June 25, 1910, as amended by act of July 1, 1918, 40 Stat. 705.

In *Dable* v. *Flint*, 137 U. S. 41, it was held that neither an inventor nor an author has any exclusive right to property in his invention or writing after publishing it, except under and by virtue of the statutes securing it to him, and in accordance with the regulations and restrictions of such statutes. In *Gayler* v. *Wilder*, 10 How. (U.S.) 477, the majority opinion said no suit can be maintained by the inventor against anyone for using it before the patent is issued. As in other contractual relations an implied license may arise through

the acts of the owner of a patent or invention or as a result of the terms or circumstances of the employment of the inventor. Mere acquiescence for a valuable consideration is sufficient to create a license. The terms and circumstances between an employer and employee may entitle the employer to the ownership of a patent, to the license to make use and sell the invention or to a more limited license sometimes defined as "shop right," indicating generally a right of the employer to use the invention in his factory but not to make or sell the invention. Section 4899, Revised Statutes, provides that persons purchasing of the inventor before application may use or sell the thing purchased and it has been held that a previously purchased machine can be no infringement during an extension of the term. See *Paper Bag Machine cases*, 105 U. S. 766. Examples of irrevocable licenses to an employer by the terms of employment are found in *Solomons* v. *United States*, 137 U. S. 342; *Lane & Bodley* v. *Locke*, 150 *id.* 193; *Gill* v. *United States*, 160 *id.* 426. See 1 Rogers on Patents 178, 179, and 194. While a contractor employed by the United States to produce a certain article would seem to be an "employee" within the principles relating to patents it is not now necessary to further consider that question.

One of the essential elements of a valid contract is the matter of consideration, for without something which the courts can recognize as of adequate consideration a contractual agreement is unenforcible; consequently there is for ascertainment the consideration which is sufficient to support the provisions in the contract of November 4, 1918, and bind the Government to pay $200 for every MB–3 airplane which it may have manufactured for it by some manufacturer other than the claimant company. The consideration in this case is designated as a "royalty," and this term is recognized and defined to be payment made to a patentee for the right to make, sell, or use a patented article. A patent upon which the right to demand royalty rests is defined in one sense as the right granted by the Government to an individual to prevent the use of a patented article by others, 30 Cyc. 817, except upon concession and terms satisfactory to the patentee.

The right to royalty and its value as a consideration to support an enforcible contract therefore rests upon the existence of patent rights granted upon this special model of airplane, or some essential feature of it, which an unauthorized use by the Government would constitute an infringement of that patent.

An examination of the contract for the original four style MB–3 airplanes discloses that they appear to have been built more or less experimentally, this being evidenced both by the graduated prices charged as well as the rather comprehensive detailed specifications

provided by the Government, together with the supplemental contracts covering construction changes. From the history of the progress in the development of the airplanes by well-known pioneers in that field, together with the rapidly changing requirements developed by the stress and experience of war, it is safe to say that possibly all that the MB–3 plane embodied of any possible patentable feature that could confer any proprietary patentable right upon the claimant company was some subordinate detail and not a distinctively new model of craft.

The archives of the Patent Office have been examined and only two patents have been located, both covering subordinate features of such craft, each issued to B. D. Thomas, one of which, No. 1370242, is dated as patented March 1, 1921, and another, No. 1389106, is dated as patented August 30, 1921. If, as it seems, these are the only patents owned by the claimant company then they were not in existence at the time the supplemental agreement of December 13, 1919, was entered into and as the basis for the granting of any privilege or license could not comprise a claim to royalty as a consideration to support a contract. It is necessary in an agreement based upon a license as the subject matter to support the reciprocal consideration in an agreement of this kind that the particular patent be set forth for which use a license is granted. In the absence of a showing of such patent rights the existing agreement fails to establish the right to any claim of royalty from the Government, and becomes merely a *nudum pactum*. In advance decision dated June 22, 1923, No. 7731, with reference to this identical claim it was said that if there is no legal obligation on the part of the Government to pay the royalty in question the proposed contract (for payment of the royalty claimed) would impose no such obligation, because it does not even purport to give or secure to the Government any additional right, benefit, privilege, or thing of value; in other words, it is without consideration moving to the Government.

From a careful examination of the several contracts involved it appears that such design of airplane as was originally offered by claimant was so changed as to cause the manufacture and delivery of an airplane differing materially in design and structure. During the periods of performance of these contracts many changes were made at the direction of the Government, some of which appear to be departures not only from the original design but even with reference to claimant's alleged inventions, and in other particulars improvements were made of such character as to suggest original invention by Government officers and employees, not to mention such new and useful inventions by them originating from time to

time throughout the development of the art of heavier-than-air flying machines, as to which there can be no infringement by the Government. During the testing of the first airplanes being manufactured under the contract of June 19, 1920, it developed that the airplanes manufactured, presumably in accordance with claimant's design, were unsafe and dangerous. See report of Lieutenant McCready, dated April 6, 1921. Thereupon, further changes and improvements were made in the construction, for which claimant received additional compensation, about $100,000. Whether or not the defects in construction were such as claimant should have remedied without additional compensation does not appear but will be the subject of further inquiry to determine whether any consideration moved to the Government sufficient to support the payments in excess of the contract price.

Another phase of the contract with the Boeing Airplane Co., of April 8, 1921, for consideration is the conditions stipulated in Article VI, paragraphs 1 and 2, adverted to herein, namely, the requirements that the Boeing Co., should protect the Government from all liability that might arise from the use of any patent rights owned or enjoyed by it, the Manufacturers' Aircraft Association, or rights that are cross licensed under the so-called cross-license agreement, and/or its supplements, while the Government was to protect the Boeing Co., against all others.

From an available copy of the cross-license agreement dated July 14, 1917, and supplement of April, 1918, it is ascertained that these articles constitute an incorporation of certain aircraft manufacturers into what is styled the Manufacturers' Aircraft Association (Inc.), in connection with which there was incorporated an agreement to the effect that in consideration of the premises, the covenants and conditions therein contained, and other good and valuable considerations moving between the subscribers, it was covenanted and agreed that each subscriber granted, agreed to grant, and caused to be granted to each other, license to make, use and sell airplanes, under all airplane patents of the United States then or thereafter owned or controlled by them or any of them, or by any firm, corporation, or association owned or controlled by them or under which they, or any of them, or any such firm, corporation, or association have or shall have the right to grant licenses, and the subscribers are bound to pay certain sums up to $200, into a general fund, upon each and every airplane severally manufactured by them.

The supplemental agreement of April, 1918, mainly amended the agreement to provide for the payment by each subscriber into the common fund of only $100 on each airplane manufactured for the

United States after April 1, 1918. A certified list of the membership of the Manufacturers' Aircraft Association (Inc.), by the general manager thereof discloses both the Boeing Airplane Co., and the claimant company to be members of such association. In view of the situation thus exhibited to have existed, the Boeing Airplane Co., had the right in connection with its United States contract to use any of the patent rights of the associated membership, which included any patent rights of the claimant company, without any liability for infringement, other than the specific contributions to the general fund of such association, presumably allowed for in the contract price, and if there was no such liability resting upon the Boeing Co., in manufacturing the particular planes for which claim is now made for royalty, and as being the character of liability from which they were to save the Government harmless, then there is no obligation imposed upon the Government to pay royalty for protection as to a nonmember.

Further examination of the cross-license agreement discloses several matters open to question, therefore, anything said herein with reference thereto must be understood as affecting the subject matter only and not as a construction of said agreement with reference to its legality in other respects. Whether or not the cross-license agreement creates an unlawful combination or trust, or is an improper restraint upon trade and competition, prohibited by law, is not for decision by this office and nothing said herein is so intended. It is proper to observe, however, that the cross-license agreement apparently taxes its subscribers on the basis of manufactures for the United States and thereby indirectly affects the interests of the United States; that it requires its subscribers to divulge to the association information material to the air defenses of the United States, information to an association that owes no duties to the United States and which may divulge to others the adequacy or inadequacy in detail of our air defenses. The agreement apparently empowers its subscribers by combination to secure to themselves monopolies over claimed inventions that have not and possibly can not be the basis of patent rights under existing laws, or extend monopolies thereon beyond the statutory period.

There is also for consideration the condition in the contract with the claimant company of December 13, 1919, stipulating for the royalty in question, which provided that should said corporation or a subsidiary or allied corporation produce one hundred or more of such airplanes for the Government, then and in that event the said Thomas-Morse Aircraft Corporation waives the payment of all royalty fees.

Previous to the contract with the Boeing Co., the claimant company by contract No. 265, dated June 19, 1920, redesigned and constructed 50 MB–3 airplanes for the Government which it acknowledged should be credited in accordance with the foregoing provisions, and by contract No. 265–S–1, dated May 16, 1921, it constructed 12 more such planes; then by the contract with the Boeing Co. 200 more MB–3 planes were constructed by what is disclosed to be an allied corporation, making a total of 266 (including the first 4) of such planes constructed for the Government which appear properly to be creditable under the conditions of the agreement of December 13, 1919. The total number thus exceeds by 166 the number which when constructed as provided for would release the Government from the payment of all royalty, and therefore a claim to any sum based upon the provisions for royalty in the agreement of December 13, 1919, would appear to be further barred by fulfillment of the conditions thus stipulated.

Under contract No. 265, dated June 19, 1920, for the construction of 50 MB–3 airplanes by claimant, it was agreed in Article VI that claimant would hold and save the Government harmless from the use of any patented or unpatented invention, etc., and would secure the Government from all demands or liability on account of the type of airplane manufactured, except as to infringement by reason of articles, etc., furnished by the Government. It was further stipulated in said Article VI as follows:

(2) The contractor agrees to grant, and by the execution of this contract does grant, to the Government without further consideration the irrevocable and nonexclusive right and license to make, have made, use, and sell, for Governmental purposes only, any and all parts, machines, manufactures, compositions of matter and/or designs, and to practice or cause to be practiced any and all discoveries, inventions, improvements and/or suggestions that may be made, perfected, or devised by the contractor, its representatives, officials, and/or other employees in connection with or in pursuance of the performance of this contract, under any and all patents and other rights based upon such discoveries, inventions, improvements, and/or suggestions. Said right and license shall extend throughout the United States, its territories, and all foreign countries in which such patents or other rights shall be obtained, and shall remain in force and effect for the full period of said patents or other rights.

By this stipulation the contractor granted to the Government an irrevocable, unlimited, and nonexclusive license to make, have made, use, and sell, for Government purposes, any and all parts of the style of airplane in question. It should be noted that claimant contractor in presenting its claim under the contract of November 4, 1918, failed to call attention to the provisions of the contract of June 19, 1920, above quoted. Such failure on the part of claimant might have resulted in serious damage to the Government. It is not understood what claimant's purpose was in asserting a claim for a

matter to which it had no right and requiring this office to go afield to negative its assertions.

From the evidence at hand and the conditions associated therewith, as reviewed herein, there appears no valid basis for the claim for $10,000 royalty from the Government on account of the construction by the Boeing Airplane Co., claimant, or others of the MB-3 style airplane, and accordingly upon review the disallowance thereof is affirmed. The intent of claimant in presenting the claim is not clear, and it apparently ignores its agreements and the statutes relating thereto.

In view of recent developments and additional evidence the decision in the case of the Ordnance Engineering Corporation, dated January 31, 1924, referred to, can not serve as a precedent in this case. The principles here announced, until modified or reversed, will prevail over existing decisions in conflict herewith.

(A-4197)

FEDERAL AID TO STATE HIGHWAY CONSTRUCTION—APPROACH TO BRIDGE

An earth fill across five-eighths of a mile of flood plains from the east end of the Winona bridge, Minnesota, already built over the Mississippi River channel, to the C. B. & Q. Railroad embankment does not constitute an "approach" to the bridge and therefore may not be regarded as comprehended in the term "bridges," as that term is used in the several acts of Congress providing for Federal aid to highway construction, excepting bridge construction from the maximum amount per mile the Government may contribute.

Comptroller General McCarl to the Secretary of Agriculture, August 29, 1924:

I have your letter of July 18, 1924, requesting decision whether an earth fill across five-eighths of a mile of flood plains from the east end of the Winona bridge, Minnesota, already built over the Mississippi River channel, to the C. B. & Q. Railroad embankment may be regarded as comprehended in the term "bridges," as that word is used in the clause appearing in the several acts of Congress providing for Federal aid in highway construction which excepts bridge construction from the maximum amount per mile the Government may contribute.

Under section 6 of the act of July 11, 1916, 39 Stat. 357, and section 11 of the Federal highway act of November 9, 1921, 42 Stat. 212, it is provided that Federal aid shall not exceed 50 per cent of the total estimated cost of the construction. Certain increases have been authorized in public-land States not here involved. Section 2 of the

act of November 9, 1921, *supra*, includes "bridges" within the definition of the term "highway."

The provision for Federal participation up to 50 per cent of the estimated cost has been restricted in various acts by the fixing of a maximum amount per mile which the Government may contribute. The rate now in force has been fixed by the act of June 19, 1922, 42 Stat. 661, at not to "exceed $15,000 per mile exclusive of the cost of bridges of more than 20 feet of clear span."

Accordingly, if the proposed project may lawfully be considered as bridge construction within the meaning of the expression just quoted, the Government may contribute as much as 50 per cent of the estimated cost regardless of what the amount per mile may be; but if the proposed project may not lawfully be considered as bridge construction, the Government's contribution would be limited to five-eighths of $15,000.

You state the facts to be as follows:

The circumstances are as follows: A steel truss bridge extends easterly across part of the Mississippi River at Winona, Minn., to the west shore of Island 72 in the river, where it is joined by a viaduct bridge extending across this island and across the rest of the river channel to the east bank thereof in the State of Wisconsin. From this east bank proper of the river flood plains extend for about a mile to some precipitous bluffs still farther to the east. Until these flood plains were cut by a railroad embankment of the C. B. & Q. Railroad, they were all flooded at certain high-water seasons of the year, but this railroad embankment is high enough to form a sort of levee which keeps the water from the plains lying between it and the high bluffs to the east, while the portion of the flood plains between the C. B. & O. Railroad embankment and the east bank of the Mississippi continues to be flooded at these periods. The records of the United States Engineer's office at St. Paul show that these flood plains were covered with water from one to five times every year but three from 1879 to 1922, inclusive, the flood period continuing for several weeks in a great many instances. During these flood periods the bridge across the river channel becomes inaccessible from the Wisconsin side, at least a part of the time, as the approach now provided becomes covered with water, and in order to overcome this unsatisfactory situation the State desires to build an approach which will render the bridge accessible at all times.

It would be possible to construct this approach as a steel or concrete viaduct for the five-eighths of a mile from the end of the existing bridge on each bank of the river to the C. B. & Q. Railroad embankment, or partly as an earth fill with one or more steel or concrete viaduct openings of more than 20 feet clear span each, in either of which cases Federal-aid participation would unquestionably be permissible in the allowable percentage, even though such participation might call for Federal-aid funds very greatly in excess of $20,000 per mile. However, the water which overflows this area is only back water and has no appreciable current, in view of which fact it is believed that instead of an expensive steel or concrete structure, either for the whole or any part of the approach to be built, it will be more economical to build an earth fill about seven feet high with a concrete road on top of it, such fill either to follow the present road or to take a more direct route. It is estimated that to construct such an earth-fill approach will cost approximately $80,000. Since it is reasonable to construe the term "bridge" to include necessary approaches thereto, it would seem to this department that it might properly pay up to 50 per cent of the cost of this proposed earth-fill approach, except that it has been suggested that the propriety of such payment may be questioned because the approach is to consist of a solid earth fill about five-eighths of a mile in length. However, it would seem that the length should be considered merely as an incident, as

the approaches to a bridge must necessarily extend to such point in each direction as the topography may require in order that the same may be adequate to render the bridge accessible to and usable by traffic at all times.

Two other supplemental statements have been submitted under dates of July 31 and August 1, 1924, by the Chief of the Bureau of Public Roads, setting forth certain engineering features to show the difference between the proposed construction and ordinary road construction.

The essential point of the first statement is that the proposed construction of the earth fill must be of such material and in such form as to withstand the action of the flood waters of the adjacent river, varying materially from ordinary road construction and costing greatly in excess of ordinary road construction. Because of this large degree of departure from ordinary road construction it is stated there can be no difference of opinion from an engineering point of view that the proposed earth fill approach should be classed as inherently appurtenant to the bridge and entirely comparable with ordinary bridge approach work, differing only as to its length.

The essential point of the second statement is that the earth fill should be classified as "approach" construction because of the geological characteristics of the Mississippi River Valley at this point, that is, its width and the frequent flood condition to which the valley is subjected. Because of these conditions it is stated that the engineer must consider the crossing of the stream valley between the limits established by the known and foreseen flood conditions.

It is a fundamental rule of construction that terms appearing in statutes must be given their usual and ordinary meaning unless some other meaning is expressly given to them. For instance, in the act of June 19, 1922, 42 Stat. 658, it is provided that the term "bridges" as used in the appropriations to aid States in the construction of rural post roads shall include railroad grade separations, whether by means of overhead or underpass crossings.

It is, of course, obvious that the proposed project could not be considered as a bridge and could be considered as constituting "bridge" construction only on the basis of being an approach to a bridge.

It is well settled that a bridge includes the abutments and approaches necessary to make it accessible. *The Clinton Bridge*, 10 Wall. 454; *United States* v. *Cincinnati & M. V. R. Co. et al.*, 134 Fed. Rep. 353. What constitutes an approach depends on the local conditions existing in individual cases, 9 Corpus Juris 422, citing the following definitions of "approaches":

"Approaches" means all such artificial structures as may be reasonably necessary and convenient for the purpose of enabling the public to pass from the road on to the bridge and from the bridge on to the road, and does not

include the highway to a distance of one hundred feet from each end of the bridge, at all events, unless the artificial structures extend so far. *Traversy* v. *Gloucester*, 15 Ont. 214, 216.

In the present instance there is no bridge proposed to be constructed, the Winona Bridge over the channel of the Mississippi River having been heretofore constructed. The geological conditions were there apparently when the bridge was constructed, and it would seem that the present project, while no doubt desirable as an improvement, could not in the ordinary sense be considered as necessary or essential to make the bridge accessible. Also the distance involved, while not of itself controlling, is an element to be considered in applying the term "bridge," and in the present case five-eighths of a mile of construction work may not reasonably be considered as an approach except by application of a very unusual expansion of that term. On the contrary, the project has all the characteristics of road construction, out of the ordinary to meet flood conditions over lowlands, it is true, but none the less road construction. The construction is in fact caused by a change in the running direction of the road, necessitating a change in its grade—the object being to make a junction point which the road did not heretofore make, and it is properly classed as road construction. It is not believed that Congress intended to include within the term "bridge" such a project as here contemplated. A more definite expression from Congress, such as was made of the railroad crossings, should appear to justify the inclusion of this earth fill in the term "bridge."

Accordingly, it must be held that the proposed project does not constitute bridge construction within the meaning of the exception to the maximum amount per mile which the Government may contribute, but that the construction is subject to the limitation per mile fixed by the act of June 19, 1922, viz, five-eighths of $15,000.

(A–4307)

NAVY PAY—WARRANT OFFICERS APPOINTED ENSIGN SUBSEQUENT TO JUNE 30, 1922

A warrant officer of the Navy appointed an ensign subsequent to June 30, 1922, is not an "officer in the service on June 30, 1922," within contemplation of section 1 of the act of June 10, 1922, 42 Stat. 627, as that provision relates only to officers holding "commissions" in the permanent service on that date, and in consequence he may not count "all service which is now (June 10, 1922) counted in computing longevity pay." Upon his acceptance of appointment as ensign the officer falls within the class of "officers appointed on and after July 1, 1922," for which section 1 of the act of June 10, 1922, authorizes in his case only the counting of "active commissioned service under a Federal appointment."

Decision by Comptroller General McCarl, August 29, 1924:

There is before this office the claim of Ensign George W. Allen, United States Navy, for difference between $208.33 per month, base pay of the second period plus 25 per cent, under the act of June 10, 1922, 42 Stat. 625, and $131.25 per month, base pay of the first period plus 5 per cent, under said act, for the period May 5 to 31, 1924.

The report of claimant's service by the Bureau of Navigation shows that he enlisted in the Navy October 28, 1908; discharged October 27, 1912; reenlisted January 27, 1913; discharged January 17, 1917; reenlisted March 20, 1917; accepted appointment as gunner (temporary) September 29, 1917; accepted appointment as ensign (temporary) January 20, 1918; appointed lieutenant (j. g.) (temporary) to rank from July 1, 1918, and lieutenant (temporary) to rank from July 1, 1919; accepted appointment as gunner (permanent) December 29, 1921, and on May 27, 1924, accepted commission as ensign to rank from February 9, 1924.

The act of March 3, 1901, 31 Stat. 1129, provided:

> Whenever, in view of the vacancies in the grade of ensign on July thirtieth of any year unfilled by graduates of the Naval Academy, the Secretary of the Navy shall so recommend, the President may appoint to that grade, as of July thirtieth, from among the boatswains, gunners, or warrant machinists, not exceeding six in any one calendar year. No person shall be so appointed who is over thirty-five years of age; who has served less than six years as a warrant officer; who is not recommended by a commanding officer under whom he has served; nor until he shall have passed such competitive examination as may be prescribed by the Navy Department.

This provision of law was in effect amended by the following provision of the act of March 3, 1903, 32 Stat. 1197:

> Hereafter in each calendar year there may, under the restrictions imposed by existing law, be appointed from the boatswains, gunners, and warrant machinists of the Navy twelve ensigns.

These two provisions were further amended by the following provision of the act of April 27, 1904, 33 Stat. 346:

> That subject to the restrictions imposed by existing law, boatswains, gunners, and warrant machinists shall be eligible for appointment to the grade of ensign after four years' service as warrant officers. * * *

Section 1 of the act of June 10, 1922, 42 Stat. 625–627, provides:

> That, beginning July 1, 1922, for the purpose of computing the annual pay of the commissioned officers * * * of the Navy below the grade of rear admiral * * * pay periods are prescribed, and the base pay for each is fixed as follows:
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> The first period, $1,500; the second period, $2,000; * * *.
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> * * * * * * *
>
> The pay of the second period shall be paid to * * * ensigns of the Navy, and officers of corresponding grade who have completed five years' service.
>
> The pay of the first period shall be paid to all other officers whose pay is provided for in this section.
>
> * * * * * * *

Every officer paid under the provisisions of this section shall receive an increase of 5 per centum of the base pay of his period for each three years of service up to thirty years: * * *.

For officers appointed on and after July 1, 1922, no service shall be counted for purposes of pay except active commissioned service under a Federal appointment and commissioned service in the National Guard when called out by order of the President. For officers in the service on June 30, 1922, there shall be included in the computation all service which is now counted in computing longevity pay, * * *.

These provisions of section 1 treat of commissioned officers. Sections 9 and 10 of the act treat of pay of warrant officers, including the increases for length of service. On June 30, 1922, claimant was a warrant officer, and the provision of section 1 relative to "officers in the service on June 30, 1922," had no application to him. 6 Comp. Dec. 496. Upon being appointed a commissioned officer of the permanent Navy he came under the provisions of section 1, and within the meaning of that section was an officer "appointed on and after July 1, 1922." As such he was entitled in computing his pay under section 1 to count only such "active commissioned service under a Federal appointment" as he may have had. The record furnished by the Bureau of Navigation shows over three but less than five years of such service.

Claimant accordingly has not "completed five years' service" to entitle him to second period base pay and so falls within the provision for base pay of the first period, viz: $1,500 per annum, to which attaches 5 per cent increase, a total of $1,575 per annum or $131.25 per month.

He contends, however, that he is protected from a reduction in pay by the following provision of section 16 of the act of June 10, 1922, 42 Stat. 632:

That nothing contained in this Act shall operate to reduce the pay of any officer on the active list below the pay to which he is entitled by reason of his grade and length of service on June 30, 1922. * * *

The act of June 10, 1922, contains no provision relative to promotion or advancement of officers in grade or rank, hence claimant's appointment did not arise from any provision contained in that act and the saving clause has no application to a warrant officer appointed by selection to a commissioned grade subsequent to June 30, 1922. The claim will accordingly be disallowed.

(A–4487)

CLASSIFICATION OF CIVILIAN EMPLOYEES—LIBRARY OF CONGRESS

The employment of special and miscellaneous personal services in the Library of Congress, temporary or permanent, the need for which arises in the ordinary and usual work of the Library organization, is subject to the provisions of the classification act of March 4, 1923, 42 Stat. 1488.

Comptroller General McCarl to the Librarian, Library of Congress, August 29, 1924:

I have your letter of July 30, 1924, as follows:

May I have your opinion as to what, under the law, is required of the authorities of the Library, so far as the General Accounting Office is concerned, as to special, temporary, and miscellaneous service?

In our estimates for Library salaries, in connection with the distribution of catalogue cards, after specifying a certain number of positions in certain grades a general sum was requested for hour workers. The full amount estimated, including this general sum, was granted.

In the estimates for legislative reference service, after specifying a certain number of positions in certain grades, a general sum was requested for special, temporary, and miscellaneous service. The whole amount estimated was granted.

For the Library proper a separate appropriation for special, temporary, and miscellaneous service was requested and granted, as it has been annually since and including 1900.

The employment under these funds for special, temporary, and miscellaneous service is by the month, week, day, or hour.

The greatest number of persons so employed are engaged in the card division where they withdraw catalogue cards, from our stock of many millions, as called for in orders from subscribing libraries. Some of these assistants work a few hours on occasional days; others work regularly every day and for many hours, and, on occasions, work Sundays and holidays as well. Compensation in the half month has varied in total from $3 or $6 to as high as $95.

Query: Are we required to have this work allocated to the Personnel Classification Board?

With the legislative reference service certain additional assistants are taken on while Congress is sitting, to meet the extra demands; others are engaged for distinct undertakings, we agreeing to pay a certain sum of money for the undertaking when completed.

With the Library proper the special, temporary, and miscellaneous service may be divided roughly into three classes:

(1) For special undertakings; for example, we avail ourselves of the opportunity to secure the services of Chinese scholars during the summer months to advance the cataloguing of the Chinese collection. This has been done for a number of years. They serve from one to three months.

(2) With the many small divisions of the Library the absence of a single assistant sometimes necessitates the employment of a substitute. This service may be for only one or two weeks; but also may be for two, perhaps three, months.

(3) On occasions it becomes necessary to engage extra service to aid, for example, in moving many thousands of books, reshelving them and installing others; or to prepare for shipment some thousands of duplicate books, papers, and magazines on exchange account. Persons are taken on for this service sometimes for only a single day, sometimes for two days, sometimes three days, sometimes as much as a week or more.

In all these cases noted above are we required to file classification sheets and secure the approval of the Personnel Classification Board in advance?

In not a few instances the service would be wholly lost to us through the delay and in other instances the service would be greatly embarrassed through the delay.

Section 2 of the classification act of 1923, expressly includes the Library of Congress within the provisions of the act.

The act of June 7, 1924, 43 Stat 589, made the following provisions for the personal services under the Library of Congress for the fiscal year 1925:

LIBRARY OF CONGRESS

SALARIES

For the Librarian, chief assistant librarian, and other personal services in accordance with "The Classification Act of 1923," $457,020.

COPYRIGHT OFFICE

For the Register of Copyrights, assistant register, and other personal services in accordance with "The Classification Act of 1923," $147,320.

LEGISLATIVE REFERENCE SERVICE

To enable the Librarian of Congress to employ competent persons to gather, classify, and make available, in translation, indexes, digests, compilations, and bulletins, and otherwise, data for or bearing upon legislation, and to render such data serviceable to Congress and committees and Members thereof, $56,000.

DISTRIBUTION OF CARD INDEXES

For the distribution of card indexes and other publications of the Library, including personal services, freight charges (not exceeding $500), expressage, postage, traveling expenses connected with such distribution, and expenses of attendance at meetings when incurred on the written authority and direction of the Librarian; in all, $85,634.

Temporary services.—For special and temporary service, including extra special services of regular employees, at the discretion of the Librarian, $3,000.

SUNDAY OPENING

To enable the Library of Congress to be kept open for reference use on Sundays and on holidays within the discretion of the Librarian, including the extra services of employees and the services of additional employees under the Librarian, $13,125.

Section 2 of the classification act defines "position" as "a specific civilian office or employment, whether occupied or vacant" and defines "employee" as "any person temporarily or permanently in a position."

The fundamental purpose and intent of the classification act is that the employment of all personal services in the District of Columbia shall be subject to the provisions of the act unless expressly excluded, or unless the duties to be performed are of such an unusual nature, foreign to the ordinary and usual work of the particular office concerned, the need for which infrequently arises, as to classify the work otherwise than as a "position." The duration of the work to be performed, that is, whether permanent or temporary, is not controlling, but whether the work is that which the particular office is ordinarily and usually required to perform.

I assume that in most of these employments the nature of the work, that is to say, the duties of the positions, are definitely fixed and remain the same from year to year, the uncertainty being only as to the number of employees required and the duration of the employment. If such are the facts, I see no reason why the positions should not be allocated, thereby fixing the rate of compensation and leaving for the determination of the administrative office only the questions as to when, how many, and for how long a period employees should be engaged in said positions.

The submission would seem to indicate you are under the impression that it is the employee who is classified rather than the position.

Bearing in mind always that the "position" is what the law requires to be classified rather than the incumbent, there should be no difficulty in obtaining allocation of temporary positions sufficiently in advance of the need of filling such positions. The duties to be performed by all of the various classes of employees mentioned in the submission constitute a part of the regular work of the Library of Congress, that is, work the need for which may arise in the ordinary and usual routine of the organization, and nothing has been submitted to justify an exception of the positions concerned from the provisions of the classification act.

The questions are answered accordingly.

(A–4245)

CLASSIFICATION OF CIVILIAN EMPLOYEES—HOLIDAYS—BUREAU OF ENGRAVING AND PRINTING

Although the classification act of March 4, 1923, 42 Stat. 1488, provided for the payment of compensation only on the per annum and per hour basis, making no provision for a per diem basis of payment, employees of the Bureau of Engraving and Printing, formerly paid on a per diem basis but now paid on a per hour basis under the classification act, are nevertheless entitled to pay for legal holidays under the acts of January 6, 1885, 23 Stat. 516, February 23, 1887, 24 Stat. 644, and June 28, 1894, 28 Stat. 96, there being no intention by the classification act to repeal the cited acts providing holiday pay.

Comptroller General McCarl to the Secretary of the Treasury, August 30, 1924:

I have your letter of July 21, 1924, as follows:

Your decision is requested on the question of holiday pay for the per-hour-rate employees at full time (eight hours) in the Bureau of Engraving and Printing.

The plate printers' assistants, counters, examiners, feeders, other operatives, skilled laborers, and others, numbering about three thousand, have been allocated to the Clerical-Mechanical Service under the Classification Act of 1923, at per hour rates of compensation. Prior to July 1, 1924, these employees were per diem employees and for many years have been paid for holidays, see 23 Stat. L., 516, approved January 6, 1885, and 24 Stat. L., 644, approved February 23, 1887. During all these years as well as for the current fiscal year, the appropriations have been made on the basis of paying these per diem (now per hour) workers for the holidays, as well as the employees paid at annual rates of compensation. In view of the long practice prevailing in the Bureau of paying for holidays to all its employees, it would be a hardship to three thousand employees to now deny them this pay, which had once been denied them but which was restored to them many years ago by the acts referred to and which the Classification Act does not specifically deny them.

The act of January 6, 1885, 23 Stat. 516, provided as follows:

That the employees of the Navy Yard, Government Printing Office, Bureau of Printing and Engraving, and all other per diem employees of the Government on duty at Washington, or elsewhere in the United States, shall be allowed the following holidays, to wit: The first day of January, the twenty-second day of February, the fourth day of July, the twenty-fifth day of December, and such days as may be designated by the President as days for national thanksgiving, and shall receive the same pay as on other days.

The act of February 23, 1887, 24 Stat. 644, provided as follows:

That all per diem employees of the Government, on duty at Washington or elsewhere in the United States, shall be allowed the day of each year, which is celebrated as "Memorial" or "Decoration Day" and the fourth of July of each year, as holidays, and shall receive the same pay as on other days.

The act of June 28, 1894, 28 Stat. 96, provided as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the first Monday of September in each year, being the day celebrated and known as Labor's Holiday, is hereby made a legal public holiday, to all intents and purposes, in the same manner as Christmas, the first day of January, the twenty-second day of February, the thirtieth day of May, and the fourth day of July are now made by law public holidays.

A "per diem employee" within the meaning of these statutes has been defined as one who is employed by the day and paid a certain sum for a day's wages. 8 Comp. Dec. 236.

The classification act of 1923 provides for only two bases for computing compensation, viz, per annum and per hour. Decision of June 16, 1924, 3 Comp. Gen. 964.

The provisions of the classification act thus suggest the question whether the acts of January 6, 1885, February 23, 1887, and June 28, 1894, *supra*, so far as they relate to employees of the Bureau of Engraving and Printing whose positions come under the classification act, were by said enactment repealed or rendered inoperative. The three laws above mentioned were enacted solely to allow the employees here involved, with others, holidays with pay on the days in such laws enumerated. The prime purpose of the classification act was to classify and readjust the compensation of Government employees, and said enactment reflects no intent or purpose to repeal or modify the enactments cited above so as to deprive the employees of the bureau of the privileges specifically allowed by such prior enactments. While the employees involved are now paid on a "per hour" rather than a "per diem" basis, it does not necessarily follow that the holiday acts were repealed or that they may not now be justly executed. With respect thereto the procedure heretofore followed as to this class of employees may continue to be followed, and the normal day the employee is required to render service for which pay per hour is paid shall be the rate of the pay where a holiday is involved. Doubtful cases should be submitted to this office for consideration and direction.

(A–4887)

NATIONAL GUARD PAY—AGE LIMIT

Sections 57 and 58 of the national defense act of June 3, 1916, 39 Stat. 197, fixes the maximum age for enlistment in the National Guard at forty-five years, and payment of armory drill pay to an enlisted man or to his estate who was fifty-five years of age when he enlisted is not authorized.

Comptroller General McCarl to E. W. Wilson, Disbursing Officer, United States Army, August 30, 1924:

There has been received by your eighteenth indorsement of December 20, 1923, papers in connection with the claim of Mrs. Velina L. Parsons, wife and executrix of the last will and testament of William Parsons, late a sergeant, headquarters and service company, 112th Engineers, Ohio National Guard, for armory drill pay, earned prior to his death May 25, 1922, with request for decision whether you are authorized to pay the claim on the facts now presented. The matter was heretofore considered by this office and in decision of November 10, 1923, it was stated:

* * * This is a claim for armory drill pay believed to have been earned under section 110 of the National Defense Act, 39 Stat. 210, and 41 Stat. 784. The third paragraph of that section provides in part:

"Except as otherwise specifically provided herein, no money appropriated under the provisions of this or the last preceding section shall be paid to any person not on the active list, nor to any person over sixty-four years of age, * * *."

The age of Parsons having been indicated by his widow in circumstances entitling her statement to great weight, and the age so indicated being over 64 years during the period covered by the claim, the restriction on the use of the appropriation is absolute and no executive officer can waive it. 27 Comp. Dec. 1021, 1 Comp. Gen. 132.

It is now represented by the widow that the figures of the year of birth of Sergt. William Parsons were transposed in her former affidavit; that the year of his birth was in fact 1865 and that he was therefore under 56 years of age at date of enlistment, January 5, 1921. On this revised state of facts, the question is whether a person over 45 years of age may be entitled to pay as an enlisted man of the National Guard.

Sections 57 and 58 of the act of June 3, 1916, 39 Stat. 197, provide:

SEC. 57. COMPOSITION OF THE MILITIA.—The militia of the United States shall consist of all able-bodied male citizens of the United States and all other able-bodied males who have or shall have declared their intention to become citizens of the United States, who shall be more than eighteen years of age and, except as hereinafter provided, not more than forty-five years of age, and said militia shall be divided into three classes, the National Guard, the Naval Militia, and the Unorganized Militia.

SEC. 58. COMPOSITION OF THE NATIONAL GUARD.—The National Guard shall consist of the regularly enlisted militia between the ages of eighteen and forty-five years organized, armed, and equipped as hereinafter provided, and of commissioned officers between the ages of twenty-one and sixty-four years.

Paragraph 319, National Guard Regulations, 1922, provides:

Any male citizen of the United States and of the State concerned, or person who has legally declared his intention to become a citizen, if above the age of 18 and under the age of 45 years, able-bodied, free from disease, of good character and temperate habits, may be accepted for enlistment in the National Guard of any State with the exceptions herein stated. The restriction as to maximum age and citizenship shall not apply to soldiers who have previously served honestly and faithfully in the United States Army, Regular Army, the Organized Militia, or the National Guard.

Section 57 prescribes that the militia (all of the militia) shall consist of able-bodied male citizens not more than 45 years of age,

and section 58 that the National Guard class of militia shall consist of "the regularly enlisted militia between the ages of 18 and 45 years." There is no exception contained in these provisions of law as there is in section 1116, Revised Statutes, and in the proviso of section 4 of the act of March 2, 1899, 30 Stat., 978, with respect to the age limits for enlisting and reenlisting in the Regular Army.

The law is mandatory that enlisted men of the National Guard class of the militia shall be "not more than 45 years of age" and those statutory provisions can not be waived either on original enlistments or on reenlistments. The enlistment of William Parsons January 5, 1921, having been contrary to law, he earned no pay and his estate is not entitled to be paid pay for services under that enlistment. The papers received with your submission are returned herewith.

(A-3892)

NATIONAL GUARD PAY—LONGEVITY—SPECIALISTS' RATINGS

Officers of the National Guard whenever entitled to Federal pay, except armory drill and administrative function pay, on or after July 1, 1922, are entitled to longevity pay in addition to their base pay as provided in section 3 of the act of June 10, 1922, as amended by section 1 of the act of May 31, 1924, 43 Stat. 250.

Enlisted men of the sixth and seventh grades of the National Guard are entitled to specialists' pay, when so rated, in addition to the pay provided in section 14 of the act of June 10, 1922, from the approval of the act of June 3, 1924, 43 Stat. 365. Payments theretofore made on account of said pay are validated by the act of June 3, 1924, but an enlisted man is not entitled to reimbursement for said pay in case payment therefor has not been made, or where payments were made and subsequently refunded.

Comptroller General McCarl to Maj. Horace L. Manchester, former property and disbursing officer, National Guard, September 2, 1924:

I have your letter of June 19, 1924, transmitted through official channels, as follows:

1. Reference to statement of differences—Major Horace L. Manchester U. S. P. & D. officer in Rhode Island, October 26th 1923 referred to as
"D. S. No. 10
Certificate No. M-1988-W
Dated October 20, 1923"
said difference in the sum of six hundred ninety-five, and 39/100 dollars ($695.39) covering pay of certain officers for longevity, and enlisted specialist ratings for men of the 6th and 7th grade, on vouchers 401, 402, 403, July, 1922; 411, 429, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, August, 1922; 458, 464, 465, 466, 482, September, 1922; 518, 519, October, 1922, having been disbursed, was on December 4th, 1923, by 1st indorsement U. S. P. & D. officer, Providence, R. I., to General Accounting Office, Military Division, Washington, D. C., returned with notice of right reserved to claim reimbursement in case of future retroactive legislation validating such payment. (See inclosure.)

2. Inasmuch as the act of May 31, 1924 amending the pay readjustment act of June 30th, 1922, authorizes longevity pay for commissioned officers of the National Guard, and specialist pay for enlisted men of the 6th and 7th grade from July 1, 1922, when in attendance at camps of instruction and maneuvers under competent Federal orders, and vouchers heretofore referred to are accompanied by proper certificates and notation of orders required, it is requested

the State of Rhode Island, Adjutant General's Department, be reimbursed as provided, and in the amount named—six hundred ninety-five and 39/100 dollars ($695.39).

The first section of the act of May 31, 1924, 43 Stat., 250 provides:

That section 3 of the Act entitled "An Act to readjust the pay and allowances of the commissioned and enlisted personnel of the Army, Navy, Marine Corps, Coast Guard, Coast and Geodetic Survey, and Public Health Service," approved June 10, 1922, be, and the same is hereby, amended by inserting immediately after the first sentence thereof the following sentence:

"Such officers whenever entitled to Federal pay, except armory drill and administrative function pay, shall receive as longevity pay, in addition to base pay provided but not exceeding the maximum pay prescribed by law, an increase thereof at the per centum and time rates up to thirty years provided in the tenth paragraph of section I."

Section 7 of the same act, provides:

That the provisions of this Act shall be effective from and after July 1, 1922.

Accordingly, officers of the National Guard whenever entitled to Federal pay, except armory drill and administrative function pay, on or after July 1, 1922, are entitled to longevity pay in addition to their base pay, as provided in the tenth paragraph of section 1 of the act of June 10, 1922.

You are therefore advised that reimbursement may be had, for the longevity pay in question, by the preparation of supplemental pay rolls, covering the disbursements made to each officer whose longevity pay was disallowed by this office, and subsequently refunded by you as shown in your accounts.

As to enlisted men of the sixth and seventh grades of the National Guard holding specialists' ratings, section 6 of the act of June 3, 1924, 43 Stat., 365–366, provides as follows:

Enlisted men of the sixth and seventh grades of the National Guard holding specialists' ratings under the provisions of the National Defense Act, as amended, shall, in addition to the pay provided in section 14 of the Pay Readjustment Act of June 10, 1922, be entitled to one-thirtieth of the specialists' pay provided in section 9 of said Pay Readjustment Act for each day of participation in exercises provided for by sections 94, 97, and 99, National Defense Act, as amended: *Provided*, That payments heretofore made to enlisted men of the sixth and seventh grades of the National Guard holding specialists' ratings of one-thirtieth of the specialists' pay provided in section 9 of said Pay Readjustment Act for each day spent in participating in exercises or performing the duties provided for by sections 94, 97, 99, and 110 of the National Defense Act of June 3, 1916, as amended, be, and the same are hereby, validated.

The above act does not provide for the payment of specialists' pay provided in section 9 of the act of June 10, 1922, to enlisted men of the sixth and seventh grades of the National Guard, holding specialists' ratings, in addition to the pay provided in section 14 of the act of June 10, 1922, prior to the approval of the said act. It does provide that payments heretofore made to such enlisted men on account of specialists' pay are thereby validated. No provision is made in the act for reimbursement to those who received no payments therefor prior to the date of the act; neither is there any provision for reimbursement to those who received payments prior to the act but who

subsequently refunded such payments. There is no law authorizing reimbursement for the pay in question prior to the act approved June 3, 1924.

(A-4262)

MEDICAL TREATMENT OF DESTITUTE AMERICAN SEAMEN

Where the master of a vessel places a member of his crew, an American seaman who had been injured in the service of the ship, in a hospital in a foreign port for medical treatment, pays the arrears of the seaman's wages to a United States consul, and secures the seaman's discharge on account of injury incapacitating him for service, the vessel and her owners are primarily liable for the cost of maintenance and medical treatment furnished by the hospital, both before and after discharge, notwithstanding the fact that the injury was the result of the seaman's own fault.

Comptroller General McCarl to the Secretary of State, September 2, 1924:

I have your letter of July 21, 1924, as follows:

The department encloses a copy of a despatch, dated June 19, 1924, from the American consul in charge at Calcutta, India, in which the consul reports that the local representatives of the Kerr Steamship Line have refused to pay the hospital bill incurred on behalf of one John A. Morris, an American seaman, who was injured while a member of the crew of the steamship *West Mahomet;* was placed in the hospital by the master of that vessel on account of the injury on April 30, 1924, and on May 2, 1924, when the matter was reported by the master to the consulate, was discharged by that office.

It appears that the agents of the vessel base their refusal to pay the hospital expenses of the injured seaman upon the fact that his injury was the result of his own fault and not caused by his service on the vessel.

In your decision of January 16, 1923, confirmed on March 17, 1923, it is stated that if a seaman becomes ill or is injured while a member of the crew of a vessel and is placed in a hospital by the master prior to being discharged by a consular officer, but is later discharged by a consul on account of such illness or injury, the consular officer would not be authorized to pay from United States funds any part of the hospital expenses incurred either after the discharge or prior thereto.

In the present instance the department would appreciate a statement from you whether the fact that the seaman appears to have been responsible for his injury and that no fault lies with the vessel relieves the vessel from responsibility for the cost of his hospital treatment.

Attention is invited to the situation which unfortunately arises in foreign ports when, as in the case under discussion, the vessel refuses to assume responsibility and pay the necessary expenses incurred and when at the same time the consular officer is not authorized to expend Government funds for the relief of the seaman involved. The consular officer's relations with local authorities and hospitals are unfortunately prejudiced through the failure of the Government to render assistance to seamen under its flag, and instances may conceivably arise in which ill or injured seamen may be refused treatment or admittance into proper institutions, since the latter may naturally be expected to wish assurance of payment for serviecs rendered.

In the case of the *City of Alexandria*, 17 Fed. Rep. 390, quoting from the syllabus, it was decided:

By the maritime law, ancient and modern, a seaman, in case of any accident received in the service of the ship, is entitled to medical care, nursing, and attendance, and to cure, so far as cure is possible, at the expense of the ship, and to wages to the end of the voyage, and no more.

Where a seaman is hurt in the service of the ship, his inchoate right to recover the expense of his cure from the ship accrues at once, and is not affected by his subsequent discharge while sick ashore.

Jansen v. *The W. L. White*, 25 Fed. Rep. 503. That the master of a ship at sea is agent for the owners as to everything about the crew, or that the seamen are entitled to care and cure in sickness from disease or injury, at their expense, within reasonable bounds, is not disputed or disputable. *Gabrielson* v. *Waydell*, 67 Fed. Rep. 342 (p. 344). A seaman is not allowed to recover an indemnity for the negligence of the master, or any member of the crew, but is entitled to maintenance and cure, whether the injuries were received from negligence or accident. *The Osceola*, 189 U. S. 158.

In the case of *McCarron* v. *Dominion Atlantic Railway Co.*, 134 Fed. Rep. 762, it was held, quoting from the syllabus, that:

> The liability of a ship for the maintenance and cure of a seaman injured in its service does not terminate with the voyage, but continues until the cure is completed, so far as expenses necessarily incurred for the cure are concerned.

In *The Alector*, 263 Fed. Rep. 1007, it was held that seamen are entitled to a reasonable allowance for their maintenance and cure, if taken ill while in the ship's service, or within a reasonable time thereafter, arising from causes incident to their employment; but the right to cure does not involve liability for diseases arising from their own vices or gross acts of indiscretion. A seaman who took sick before the end of the voyage and was sent to a hospital is entitled to reimbursement from the owners of the ship for his expenses for medical attendance while in the hospital and to his wages to the end of the voyage. 12 Comp. Dec. 213.

In 2 Comp. Gen. 438, it was held, quoting from the syllabus, that:

> American seamen found destitute within the district of any consular officer may be furnished subsistence and transportation to the United States under section 4577, Revised Statutes, irrespective of whether discharged or whether their discharges resulted from their own misconduct.
>
> American seamen who have not been discharged are not entitled to relief from United States funds unless destitute.
>
> American seamen discharged by or before a consular officer on account of injury or illness incapacitating them for service may be furnished subsistence and transportation to the United States, under section 4581, Revised Statutes, irrespective of whether the illness or injury resulted from their own misconduct or whether they have funds of their own sufficient for their immediate needs.
>
> Consular officers are not authorized to pay from United States funds any part of the hospital bill of American seamen who become ill or are injured while members of the crew of a vessel and are placed in a hospital by the master of the vessel and later discharged by the consul for illness or injury.

In view of the facts presented that John A. Morris, an American seaman was injured while a member of the crew of the S. S. *West Mahomet* (U. S. Shipping Board Co.), and was placed in the Presidency General Hospital, Calcutta, India, by Capt. H. Milde, master of that vessel, whether or not the injury was the result of the seaman's own fault, the vessel is primarily responsible for the cost of his hospital treatment, both before and for a reasonable time following the seaman's discharge. 14 Comp. Dec. 570; 15 *id.* 348.

(A-2008)

NAVY PAY—OFFICERS OF THE STAFF CORPS

A lieutenant of the staff corps of the Navy is entitled to the pay and allowances of the fourth pay period, under the act of June 10, 1922, 42 Stat. 625, from the date his total commissioned service equals the total commissioned service of a lieutenant commander of the line of the Navy who is drawing the pay of the fourth pay period.

Decision by Comptroller General McCarl, September 3, 1924:

Lieut. Charles L. Austin (S. C.) United States Navy, applied February 26, 1924, for review of settlement 100839-N, dated February 14, 1924, disallowing his claim for the difference in pay of the fourth pay period and that of the third pay period from August 15, 1923, under the act of June 10, 1922, 42 Stat. 625.

The act of June 10, 1922, provides:

> That beginning July 1, 1922, for the purpose of computing the annual pay of the commissioned officers of the * * * Navy below the grade of rear admiral * * * pay periods are prescribed, and the base pay for each is fixed as follows:
>
> The first pay period, $1,500; the second period, $2,000; the third period, $2,400; the fourth period, $3,000; the fifth period, $3,500; and the sixth period, $4,000.
>
> * * * * * * *
>
> The pay of the fourth period shall be paid to * * * lieutenant commanders of the Navy, * * * who have completed fourteen years' service, * * * lieutenants of the Navy, * * * who have completed seventeen years' service, * * * and to lieutenants of the Staff Corps of the Navy, * * * whose total commissioned service equals that of lieutenant commanders of the line of the Navy drawing the pay of this period.

The service record of Lieutenant Austin furnished by the Bureau of Navigation January 19, 1924, shows he was appointed a midshipman August 4, 1909; accepted appointment as second lieutenant in the Army August 29, 1913, and vacated his position as midshipman from August 28, 1913; served as second lieutenant, Coast Artillery Corps of the Army, from August 29, 1913, to February 16, 1915, vacating his position, by accepting commission as assistant paymaster in the Navy February 17, 1915; commissioned regular assistant paymaster from January 2, 1915, with rank of ensign; attained the rank of lieutenant (j. g.) (T) from July 1, 1917; attained the rank of lieutenant (T) from October 15, 1917; attained the rank of lieutenant (j. g.) (S. C.) from July 30, 1917; and was commissioned regular passed assistant paymaster in the Navy with rank of lieutenant from July 1, 1920.

Lieutenant Austin's service is thus made up as follows:

	Yrs.	Mos.	Days
Midshipman, August 4, 1909, to August 28, 1913	4	0	25
2nd lieutenant, U. S. A., Aug. 29, 1913, to Feb. 16, 1915	1	5	18
Lieutenant, U. S. N., Feb. 17, 1915, to Sept. 17, 1923	8	7	1
Commissioned service	10	0	19

Lieutenant Austin cites the case of Lieut. Commander B. G. Leighton, and claims equal length of commissioned service with that officer.

Lieutenant Commander Leighton's service is as follows:

	Yrs.	Mos.	Days
Midshipman, June 26, 1909, to June 6, 1913	3	11	11
Ensign, etc., U. S. N., June 7, 1913, to June 25, 1923. Commissioned service	10	0	19

It thus appears that Lieutenant Austin completed 10 years and 19 days' commissioned service September 17, 1923, and Lieutenant Commander Leighton completed 10 years and 19 days' commissioned service, with total service of 14 years, June 25, 1923.

It was held in 3 Comp. Gen., 353, quoting the syllabus, as follows:

Any lieutenant of the Staff Corps of the Navy is entitled to the pay of the fourth period when the total of his commissioned service equals the commissioned service to the credit of any lieutenant commander of the Navy who by reason of completion of 14 years' total service is entitled to the pay of the fourth period.

Apparently the purpose of the provision is to secure a uniformity of advancement in pay grades, promotion in the line ordinarily it would seem being more rapid than in the Staff Corps. The restriction of the comparison to "commissioned" service is for the benefit of officers of the Staff Corps. The act of March 4, 1913, 37 Stat. 891, denied to officers of the Navy and Marine Corps credit for service for any purpose as a midshipman if thereafter appointed to the Naval Academy, and repealed the provision of the act of March 3, 1899, 30 Stat. 1007, authorizing credit for five years' constructive service for longevity purposes to persons appointed to the Navy from civil life. This latter provision was effective immediately. The provision applicable to Naval Academy service was not effective as to midshipmen who had been appointed to the academy prior to that date and who were graduated in 1913, 1914, 1915, and 1916. The act of June 10, 1922, by providing for the pay of the fourth period to lieutenants of the Staff Corps of the Navy whose total commissioned service equaled that of a lieutenant commander of the line of the Navy drawing the pay of the fourth period, operates to the advantage of officers of the Staff Corps appointed from civil life subsequent to March 4, 1913, and prior to June, 1916, in effect restoring a modified and indirect credit of constructive service, their service as commissioned officers being comparable under the statute with the commissioned service of a lieutenant commander of the line entitled to count Naval Academy service for purposes of pay under the act of June 10, 1922.

It is obvious that the commissioned service of Lieutenant Austin does not now, never has, and never will (so long as both continue in the Navy on the active list) equal that of Lieutenant Commander

Leighton. He is not entitled to pay of the fourth pay period based on a comparison of his commissioned service with the commissioned service of any lieutenant commander of the line of greater length of commissioned service than he has. When a lieutenant in the Staff Corps of the Navy (before he has rendered 17 years' service) has commissioned service equal to or exceeding that of any lieutenant commander of the line who has rendered 14 years' service authorized to be counted under the eleventh paragraph of section 1 of the act of June 10, 1922, and entitling such lieutenant commander to the pay of the fourth period, he will, under the quoted provision of the law, be also entitled to the pay of the fourth period. The fact that a particular lieutenant commander was entitled to the pay of the fourth period by reason of over 14 years' service after having 10 years' commissioned service at a date before Lieutenant Austin had 10 years' commissioned service does not make his commissioned service equal to that of the lieutenant commander selected, although it equals that of the lieutenant commander when the latter attained the higher rate of pay. It is not equality of commissioned service as of the date the lieutenant commander became entitled to the pay of the fourth period, but equality of commissioned service without qualification.

The settlement is sustained without prejudice, however, to the filing of a claim based upon the commissioned service of a lieutenant commander of the line entitled to pay of the fourth period with less or no greater commissioned service than has claimant.

(A–3644)

SUBSISTENCE EXPENSES—MEALS AT HOME

An employee of the Lighthouse Service who traveled under competent orders from his official headquarters to a near-by city where he maintained his home is entitled to reimbursement of the cost of meals necessarily taken apart from his family while on official duty at the latter place.

Decision by Comptroller General McCarl, September 3, 1924:

Settlement C–10686–C, dated May 22, 1924, disallowed in the accounts of E. W. Sawyer credit for payments amounting to $16 made by him to I. N. Cory, assistant superintendent, second lighthouse district, Department of Commerce, as reimbursement of the cost of meals taken by Cory while on official duty at New Bedford, Mass.

It appears that Mr. Cory's official headquarters were at Boston, Mass., and that his home was in New Bedford, Mass. On various occasions travel orders were issued to Mr. Cory by competent authority directing him to travel to New Bedford and return to Boston for the purpose of superintending repairs being made to vessels belonging to the Lighthouse Service.

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The disallowance was on the ground that the travel regulations of the Department of Commerce prohibit allowance of charges for meals or lodging taken at the official station or home of an employee.

It is now shown that the department's interpretation of the regulation mentioned has been that an employee would not be allowed to charge for meals or lodging taken in his own home, but that the regulation did not preclude the allowance of subsistence expenses necessarily incurred while engaged on official business in the city of his home and apart from his family. Apparently the department's interpretation has been acquiesced in by the accounting officers for a considerable period and would seem to be correct.

Each of the vouchers involved in the disallowance bears the employee's certificate that none of the meals charged for was taken at his home. The employee has submitted the explanation that the work superintended was located at a considerable distance from his home and that inspection often had to be made before or after regular working hours, making it impracticable to return home for the meals for which charge is made.

In view of all the facts now presented the charges appear to be properly allowable. See 1 Comp. Gen. 120.

Upon review, $16 is certified for credit in the accounts of E. W. Sawyer, the disbursing officer.

(A–3864)

TRANSPORTATION AND MAINTENANCE OF DISABLED AMERICAN SEAMEN

Where an American seaman is discharged by a consular officer on account of illness or injury incapacitating him from further service, the responsibility for his subsistence and transportation to the United States is primarily that of the owners of the vessel from which discharged, and if a vessel of the same company is available such vessel should be required to transport the discharged seaman to a United States port without cost to the Government. Where no such vessel is available, the cost of transporting the seaman by another steamship line is payable from the fund for the maintenance and transportation of destitute American seamen.

The cost of the maintenance of an American seaman discharged by a consular officer on account of illness or injury, while awaiting transportation to the United States, is payable from the fund for the maintenance and transportation of destitute American seamen, regardless of whether he has funds of his own for his immediate needs.

Comptroller General McCarl to the Secretary of State, September 3, 1924:

There has been received your letter dated July 7, 1924, file Co–196.7/2150, as follows:

The department has received a request from the American consul at Hamburg, Germany, that you be requested to render a decision on a point concerning the relief of distressed American seamen which may be stated as follows:

"In case a seaman has been placed in a hospital prior to his discharge from the vessel by a consular officer, is the consular officer authorized when the steamship company declines to pay for the seaman's subsistence after dis-

charge from the hospital and to transport him to the United States, to assume that burden if the seaman is not actually destitute?"

In connection with the foregoing question the consul states that he does not understand exactly what is meant by the decision of the Comptroller General dated September 28, 1923, wherein it is stated that: "Such expenses would not be necessary and should not be incurred * * * when arrangements can be made to return the seaman on a vessel of the same company by which he was employed." The consul further states that he feels that steamship companies will invariably refuse to transport seamen injured on their vessels if they know that their refusal will absolve them from further liability, and remarks that the port representative of the United States Shipping Board at Hamburg says that instructions received by him prevent him from maintaining and transporting to the United States seamen of the condition under discussion after their discharge from the hospital.

A decision from you in reply to the foregoing question is respectfully requested in order that the consul may be appropriately instructed.

Section 4581, Revised Statutes, as amended, provides the manner in which American seamen shall be discharged in foreign ports by the consular officers and is in part as follows:

* * * If the seaman is discharged on account of injury or illness, incapacitating him for service, the expenses of his maintenance and return to the United States shall be paid from the fund for the maintenance and transportation of destitute American seaman.

It has been uniformly held that this statute does not shift the burden of providing for the maintenance and transportation of such injured or ill seamen from the steamship owners to the Government and that the primary responsibility for such maintenance and transportation is upon the owners of the vessel upon which such injury or illness was incurred. See 14 Comp. Dec. 570; 15 *id.*, 348; 2 Comp. Gen. 438; 25 MS. Comp. Gen. 953, Sept. 28, 1923; 29 Op. Atty. Gen. 54, and the authorities cited therein.

While the duties of consular officers with respect to the enforcement of the rights of the seamen and the liability of the vessels or their owners are not primarily for determination by this office except in so far as it affects payments made by such consular officers from public funds, you are advised that the proper procedure in cases like that here under consideration is that when a vessel owned by the same company as is that by which the sailor was employed, is available for his transportation to the United States, such vessel should be required to furnish him with the subsistence and transportation required for his return to the United States without cost to the United States.

Where no such vessel is available the necessary transportation and subsistence should be provided on another vessel, the consular officer furnishing the master of the vessel with the necessary certificate upon which payment therefor may be made in accordance with the statutes and the decisions of this office, from the funds for the maintenance and transportation of American seamen.

In regard to that portion of the consul's question relating to subsistence for the seaman while awaiting transportation to the

United States, you are advised that when a seaman is discharged by or before a consular officer on account of injury or illness incapacitating him for further service the necessary subsistence or maintenance required for him pending his return to the United States at the earliest practicable date may be furnished him regardless of whether or not he has funds of his own for his immediate needs. 2 Comp. Gen, 438.

(A–4240)

PURCHASES—EVIDENCE OF LOWEST BID

Vouchers involving single purchases to be consummated by single payments must bear satisfactory evidence as to the acceptance of the lowest and most satisfactory bid and a disbursing officer will not be protected if he makes payments of such items on vouchers which do not show such compliance.
With reference to contracts, generally referred to as continuous-service contracts, which contemplate a series of purchases by the same or different purchasing officers and payments by the same or different disbursing officers, it is permissible and satisfactory that the information with respect to the acceptance of the lowest and most satisfactory bid accompany the contract and each voucher paid to refer to such contract.

Decision by Comptroller General McCarl, September 3, 1924:

There is for consideration of this office the matter of the procedure with respect to competitive purchases; that is, as to the showing required to be made with respect to each payment when there is only one payment, which consummates the transaction, or when there is a series of payments, depending on the character of contract involved.

In decision of March 8, 1924, 3 Comp. Gen. 605, it was said:

The acceptance by an administrative officer of other than the lowest bid would ordinarily not be questioned if the reasons assigned for that action appeared satisfactory, but the action in that respect by administrative officers is not conclusive on the accounting office. It appears, therefore, that a satisfactory audit of expenditures, whether pursuant to formal or informal contracts, requires at least an affirmative showing that the lowest bid was accepted, or, if otherwise, a detailed statement of the reasons for accepting other than the lowest bid.

The information thus considered necessary may be provided either by furnishing the accepted proposal and all rejected proposals or copies thereof, or by furnishing the accepted proposal and an abstract of rejected proposals, or by a certificate on the voucher by one having knowledge of the facts that the accepted bid, attached or otherwise deposited, was the lowest bid, if that be a fact, or if the fact be otherwise, a detailed statement as to the reasons for accepting other than the lowest bid. Such requirement appears to be reasonable and is deemed necessary to a proper audit of the expenditures; therefore, the items here in question will be continued in suspension for a reasonable period of time awaiting receipt of the necessary information.

In decision of July 31, 1924, it was said:

If all the bids, or copies thereof, accompany the voucher, or if the voucher is accompanied by an abstract of bids, there must be a showing of the reasons therefor if other than the lowest bid was accepted. If all the bids, or copies thereof, do not accompany the voucher, and if the voucher is not accompanied by an abstract of bids, there must be an affirmative showing—a certificate by the officer authorizing the making of purchase being satisfactory—that the

lowest bid was accepted, or, if otherwise, a detailed statement of the reasons for accepting other than the lowest bid should be furnished.

The proposed certificate "that the lowest, most satisfactory bid had been accepted" would be the statement of a conclusion and for that reason would not meet the requirements of this office; what is required is a statement of the facts and conditions upon which the action in making a particular purchase was based, that being necessary to determine whether the award had been made to the lowest satisfactory bidder as required by law.

The decisions quoted, *supra*, were on submissions which involved single purchases consummated by single payments, and as to that class it is incumbent upon those submitting the vouchers to a disbursing officer for payment to see to it that the necessary showing as to compliance with the requirements of law, as stated in the decisions quoted, is made, and the disbursing officer will not be protected if he makes payments of such items on vouchers which do not show such compliance.

With respect to contracts, generally referred to as continuous-service contracts, which contemplate a series of purchases by the same or different purchasing officers, and payments by the same or different disbursing officers, it is permissible and satisfactory that the information with respect to the acceptance of the lowest, most satisfactory bid accompany the contract when it is deposited in the General Accounting Office, as required by section 3743, Revised Statutes, as amended, each voucher paid to refer to such contract so that it may be readily identified, and each disbursing officer making payment to be cognizant of the fact that the required showing has been made. See 25 Comp. Dec. 437; 3 Comp. Gen. 441.

(A–4429)

PROHIBITION ENFORCEMENT—INFORMERS' REWARDS

Payment of a reward under the appropriation "Enforcement of the narcotic and national prohibition acts, internal revenue, 1924," 42 Stat. 1097, is authorized where the information is furnished under an implied agreement or understanding that such reward would be paid, such as where the informer associates with the criminals for the purpose of obtaining information regarding violations of the law.

Decision by Comptroller General McCarl, September 3, 1924:

The Secretary of the Treasury requested, July 23, 1924, review of settlement No. 035061, dated June 19, 1924, disallowing the claim of Carl Richter, in the amount of $100, for service as an informer in connection with enforcement of the national prohibition law.

The basis for disallowing the claim was that no specific agreement had been entered into with the claimant for furnishing the information, the service being voluntary, for which no payment could be made.

In his request for review the Secretary states:

* * * It appears the claimant was a member of a gang of whiskey thieves and was in a position to locate liquor caches for Federal enforcement officers,

but his assistance would not have been forthcoming unless he was paid for his services. It further appears that the most valuable information regarding prohibition violations emanate from persons who are or were violators of the prohibition law themselves or those who are or were the associates and confidants of violators of the law. It is understood these persons turn informers with the hope of reward and sometimes out of the spirit of revenge. It would seem obvious that in dealing with such persons it would be impracticable to enter into any specific agreements embodying conditions and compensation for the service to be rendered. The officers seeking the information must make the best of the situation as they see it at the time of contact.

Since it would seem that pecuniary gain and not civic duty was the consideration moving the claimant to perform the services of informer and that the matter of paying informers to assist enforcement officers in procuring evidence is deemed necessary to efficient enforcement of the prohibition law, the department respectfully requests that the action of the General Accounting Office in disallowing the claim be reviewed.

The national prohibition act, 41 Stat. 305, provides that the Commissioner of Internal Revenue, his assistants, agents, and inspectors, shall investigate and report violations of the prohibition laws.

The appropriation act of January 3, 1923, 42 Stat. 1097, provides:

> For expenses to enforce the provisions of the National Prohibition Act * * * including * * * the securing of evidence of violations of the Acts * * * and such other expenditures as may be necessary in the District of Columbia and several field offices * * * $9,000,000 * * *.

The information furnished by the claimant concerned a violation of the national prohibition act; it also concerned a robbery which was about to be committed.

The facts stated in the submission are to the effect that the man Richter is in association with the violators of the law and that the information he gives the prohibition officers is thus obtained. Under such conditions no specific agreement for compensation is generally made, but with a man of such character there is, and practically must be, to obtain the information, an understanding that there will be compensation. The services in this respect furnish valuable information, apparently did so in the present case, and the claim heretofore disallowed will now be allowed.

(A–4564)

PURCHASE OF AIRPLANE MAIL STAMPS

The appropriation of the Department of Commerce for "Contingent expenses" for the current fiscal year may be used for the purchase of airplane mail stamps for use in transmitting to the Pacific coast the press releases, embodying weekly reports on world markets.

Comptroller General McCarl to the Secretary of Commerce, September 3, 1924:

I have for consideration the request of the Acting Secretary of Commerce, dated August 7, 1924, for a decision whether the appropriation of the Department of Commerce for "Contingent expenses" for the current fiscal year may be used for the purchase of airplane mail stamps.

It is noted that the department desires to use the coast-to-coast airplane mail service to send out certain press releases, embodying its weekly reports on world markets, so that they may be delivered for publication to the various papers on the Pacific coast at the same time they are released in the East.

It is stated that the Post Office Department has advised that, in view of the limited capacity of the airplanes used on the coast-to-coast route and its desire to limit the service as far as possible to paying mail in order that this service may be put on a paying basis and warrant its continuance, it is unable to accept such mail as the Department of Commerce desires to transmit without payment for the additional service.

The act of April 4, 1924, 43 Stat. 87, provides for the operation and maintenance of the airplane mail service from coast-to-coast by continuous flying by night and by day and for the making by the Post Office Department of additional charges for this service.

It is a new and special service which the Post Office Department has determined it is not obligated to employ in transmitting mails entitled to free carriage as provided by section 5 of the act of March 3, 1877, 19 Stat. 335, unless payment is made for such service. It is a service which was not contemplated when the act of 1877 was passed—a service which Government departments and offices should be able to use when it is necessary to the more expeditious exercise of their functions or when its use will enable them the better to serve the interests of the Nation—a service for which the payment by Government departments and offices, when an appropriation is available, would seem to be not less proper than payment for special delivery or registered mail service.

It seems necessary that these reports be released for publication fairly simultaneously on both coasts, as obviously no one commercial locality should be enabled to obtain the information obtained therefrom greatly in advance of any other locality merely on account of geographical proximity to the source of the reports. The simultaneous release should be effected, if possible, by expediting the release at the most remote points rather than by retarding the same at the closer points, for the prompt publication of the reports is assumed to be of vital importance generally to the commercial interests of the country.

The use of the airplane mail service for the transmittal of official mail matter, entitled to be admitted to the ordinary mails free, where it appears that the additional expense occasioned is necessary and may be paid from an available appropriation, especially where such service is cheaper than the telephone or telegraph, should not only be authorized but encouraged.

The act of May 28, 1924, making appropriations for the Department of Commerce for the fiscal year 1925, 43 Stat. 224, provides, under the title of "Contingent Expenses," specifically for certain items and generally for "all other miscellaneous items and necessary expenses not included in the foregoing."

It appears that the use here intended is necessary and that the payment of the additional charge properly may be regarded as a necessary miscellaneous item of expense within the meaning of the act providing the appropriation for "Contingent expenses."

I have to advise that the appropriation, "Contingent expenses, Department of Commerce," is available for the purchase of airplane mail service stamps, under the conditions set forth in your submission. See 19 Comp. Dec. 479; 26 *id.* 887.

(A–3911)

ACCOUNTING—REIMBURSEMENT OF APPROPRIATIONS

The expense of receipt, custody, and issue of distinctive paper for Federal reserve notes, and the receipt, examination, and destruction of mutilated Federal reserve notes arising in connection with the printing thereof, being consequential and susceptible of segregation and identification, adjustments of the appropriations may be made by transfer settlements, charging the appropriation for "Preparation and Issue of Federal Reserve Notes, Reimbursable," and crediting the appropriation for the "Public Debt Service." 4 Comp. Gen. 131 modified.

Comptroller General McCarl to the Secretary of the Treasury, September 4, 1924:

I have your letter of August 19, 1924, supplementing the information furnished in connection with your submission of July 8, 1924, upon which was based decision of July 30, 1924, A–3911, 4 Comp. Gen. 131, wherein you were advised as to costs incurred by the Division of paper custody in connection with the receipt, examination, and destruction of mutilated Federal reserve notes arising in connection with the printing thereof, that:

> In answer to that part of the submission relating to the receipt, custody, and issue of distinctive paper for Federal reserve notes, and the receipt, examination, and destruction of mutilated Federal reserve notes arising in connection with the printing thereof, you are advised that section 16 of the Federal reserve act, *supra*, clearly requires that such costs be borne by the Federal reserve banks; therefore, they should be determined as accurately as may be under the circumstances and charged under the appropriation for "Preparation and issue of Federal reserve notes, reimbusable," cited, *supra*; however, being a character of expense always heretofore charged under the appropriations for the "Public debt service," and such expense not appearing as susceptible of actual segregation and identification, which is the general requirement as to transfers between two operating appropriations, it would appear that the deposit should be to miscellaneous receipts rather than to the appropriation for the "Public debt service."

In your letter of August 19, 1924, you state:

> The department is in receipt of your decision of July 30, 1924 (A–3911) in reply to the department's submission of July 8, 1924. In answer to that part of the submission relating to the receipt, custody, and issue of distinctive paper

for Federal reserve notes, and the receipt, examination, and destruction of mutilated Federal reserve notes arising in connection with the printing thereof, you hold that such costs should be determined as accurately as may be under the circumstances and charged under the appropriation "Preparation and issue of Federal reserve notes, reimbursable," but that, being a character of expenses always heretofore charged under the appropriation "Public debt service" and such expense not appearing as susceptible of actual segregation and identification, which is the general requirement as to transfers between two operating appropriations, it would appear that the deposit should be to miscellaneous receipts rather than to the appropriation "Public debt service."

In the department's submission it was stated: "It is proposed to continue to operate the division of paper custody under the established annual appropriation, and from time to time to compute the cost arising through the custody, etc., of paper for Federal reserve notes." This statement would indicate that it is not possible to identify and segregate the items constituting expense of handling paper for Federal reserve notes, and that such an amount may only be estimated. As a matter of fact the actual expense of doing this work may be easily identified. Of the fifty-two employes in the division of paper custody, whose annual salaries aggregate $74,200, nine employes whose salaries aggregate $12,000 are engaged in handling such paper and mutilated work. In other words, if there were no Federal reserve notes printed, the division would be able to dispense with the services of these nine employes and thereby reduce the charge to the appropriation "Public debt service" by $12,000. If the cost of doing this work is to be paid from the appropriation "Public debt service" and the amount received by way of reimbursement is to be deposited as miscellaneous receipts, it will mean that this year and each succeeding year the expense of the public debt service will be increased accordingly, and appropriations for the public debt service must be sufficient to cover this additional expense.

As the cost of handling the distinctive paper for Federal reserve notes and the mutilated work arising from printing Federal reserve notes is clearly susceptible of segregation and identification, following the rule laid down in the last paragraph of your decision of July 30 it is proposed to adopt one of two courses of procedure—(a) Pay the expense out of the appropriation "Public debt service," as at present, said appropriation to be reimbursed for said expense from the appropriation "Preparation and issue of Federal reserve notes, reimbursable"; or (b) transfer the employes actually engaged on this work from the appropriation "Public debt service" and pay them directly out of the appropriation "Preparation and issue of Federal reserve notes, reimbursable." The second plan was followed prior to this fiscal year in paying the salaries of additional employes at the Government mill whose services were required in connection with the manufacture of distinctive paper for Federal reserve notes, but the first plan will be followed hereafter under your decision of July 30 in connection with paying the salaries of such employes. The first plan is preferable as it involves fewer accounting difficulties.

Your decision is, therefore, requested as to whether the department may charge the cost of salaries of employes actually engaged in handling the distinctive paper for Federal reserve notes and the mutilated work arising from printing Federal reserve notes in one of the two methods proposed.

Section 16 of the Federal reserve act of December 23, 1913, 38 Stat. 267 and 268, provides:

Any appropriation heretofore made out of the general funds of the Treasury for engraving plates and dies, the purchase of distinctive paper, or to cover any other expense in connection with the printing of national-bank notes or notes provided for by the act of May thirtieth, nineteen hundred and eight, and any distinctive paper that may be on hand at the time of the passage of this act may be used in the discretion of the Secretary for the purposes of this act, and should the appropriations heretofore made be insufficient to meet the requirements of this act in addition to circularizing notes provided for by existing law, the Secretary is hereby authorized to use so much of any funds in the Treasury not otherwise appropriated for the purpose of furnishing the notes aforesaid: *Provided, however*, That nothing in this section contained shall be construed as exempting national banks or Federal reserve banks from their liability to reimburse the United States for any expenses incurred in printing and issuing circulating notes.

The submission now shows that the expenses in question are incurred solely on account of and are clearly separable in amount from Treasury currency distinctive paper handling expenses, and it appearing desirable to maintain a uniform procedure with respect to the expenses of purchase of distinctive paper for Federal reserve notes, as well as for the expenses of the handling thereof, the plan is now approved of first charging under the current public debt appropriation the costs incurred in connection with the receipt, examination, and destruction of mutilated Federal reserve notes arising in connection with the printing thereof, and of thereafter reimbursing that appropriation by transfer settlements, charging the appropriation for "Preparation and issue of Federal reserve notes, reimbursable," and crediting the appropriation for the "Public debt service," under which the charges were made. As to the manner of stating items to be reimbursed, see 3 Comp. Gen. 889, 891.

(A-4497)

NAVY PAY—CANCELLATION OF EXECUTED DISCHARGE

An attempted revocation or cancellation of a valid executed discharge is ineffective to restore a former enlisted man of the Navy to a duty status, but where such enlisted man returned to duty upon receipt of notice that his discharge by medical survey had been canceled he may retain the pay received from the date of his actual return to duty.

The act of July 1, 1922, 42 Stat. 800, providing for the reenlistment of certain enlisted men of the Navy until they have served 16 years in order to qualify them for transfer to the Fleet Naval Reserve, did not give them a vested right to be retained in the service over all circumstances and did not render void a discharge for physical disability before the completion of the 16 years of service.

Decision by Comptroller General McCarl, September 4, 1924:

There is before this office the question of the right of Serero Velasquez to pay as a native fireman, third class, United States Navy (insular force), which was paid to him on the pay rolls of the receiving ship at Cavite in the second quarter, 1924, by Lieut. J. M. Easter (S. C.), United States Navy.

His account was taken up for pay as of January 19, 1923, under the following order of the commanding officer of the United States naval hospital, Canacao, P. I., dated August 27, 1923.

> In accordance with instructions contained in enclosure (A), you are authorized and directed to take up the above named man's amount on the patients' roll of this hospital, from the date of his discharge of 18 January, 1923, until the present date, and pay him full pay during this period.

It appears that January 18, 1923, Velasquez was given an honorable discharge as the result of a medical survey, origin in line of duty, and not the result of own misconduct. The physical disability is stated to have been a cataract on the left eye. At the time of

discharge he was serving in his fourth enlistment period on June 30, 1922, and on that date had to his credit over 12 years' service, and would, had he remained in the service until the expiration of that enlistment on September 20, 1925, have completed 16 years of service.

The act of July 1, 1922, 42 Stat. 799, provided as one of the methods to reduce the enlisted personnel of the Navy to 86,000 men:

> * * * That enlisted men of the Navy who would be eligible under existing law for transfer to the Fleet Naval Reserve after sixteen years' service at the expiration of the current enlistment in which serving * * * may be transferred to the Fleet Naval Reserve at any time after the passage of this Act in the discretion of the Secretary of the Navy, and shall, upon such transfer, receive the same pay and allowances as now authorized by law for men transferred to the Fleet Naval Reserve at the expiration of enlistment after sixteen years' service: * * * *Provided further*, That no enlisted men of the Navy shall be transferred to the Fleet Naval Reserve unless they have completed sixteen or twenty years' service after the Navy is reduced to the number of enlisted men appropriated for in this Act, and in no event after January 1, 1923.

Velasquez's service placed him in the class here described, but he was not eligible for transfer to the Fleet Naval Reserve under the above provision as he was not a citizen of the United States. Whatever right to transfer is given is " in the discretion of the Secretary of the Navy."

The act of July 1, 1922, on page 800, contained another provision in the matter of transfer to the Fleet Naval Reserve:

> * * * That enlisted men who have served for more than twelve but less than sixteen years shall be permitted to reenlist and continue serving, unless sooner discharged by sentence of a court-martial, until they have completed sixteen years' service, whereupon they shall, upon their own application, be permitted to transfer to the Fleet Naval Reserve * * *.

The latter provision, when read in connection with the former quoted one, clearly indicates it was intended to provide for that class of men who were not eligible for transfer under the former provision, viz, men who had over 12 years of service on June 30, 1922, but who would not have had 16 years of service to their credit at the expiration of that enlistment.

On July 3, 1923, the Judge Advocate General of the Navy rendered an opinion to the Chief of the Bureau of Navigation, in Velasquez's case, which makes no reference to the first quoted provision from the act of July 1, 1922, but considers the second provision only, and holds that under this provision Velasquez had, in effect, a vested right to be kept in the service and to be reenlisted until he had rounded out 16 years of service, and that he could not be discharged regardless of physical or other disqualifications, except misconduct such as would warrant his discharge from the service by sentence of a court-martial. The opinion further holds that because of eligibility for naturalization under the act of May 9, 1918, 40 Stat. 542, the existing

noncitizenship was no bar to the application of the provisions of the act of July 1, 1922, should he become a citizen before application for transfer. The opinion accordingly held that the act of July 1, 1922, was violated in discharging Velasquez on January 18, 1923, through medical survey discharge, and that the discharge should be canceled, as having been illegally issued.

In accordance with this opinion the Bureau of Navigation directed the cancellation of the medical survey discharge, notified Velasquez to report to the naval authorities, and directed that he be paid for the period from January 19, 1923, at the rate of pay in receipt of on January 18, 1923.

The language construed by the Judge Advocate General was a proviso attached to a mandatory requirement that the enlisted personnel of the Navy be reduced to 86,000 men. Neither the legislation as a whole, nor the particular proviso construed, warrants the conclusion that the intent was to increase or extend the rights of any enlisted man. The purpose of the proviso was in a sense to operate as a saving clause in connection with the reduction and the means to accomplish the reduction therein prescribed as to enlisted men of substantial service, who by discharge before expiration of term, or with the discontinuance of recruiting therein directed, could not reenlist to complete 16 years of service and who would thus lose the privilege of applying for transfer to the Fleet Naval Reserve, with the retainer pay authorized, and ultimate transfer to the retired list. There is no intendment that the blind, the halt, and the lame shall be continued on the active list of the Navy until they have completed 16 years of service with a right to transfer to the Fleet Naval Reserve. Nor does the act of August 29, 1916, 39 Stat. 587 *et seq.*, establishing the Naval Reserve Force, nor any of its amendments indicate that that force should be composed of decrepits unfit for active service. In fact, the contrary is clearly implied by the following, quoted from 39 Stat. 587:

> The Naval Reserve Force shall be composed of citizens of the United States who, by enrolling under regulations prescribed by the Secretary of the Navy or by transfer thereto as in this Act provided, obligate themselves to serve in the Navy in time of war or during the existence of a national emergency, declared by the President: *Provided*, That citizens of the insular possessions of the United States may enroll in the Naval Auxiliary Reserve.

There are other provisions in the laws applicable to the Naval Reserve Force indicating that it should be composed of physically fit members. The provision for transfer of enlisted men of the Navy after 16 and 20 years of service to the Fleet Naval Reserve was not intended to provide a form of retirement for physically unfit enlisted men of the Navy who had had that service. It is not necessary at this time to inquire whether the transfer of a physically unfit enlisted man to the Fleet Naval Reserve is illegal, but the

matter is one for inquiry by the naval authorities before such a question arises in the audit of the accounts.

The discharge of Velasquez was issued by an authorized officer pursuant to Navy Regulations and operated to separate him from the Navy. He could not be restored to the Navy except by another enlistment. An attempted revocation or cancellation of a valid, executed discharge is ineffective to restore a man to the Navy. 4 Op. Atty. Gen. 274; 13 *id.* 16; *Mimmack* v. *United States*, 97 U. S., 427; *Blake* v. *United States*, 103 U. S. 227; 2 Winthrop, Military Law and Precedents, 848. Velasquez is not entitled to pay as an enlisted man of the Navy January 18 to August 27, 1923.

From August 27, 1923, Velasquez occupied the status of a man who, without formal enlistment but with the acquiescence of the naval authorities, has resumed service in the Navy. He wore the uniform, was fed, armed, and presumably has performed duty and been paid as an enlisted man. He is therefore entitled to retain so much of the amount paid him for said period subsequent to August 27, 1923, as he would have been entitled to had he formally enlisted on that date.

The account will be adjusted accordingly.

(A–4510)

CLASSIFICATION OF CIVILIAN EMPLOYEES—TRANSFER FROM FIELD SERVICE TO DEPARTMENTAL SERVICE

Employees in the unclassified field service of the Veteran's Bureau transferred to the classified departmental service of the bureau must enter the classified departmental service at the minimum salary rate of the grade to which transferred.

Comptroller General McCarl to the Director, United States Veterans' Bureau, September 4, 1924:

I have your letter of August 4, 1924, requesting decision whether some modification, in so far as the United States Veterans' Bureau is concerned, may not be made in the rule laid down in decision of June 26, 1924, to the Civil Service Commission, that an employee transferred from the unclassified field service to the classified departmental service must be paid at the minimum salary rate of the grade pertaining to the position involved.

The rule was stated as follows, 3 Comp. Gen. 1001:

> In view of the fact that the positions of the field service have not been classified as provided by law, I am constrained to hold that under a transfer from an unclassified position in the field service to a classified position in the District of Columbia, assuming that such transfer is authorized under the civil service laws and regulations, the compensation to be paid would be the minimum compensation of the grade to which transferred, as constituting in effect a new appointment.

This matter was given the most careful consideration upon the submission of the Civil Service Commission, and it is believed the

rule is the only one justified in order to reflect the spirit and intent of the classification act. There is no legal basis for a comparison of the duties of the unclassified positions in the field to the classified positions in the departmental service, and in the absence thereof a transfer to Washington to a particular grade has most of the elements of a new appointment to the grade, which the law requires must be at the minimum salary rate of the grade. The rule that a new appointment must be at the minimum salary rate of the grade is intended not only for the purpose of requiring a new appointee to begin at the minimum salary, but also for the protection and benefit of those already in a grade. It is largely for this latter reason that I believe the persons holding unclassified positions in the field when transferred to the departmental service should be required to come in at the minimum salary rate. This rule may, of course, be subject to change if and when provision is made by law for the classification of the field service.

The questions submitted are answered accordingly.

(A–3254)

TRANSPORTATION RATES—INTERSTATE AND INTRASTATE

The fact that a shipment consigned to an overseas port originated and was transported by a carrier between points within a State to a seaport within said State does not entitle the carrier to the intrastate rates of the State, but being a shipment of an interstate character, the carrier is only entitled to the interstate rates as promulgated by the Interstate Commerce Commission.

Decision by Comptroller General McCarl, September 5, 1924:

The Lehigh Valley Railroad Co. applied, per letter of June 25, 1924, for review of settlement T–74659–W, May 9, 1924, of bill F–3141, in disallowing $527.98 on its claim for $3,112.26 for transportation of 5 carloads of explosive projectiles rated as high explosives from Picatinny, N. J., to Nixon, N. J., en route overseas to Honolulu, Hawaii, and Manila, P. I., as stated on bills of lading WQ–A–147740, 41, 42, 43, and 46, March 20, 21, and 24, 1924.

The shipments moved about 4 miles over the Wharton & Northern Railroad from Picatinny to Lake Junction, and thence about 100 miles over the Central Railroad of New Jersey and Lehigh Valley Railroad to Nixon. There are no through joint rates in connection with shipments over the Wharton & Northern Railroad, the local rates of which are added to rates to or from junction points to make through rates.

The carrier's claim was based on a special commodity rate of 22 cents per 100 pounds from Picatinny to Lake Junction, over the Wharton & Northern Railroad, and 34 cents per 100 pounds thence

to Nixon, and the allowance by the settlement was based on the first-class rate of 12.5 cents from Picatinny to Lake Junction, and 34 cents, the rate claimed by the carrier, thence to Nixon. The disallowance, therefore, was on account of the charges for that portion of the service which was over the Wharton & Northern Railroad from Picatinny to Lake Junction.

The first-class rate of 12.5 cents per 100 pounds as allowed in settlement was named in Supplement No. 2 to I. C. C. No. 72, effective October 28, 1923, and the rate of 22 cents per 100 pounds, as claimed was named in "Special Tariff No. 2," effective October 28, 1923, publishing "Special commodity freight rates for account of U. S. Government."

The carrier in its application for review contends that the class rate does not apply when there is a specific commodity rate in effect.

The Wharton & Northern Railroad Co. had published the following class rates between Picatinny and Lake Junction:

	1	2	3	4
Tariff I. C. C. 32, effective May 11, 1918	8	7	6	4.5
" " 33, " June 25, 1918	25	21.5	17.5	12.5
" " 49, " Sept. 1, 1920	25	30	24	17.5
" " 72, " " 29, 1922	31.5	27	21.5	16

In this connection it is noted that the percentage increase of rates authorized since June 24, 1918, in this territory, was 25 per cent on June 25, 1918, 40 per cent on August 26, 1920, and a reduction of 10 per cent on July 1, 1922, while the rates published by the Wharton & Northern Railroad show increases over the rates which were in effect on June 24, 1918, for example, on the first-class:

On June 25, 1918, of 212.5 per cent.
September 1, 1920, of 337.5 per cent.
September 29, 1922, of 293.75 per cent.

The tariffs publishing these rates were filed with the Interstate Commerce Commission and seem to have been intended to apply on both interstate and intrastate shipments.

The Wharton & Northern Railroad Co. issued tariffs intrastate N. J. No. 31, effective January 29, 1923, and intrastate N. J. No. 32, effective February 16, 1923, as proportional rates applicable on its line for carload shipments for the United States Government destined to or originating at Raritan Arsenal at Metuchen-Nixon, N. J., the first naming a rate of 27 cents per 100 pounds and the second 22 cents per 100 pounds on loaded projectiles and fixed ammunition, minimum carload 20,000 pounds. The tariff specifically excluded application for interstate traffic.

Intrastate N. J. tariff No. 32 was canceled by special tariff No. 1, effective February 27, 1923, naming "Special commodity freight rates for account of U. S. Government" applicable to either New Jersey intrastate or interstate traffic, however, with statement that said tariff is not filed with Interstate Commerce Commission under ruling of commission relieving carriers from filing special rates for exclusive Government shipments. This tariff named first-class rate of 22 cents per 100 pounds and carload rate on high explosives of 22 cents per 100 pounds, and by its terms was applicable to carload shipments made by United States Government on Government bills of lading. It, however, provided that less than carload shipments will be handled on published class rates on file with Interstate Commerce Commission. The rates thus named were less than regular tariff rates as published at that time in I. C. C. 72, the commodity rate on explosives being 31½ cents per 100 pounds, the same as the first-class rate. This conformed to the ruling of the Interstate Commerce Commission that the rates on high explosives in carloads should not exceed the rates on articles taking the first-class rating, while less than carloads should not exceed double first-class rates. 25 I. C. C. 19; 33 *id.* 288; 35 *id.* 77; 44 *id* 531; 51 *id.* 553; 52 *id* 26; 55 *id.* 177, 350, and 533; and 68 *id.* 264.

The Navy and War Departments instituted proceedings with the Interstate Commerce Commission, claiming reparation on account of excessive charges on interstate shipments from or to Lake Denmark and Picatinny, N. J., on the Wharton & Northern Railroad and points on other lines.

The Interstate Commerce Commission in the said case, No. 12497, decided May 8, 1923, 80 I. C. C. 143, found that Picatinny and Lake Denmark are about 4 and 6 miles, respectively, from Wharton, and the same distance from Lake Junction on a large Federal reservation, and the only traffic is that to or from the arsenal or ammunition depots, and most of it moves via Chester Junction or Lake Junction, and that the service performed by the Wharton & Northern Railroad consists of moving loaded and empty cars of other carriers between points of interchange with such carriers and the interchange tracks and maintained by the company through the War Department in connection with the arsenal and located adjacent to the company's right of way at Picatinny. The Wharton & Northern Railroad Co. in the hearing before the commission, emphasized the fact that explosives, which comprised a large part of the Government shipments, must be handled with care and advanced this as one of the reasons why the charges which it had assessed on the shipments under consideration were correct, and reparation not due.

The commission, after a thorough investigation of the reasonableness of the rates and charges on shipments of explosives upon which the Wharton & Northern Railroad Co. had assessed charges based on its published rates, held that:

* * * the combination class rates were unreasonable to the extent that the components thereof applicable over the Wharton and Northern exceeded the following bases: Prior to August 31, 1920, 125 per cent of the local rates of the Wharton and Northern in effect on June 24, 1918; between September 1, 1920, and June 30, 1922, both inclusive, 140 per cent of the basis herein found reasonable prior to August 31, 1920; and on and after July 1, 1922, 90 per cent of the basis herein found reasonable between September 1, 1920, and June 30, 1922.

We further find that complainant made interstate shipments under the combination class rates herein found unreasonable and paid and bore the charges thereon; that it has been damaged in the amount of the difference between the charges paid and those that would have accrued at the rates herein found reasonable; that it is entitled to reparation from the Wharton and Northern * * *.

An order will be entered requiring the Wharton & Northern to establish for the future the basis of rates found reasonable for the period subsequent to June 30, 1922.

The Wharton & Northern Railroad Co. published as its authority for the rates in its tariff I. C. C. 49, *supra*, the order of the Interstate Commerce Commission in Docket No. 74 (Ex Parte), dated July 29, 1920.

The Interstate Commerce Commission, in case No. 12497, *supra*, regarding these rates held that:

Our order of July 29, 1920, in Increased Rates, 1920, 58 I. C. C., 220, is referred to in the tariff of the Wharton as authority for the increases of September 1, 1920. No such authority was granted by that report or any other based thereon. On page 254 of our report in that case we said:

"We find on the record no explanation of the underlying basis of the minimum class scales and no justification for increasing them."

The commission's order required the Wharton & Northern Railroad Co. to cease and desist from publishing rates in excess of those found reasonable and requiring it to publish, on or before July 28, 1923, by not less than five days' notice, rates from Picatinny to Lake Junction of:

Class	1	2	3	4
In cents	12. 5	11. 5	9. 5	7

The Wharton & Northern Railroad Co. did not comply with the order of the commission until nearly six months after the case was decided, when by Supplement No. 2 to its tariff I. C. C. No. 72 effective October 28, 1923, it published the reasonable rates as required, but at the same time published another tariff, which it did not file with the commission, with statement on its face that it was published under the authority of I. C. C. Conference Ruling No. 36 and not

filed with the Interstate Commerce Commission; this tariff was designated "Special Tariff No. 2, effective October 28, 1923," to apply as follows:

Special commodity freight rates for account U. S. Government, between Picatinny, N. J., * * * and * * * Lake Junction, N. J., * * *. This tariff is applicable to carload shipments made directly by the U. S. Federal Government that are handled on U. S. Government bills of lading. Less carload shipments will be handled on published rates on file with the Interstate Commerce Commission.

This tariff is applicable to either New Jersey, intrastate traffic or to interstate traffic.

High explosives. * * *.

Carload minimum weight 20,000 lbs., 22 cents per 100 lbs.

The authority claimed for issuing "Special Tariff No. 2," I. C. C. Conference Ruling No. 36, which holds that tariffs providing rates applicable on shipments made directly by the Government need not be filed with the commission, must be considered in connection with the other rulings which are referred to by it—that is, Nos. 33, 244, and 452—as relating to the rates authorized by section 22 of the transportation act, which provides that free or reduced rates may be granted on shipments of property of the United States, etc., and not as authority to exact rates on Government shipments that are in excess of reasonable rates accorded to shipments for the general public.

The issuance of this special tariff at the same time that the tariff providing for the reasonable rates prescribed by the commission was issued appears to be an attempt to charge the Government rates that are in excess of those found just and reasonable by the Interstate Commerce Commission after its full and extended investigation of the matter and where the commission ordered reparation on account of excessive payments on such shipments.

In accordance with the ruling of the Interstate Commerce Commission, shipments of explosives from Picatinny to Lake Junction would take the first-class rating or 12.5 cents per 100 pounds in carload quantities, and double the first-class rate, or 25 cents per 100 pounds, in less carloads, and as Government shipments are practically all in carload quantities the Wharton & Northern Railroad, by this Special Tariff No. 2, seeks to charge the Federal Government 22 cents per 100 pounds on these carload shipments, though admitting a rate of 25 cents per 100 pounds on less carload shipments.

The Federal Government is entitled to rates which are just and reasonable and which are not discriminatory, and the Interstate Commerce Commission has decided the question as to these shipments.

All of these shipments in fact and as shown on the face of the bills of lading were destined to points outside the State of New Jersey, the consignment to Nixon, N. J., in care of Raritan Arsenal, being merely intermediate to ultimate destinations outside of the

State of New Jersey, fixed at time of and at point of origin of shipment. Shipments were for continuous carriage and forwarding to final destination by the agent of the Government charged with this duty and in whose care the property was shipped.

A statement of the rule applicable to such a case as is here presented has been announced by the Supreme Court of the United States in the case of *Binderup* v. *Pathe Exchange*, in which by decision of November 19, 1923, it was held that:

> The general rule is that where transportation has acquired an interstate character "it continues at least until the load reaches the point where the parties originally intended that the movement should finally end." *Illinois C. R. C.* v. *De Fuentes*, 236 U. S. 157, 163 * * *. And see *Western U. Teleg. Co.* v. *Foster*, 247 U. S. 105, 113; * * * *Western Oil Ref. Co.* v. *Lipscomb*, 244 U. S. 346, 349, * * *.

In the case of *Baltimore and Ohio Southwestern Railroad Co.* v. *Settle et al.*, the Supreme Court held, November 13, 1922, quoting syllabi, 260 U. S. 166, that:

> 1. Whether a shipment of goods is interstate and is therefore subject to the rates provided by the carrier's interstate tariff, depends upon the essential character of the movement and this character is not necessarily determined, by the contract between shipper and carrier. P. 169.
> 2. Neither through billing, uninterrupted movement, continuous possession by the carrier, nor unbroken bulk is an essential of interstate shipment, though these are common incidents of through shipment, and their presence or absence may be important evidence of the intention with which a shipment was made, when that question is an issue. P. 171.

In the case of *Baltimore and Ohio Southwestern Railroad Co.* v. *Settle et al.*, 260 U. S. 166, the Supreme Court held:

> The question is presented whether, in view of the undisputed facts, the original and continuing intention so to reship made the reshipment, as matter of law, part of a through interstate movement. * * *
> Whether the interstate or the intrastate tariff is applicable depends upon the essential character of the movement. That the contract between shipper and carrier does not necessarily determine the character was settled by a series of cases in which the subject received much consideration. *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498; *Ohio Railroad Commission* v. *Worthington*, 225 U. S. 101; *Texas & New Orleans R. R. Co.* v. *Sabine Tram Co.*, 227 U. S. 111; *Railroad Commission of Louisiana* v. *Texas & Pacific Ry. Co.*, 229 U. S. 336.

See discussion of this question in decision of this office dated March 12, 1924, 3 Comp. Gen. 619.

The shipments under consideration, by the terms of the interstate commerce act, are clearly within the jurisdiction of the Interstate Commerce Commission as to the charges for the rail transportation within the United States, being transportation of property from a place in the United States to a foreign country within the meaning of the act.

The Interstate Commerce Commission, in decision of April 14, 1919 (52 I. C. C. 671), said, on page 727:

> The transportation of traffic from an inland point to a port of export, for export, is subject to all the provisions of section 1 of the act. This is true even when the transportation to the port is performed wholly within the confines

of the State in which it originates and whether the traffic be carried on local or on through bills of lading. *Red River Oil Co.* v. *T. & P. Ry. Co.*, 23 I. C. C. 438; *Texas & Pac. Ry. Co.* v. *Railroad Com'n. of Louisiana*, 183 Fed. 1005; *So. Pac. Terminal Co.* v. *Int. Comm. Comm.*, 219 U. S. 498.

See also decision of Interstate Commerce Commission of November 24, 1922 (74 I. C. C. 613), and of July 10, 1924 (91 I. C. C. 315).

The settlement having been made in accordance with the rates prescribed by the Interstate Commerce Commission is affirmed.

(A–4391)

VEHICLES, PASSENGER-CARRYING—PURCHASE OF CHASSIS

The prohibition contained in the act of June 7, 1924, 43 Stat. 487, against the "purchase of motor-propelled passenger or freight carrying vehicles for the Army" is not applicable to the purchase of a chassis constituting a part of motor searchlight units, the primary function of which is to generate power for the operation of searchlights at seacoast defenses, the carrying or drawing of the unit being only incident thereto.

Comptroller General McCarl to the Secretary of War, September 5, 1924:

I have your letter of July 28, 1924, requesting decision whether the appropriation, "Seacoast defenses, insular possessions," and "Seacoast defenses, Panama Canal," appearing in the act of June 7, 1924, 43 Stat. 496, providing appropriations for the War Department for the fiscal year 1925, are available for the purchase of a Cadillac chassis to be used as power units and only incidentally for transportation purposes in the operation of mobile searchlight units, or whether such purchase is prohibited by the provision of the same act against the purchase of motor-propelled passenger or freight carrying vehicles.

The particular appropriation items are as follows:

For the installation and replacement of electric light and power plants and the purchase and installation of searchlights at the seacoast fortifications of the Hawaiian Islands, $11,000.

* * * * * * *

For the installation and replacement of electric light and power plants, and the purchase and installation of searchlights for the seacoast fortifications on the Canal Zone, $50,000.

The same act, 43 Stat. 487, provides as follows:

None of the funds appropriated or made available under this Act or any of the unexpended balances of any other Act shall be used for the purchase of motor-propelled passenger or freight carrying vehicles for the Army except those that are purchased solely for experimental purposes, and except one automobile for the official use of the Secretary of War, and with the further exception that not to exceed $50,000 may be used as part payment in exchange of motor-propelled passenger or freight carrying vehicles.

From the papers submitted it appears that the chassis to be purchased from these appropriations constitute a part of mobile searchlight units for which the greater part of the appropriations were intended. The chassis either draw or carry the remainder of the unit

and are designed to also generate the power for the operation of the searchlight. The prohibition is against "purchase of motor-propelled passenger or freight carrying vehicles." The primary function of these chassis, it is understood, is the generating of power for the searchlight, and the transportation of the unit is merely incident thereto.

Accordingly you are advised that the purchase of the chassis in question is not prohibited as a purchase of passenger or freight carrying vehicles.

(A–4461)

TRAVELING EXPENSES—AUTOMOBILE HIRE

The hire of an automobile by a prohibition enforcement officer from his minor son, or from the minor son of another officer, raises a presumption of benefit to the officer by indirectly augmenting official compensation through private transactions with the Government, and payment from public funds for such hire is not authorized.

Decision by Comptroller General McCarl, September 5, 1924:

Sam Collins, special disbursing agent, internal revenue, by letter dated July 25, 1924, requests review of so much of settlement C–10836–Ti, dated May 26, 1924, as disallowed the following items comprising reimbursement to national prohibition agents Felix G. Fields, W. C. White, and W. H. Green, representing charges for hire of automobiles from the minor sons of agents Fields and Green:

Voucher 179, Felix G. Fields, auto hire paid to Emmett G. Fields, August 8, $6; August 9, $5; August 10, $5; August 11, $10; August 12, $6; total, $32.

Voucher 194, W. C. White, auto hire paid to Emmett G. Fields, August 9, $5; August 18, $15; total, $20.

Voucher 326, W. H. Green, auto hire paid to C. W. Green, September 16, $6; September 18, $8; September 20, $7; September 29, $10; total, $31, erroneously disallowed $33 because subvoucher No. 11 receipted for $8 instead of $6.

Concerning reimbursement to Felix G. Fields, it appears that the hiring was from his minor son, whose age at the time is stated to have been 17 years 9 months. Agent Fields furnishes an affidavit to the effect that Emmett Fields was the sole owner of the automobile so hired and received the full benefit of the hiring and that affiant received none. In substantiation of the son's ownership there is furnished a duplicate registration certificate of the State of Kentucky in the son's name, but bearing the subsequent date of December 26, 1923, and there is also furnished an undated pencil copy of a bill of sale purporting to bear the signature of the manager of the Franklin Motor Co., of Lexington, Ky. Whether or not owner-

ship of the car was in the son at time of hiring is not of paramount importance as the propriety of the payment rests upon the circumstances of the payment being to a minor son. As a minor dependent member of his household, which the parent presumably maintains, it is not seen how a payment for hire of the son's car, under such conditions, can result otherwise than as of some benefit to the parent. It has been held that payment under such conditions is in effect reimbursement to the father for use of his own machine.

Upon the facts presented it must be held that the disallowance of the sum of $32 paid as reimbursement to Agent Fields for the auto hire in question was correct.

Reimbursement to W. C. White represents auto hire paid to Emmett G. Fields, as minor son of a fellow officer, and the resultant circumstances are as to all essentials substantially as set forth in the case of Agent Fields. Such practice permits public money to be so paid as to result in obtaining a beneficial contribution which indirectly augments official compensation through accomplishing a private transaction with the Government while at the same time representing it officially. Such transactions are clearly incompatible with official duty and no payments may be allowed for obligations thus imposed.

Accordingly the disallowance of credit for the item of $20 paid to Agent Field's minor son was also correct.

Reimbursement to W. H. Green is for hiring of an automobile from his son, C. W. Green. An affidavit by C. W. Green asserts that the machine used was registered in the name of W. H. Green, but nevertheless was presented to him by his father some time previous to the hiring in question. The son further swears that W. H. Green received no benefit from the hire of said car whatever; that the son became 21 years of age on the 11th day of June, 1924, and that he supports himself and maintains the car from his own resources.

This affidavit was made June 30, 1924, nearly a year subsequent to date of the hiring, and does not even purport to show independent and separate maintenance on the part of affiant during the period of the hiring. The son may then have been either entirely dependent, or at least have been a member of and partial contributor to a household which received a joint benefit from the total contributions of father and son. Further, the maintenance of the car may have depended upon this character of hiring. On the whole, the facts indicate a similar situation as to the essential conditions discussed in the case of W. C. White, *supra*, in that such practice permits of augmenting official compensation through participating in private transactions with the Government. It is considered therefore that the disallowances as to $31 paid by W. H. Green to his

son for hire was, under the conditions recited, correct, but the $2 inadvertently disallowed which is disclosed not to have been charged will now be admitted to credit.

(A-4457)

REIMBURSEMENT OF EXPENSES OF GUARD TRANSPORTING A PRISONER WHO ESCAPED BUT WHO LATER VOLUNTARILY SURRENDERED HIMSELF

Where a prisoner, being transferred from one jurisdiction to another escaped through the negligence of his guard but later voluntarily surrendered to a United States commissioner and gave bond for his appearance in court, the guard may be reimbursed his authorized expenses actually incurred up to the time of the escape, less the amount of such additional expenses, if any, as may have been incurred by the Government in regaining custody of the prisoner and transporting him to the desired destination.

Comptroller General McCarl to the Attorney General, September 6, 1924:

There has been received your letter of July 31, 1924, quoting a letter from the marshal for the Eastern District of Tennessee relative to the payment of expenses of Deputy Walker of his district in transporting a prisoner who escaped near Berea, en route from Knoxville, Tenn., to Covington, Ky. The marshal further states that he has a letter from W. C. Bennett, United States commissioner at Richmond, Ky., 117 miles distant from Covington, the place to which the prisoner was being transported, that Chester A. Preston, the prisoner who made his escape from his deputy near Berea, appeared before him at Richmond and executed bond in the sum of $1,000 for his appearance at the Richmond term of court, which convenes on the 1st day of November, 1924, and requesting to be advised whether under the circumstances above set forth the deputy may properly be reimbursed covering expenses incurred by him incident to the transportation of the prisoner.

The general rule applicable in cases where the escape is due to negligence of the officer in charge or the guard is that the officer is entitled to credit for expenses actually incurred in transporting the prisoner, less so much thereof as was caused by the escape and recapture of the prisoner, or, in other words, that the United States must not be charged with any additional expense on account of the escape. 20 Comp. Dec. 159; 3 Comp. Gen. 674.

In the instant case the deputy may be reimbursed his authorized actual expenses incurred up to the time of escape, less the amount of such additional expenses, if any, as may have been incurred by the Government in regaining custody of the prisoner and transporting him to the desired destination.

(A–4482)

SUBSISTENCE, PER DIEM IN LIEU OF—FRACTIONAL DAYS—PRACTICE—EFFECTIVE DATE OF A DECISION

Short temporary absences from headquarters on official business for only a few hours during the day at such time and under such conditions as to preclude any presumption as to the necessity for the incurring of any additional expenses for subsistence do not entitle an employee to reimbursement either on a per diem or an actual expense basis.

A per diem in lieu of subsistence for the fractional part of a day is authorized when forming part of a continuous absence of one day or more.

The rule that a decision which changes an existing practice based upon a former construction of a law or regulation will be applied only to expenditures thereafter made may be invoked only in those cases in which the payment involved was made by reason of the former practice and the expense would not have been incurred had it been known that credit therefor would not be allowed.

Comptroller General McCarl to the Attorney General, September 6, 1924:

I have your letter dated August 1, 1924, in which attention is invited to certain recent decisions of this office to the effect that short temporary absences from headquarters on official business trips at such hours and under such conditions as to negative the incurring of any actual expenses for subsistence do not entitle the employee to any reimbursement on account of such subsistence, either on a per diem or an actual expense basis: citing decisions in 3 Comp. Gen. 598; 3 *id.* 739; 3 *id.* 966; and unpublished decision of May 3, 1924, A–2226.

In connection therewith reference is made to decisions of a former Comptroller of the Treasury, 23 Comp. Dec. 315, and 24 *id.* 59; holding that a per diem allowance in lieu of subsistence in the case of an officer or employee of the Government traveling on official business "is based on a period of time, and not on meals to be taken," and you quote the syllabus of the latter decision in which a per diem is defined as follows:

A per diem in lieu of subsistence is a fixed, indivisible sum, payable without qualification to an employee in a travel status, entitled thereto, and accrues solely from lapse of time and regardless of the actual expense incurred or whether there was any expense.

You then state that based upon the holdings of these former decisions there was issued by your department the Circular No. 961, dated April 26, 1919, which provided per diems for trips involving fractional portions of a day. You refer to the decisions of this office hereinbefore cited as indicating a reversal of the former decisions on which you state Circular No. 961 was based and you request decisions as promulgated in said circular relative to the per diem in lieu of subsistence for United States marshals, and other court officers, be modified to conform to the more recent rule as announced, and if so the date the modified regulations should, in fairness to such officials, become effective.

It may be said that the recent decisions referred to are not viewed as necessarily reversing the former rulings. The later decisions are to the effect that an employee absent from his official station for only a few hours during the day at such time and under such conditions as to preclude any presumption as to the necessity for incurring any additional expenses on account of subsistence is not to be regarded as in a travel status within the meaning of the laws authorizing payment of subsistence expenses of employees traveling on official business; and I assume that the decisions of the former Comptroller of the Treasury were not intended to authorize payment of per diem in such cases.

The per diem allowance authorized by law is in lieu of the "expenses actually incurred for subsistence" such as the employee would be entitled to reimbursement for under the provision in the act of April 6, 1914, 38 Stat. 318. Therefore when the absence is of such short duration as to preclude a presumption of necessity for actually incurring any expenses for subsistence, there is no status entitling to per diem.

The provisions for the payment of per diem, or fractions thereof, must not be applied so as to result in the payment of a subsistence allowance regardless of the fundamental reason and intention for such payment, and in the acquiring of a mere gratuity, or additional compensation, both of which are unlawful.

However, where there is travel under conditions necessarily involving expenses for subsistence former decisions, and regulations not inconsistent therewith, are left unaffected by the more recent decisions of this office.

In regard to fractional per diems, it appears that they have been erroneously viewed as automatically accruing to the employee by the mere fact of being absent on a short local trip into the territory adjacent to the official station and under conditions that ordinarily do not interfere with the domestic arrangement for obtaining the usual subsistence thus resulting in payments not authorized under the law.

To the extent that your regulations purport to authorize a per diem in any amount for an absence of only a fractional part of a day—such absence not being a part of a continuous absence of one day or more—under conditions where manifestly no expenses for subsistence would be incurred, they transcend the law and should be amended.

Regarding what may be considered as a plea for indulgence to cover a period that must necessarily elapse before an amended circular may be put into effect, you are advised that the rule that a decision which changes an existing practice based upon a former

construction of law or regulation will be applied only to expenditures thereafter made, will be invoked only in those cases in which the payment involved was made because of the former practice and the expense would not have been incurred had it been known that credit therefor would not be allowed. It is assumed that it will not be contended that trips involving a claim to per diems under the conditions reviewed were made because of the belief that a per diem therefor would be collected.

Your submission is answered accordingly.

(A-2879)

NAVAL RESERVE FORCE—RETAINER PAY

Active service for the maintenance of efficiency is required with regard to an enrollment as a whole and must be performed before a member of the Naval Reserve Force is entitled to confirmed retainer pay for the fourth year of an enrollment, and this notwithstanding that during a portion of the enrollment the member held only a provisional rank, grade, or rating or was in a class in which active duty for training was not required by law.

For certain classes of the Naval Reserve Force two months' active duty for training is required during each enrollment; and such duty may be performed "in one period or in periods of not less than 15 days each." The restriction on payment of retainer pay to any member "who fails to train as provided by law" prohibits crediting for pay purposes periods of active duty for training of less than 15 days' duration.

All active service for training complying with the requirements of the law may be credited a member of the Naval Reserve Force notwithstanding a portion was performed while the member was in a class of whom the law required no active duty for training.

As the law provides no exceptions to the requirement for active duty for training during an enrollment, or drills, or equivalent duty during each year thereof, the failure of a member of the Naval Reserve Force to perform the required service is an absolute bar to payment of retainer pay, and the reason for the failure is not material in this connection.

Comptroller General McCarl to Capt. George G. Seibels, United States Navy, September 8, 1924:

By reference of the Judge Advocate General, I have your letter of June 3, 1924, requesting decision in the matter of payment of retainer pay to confirmed members of the United States Naval Reserve Force, summarized as follows:

The questions arising in the several cases herein submitted may be summarized as follows:

(A) Is it a prerequisite to the payment of retainer pay to an enrolled confirmed member of class 1, 2, 4, or 5, of the Naval Reserve Force, for any part of the fourth enrollment year, that the reservist shall have performed the full amount of active service prescribed by law for a full enrollment (60 days) although for a portion of the enrollment—

1. He occupied only a provisional status;

2. He was a member of a class in which no active service was required by law or regulation as a prerequisite to the payment of retainer pay;

3. He was in a class for which certain active service and drills or equivalent duty were required by law as a prerequisite to the payment of retainer pay,

but because of limited facilities no opportunity for the attendance at drills or the performance of equivalent duty was granted him by the Navy Department, thus he was precluded from earning retainer pay for the period involved;

4. He was in a class for which certain drills or equivalent duty were required by law as a prerequisite to the payment of retainer pay, but the Navy Department prohibited the attendance at drills or the performance of equivalent duty, because of limited appropriations, thus precluding the earning of retainer pay for the period involved;

5. He was a member of a class for which no retainer pay is provided and in which no duty is necessarily performed in time of peace. Or

(B) May payment for any portion of the fourth enrollment year be made to a reservist who has performed active service proportionate only to the period or periods of the enrollment during which he was a confirmed member of Class 1 (1–a or 1–b), 2, 4, or 5? Or

(C) May payment for any portion of the fourth enrollment year be made to a reservist who has performed active service proportionate only to the period or periods of the enrollment during which retainer pay has been earned by the performance of drills or other equivalent duty?

The decision of this office May 17, 1924, 3 Comp. Gen. 867, dealt with the following provisions of law:

The act of July 1, 1918, 40 Stat. 710:

That the minimum active service required for maintaining the efficiency of a member of the Naval Reserve shall be two months during each term of enrollment and an attendance at not less than thirty-six drills during each year, or other equivalent duty. The active service may be in one period or in periods of not less than fifteen days each.

The act of June 4, 1920, 41 Stat. 837:

SEC. 9. * * * That hereafter the minimum amount of active service required for the maintenance of the efficiency of the Fleet Naval Reserve shall be the same as for the Naval Reserve.

The act of August 29, 1916, 39 Stat. 591 *et seq.*:

NAVAL AUXILIARY RESERVE

* * * * * * *

The requirement as to qualifications of officers and men for confirmation in rank or rating, and as to the maintenance of efficiency in rank or rating, shall be prescribed by the Secretary of the Navy and shall be limited to the requirements for the proper organization, discipline, maneuvering, navigation, and operation of vessels of the merchant ship type while performing auxiliary service to the fleet in time of war, and length of time of employment on board such vessels in the merchant service.

NAVAL COAST DEFENSE RESERVE

* * * * * * *

The amount of active service required for * * * maintaining efficiency in rank and rating shall be the same as that required for members of the Naval Reserve.

VOLUNTEER NAVAL RESERVE

The Volunteer Naval Reserve shall be composed of those members of the Naval Reserve Force who are eligible for membership in any one of the other classes of the Naval Reserve Force, and who obligate themselves to serve in the Navy in any one of said classes without retainer pay * * * in time of peace.

NAVAL RESERVE FLYING CORPS

* * * The amount of active service required for * * * maintaining efficiency therein, shall be the same as that required for members of the Naval Reserve. * * *.

The questions seem to indicate doubt as to whether performance of the active duty and drills or equivalent duty required by statute during the enrollment must be shown before payment of retainer pay for the fourth year may be made. The statute authorizes no exception. The minimum active service required for maintaining efficiency of a member of the Naval Reserve Force shall be two months during each enrollment and a member who has not complied with that requirement is not entitled to retainer pay for the fourth year of his enrollment. Also, the statute requires 36 drills or equivalent duty annually and payments during the first three years of the enrollment are with respect to the performance of this duty and, if specifically required (otherwise not), active duty for training.

The act of August 29, 1916, 39 Stat. 587, provides:

> When first enrolled members of the Naval Reserve Force, except those in the Fleet Naval Reserve, shall be given a provisional grade, rank or rating in accordance with their qualifications determined by examination. They may thereafter, upon application, be assigned to active service in the Navy for such periods of instruction and training as may enable them to qualify for and be confirmed in such grade, rank or rating.
>
> No member shall be confirmed in his provisional grade, rank or rating until he shall have performed the minimum amount of active service required for the class in which he is enrolled * * * .
>
> * * * * * * *
>
> NAVAL RESERVE.
>
> * * * * * * *
>
> The minimum active service required of members to qualify for confirmation in their rank or rating in this class shall be three months.

As to the Naval Coast Defense Reserve and the Naval Reserve Flying Corps, the act of August 29, 1916, provides:

> The amount of active service required for confirmation in rank and rating * * * shall be the same as that required for members of the Naval Reserve.

The law accordingly takes into consideration two classes of active duty for members of the Naval Reserve Force: (1) For "instruction and training as may enable them to qualify for and be confirmed in such grade, rank, or rating;" and (2) for "maintaining the efficiency" after confirmation. The provision relative to the performance of active duty for purposes of qualification in rank, grade, or rating is made optional with the member, and the failure to perform active duty for this purpose does not affect the member's right to receive the nonconfirmed rate of retainer pay, viz, $12 per annum. 17 MS. Comp. Gen. 1071, January 25, 1923. On the other hand, the provision relative to performance of active duty and attendance at drills is in effect made compulsory in order that a confirmed member may receive retainer pay as such, and as to active duty covers the entire enrollment notwithstanding during a portion of the enrollment he was in a provisional grade.

It is to this latter class of active service that the acts of July 1, 1918, and June 4, 1920, refer. The act of July 1, 1918, was directed in terms to members of class 2 (the Naval Reserve) and by reason of the provisions of the act of August 29, 1916, extended to class 4 (the Naval Coast Defense Reserve) and to class 5 (Naval Reserve Flying Corps). It was extended to class 1 (the Fleet Naval Reserve) by the act of June 4, 1920. Neither the act of July 1, 1918, nor June 4, 1920, was directed to either class 3 (the Naval Auxiliary Reserve) or class 6 (the Volunteer Naval Reserve), and the act of August 29, 1916, did not put the members of either of these two classes under the same requirement as for the other four classes.

From what has already been said, it is apparent that a member completing an enrollment must show the performance of the active duty required by law, and the fact that during a portion of the enrollment he was a member of a class in which active duty was not required does not relieve him from compliance with the requirements of the class in which he is serving upon expiration of enrollment.

Questions A–1, 3, 4, 5 are accordingly answered in the affirmative, with the qualification that the failure to perform drills or equivalent duty operates as a forfeiture for the period of failure and is not required to be made up in the fourth year. The statute makes no exception with respect to active duty.

Question A–2 seems to relate to the Naval Auxiliary Reserve. The requirements as to the maintenance of efficiency are to be prescribed by the Secretary of the Navy. It is stated that the Secretary of the Navy, September 10, 1921, directed payment of retainer pay to be made to members of the Naval Auxiliary Reserve (class 3) pending the issuance of instructions prescribing the requirements for maintenance of efficiency. That instruction is authority for payment until the issuance of the instructions therein contemplated. After the issuance of those instructions they will be operative under the statute. What, if any, later instructions have been issued are not indicated, and a more definite reply can not be made on the present showing.

Question B seems to be the same as question A–1. As has been stated, the active service required by law during the enrollment must be performed before retainer pay may be paid for the fourth year, and the enrollment includes the period during which the member had only a provisional rank, grade, or rating. This question and question C are both answered in the negative.

There is a further question presented with respect to the provision for active duty for maintaining efficiency for periods of less than 15 days. The statute is specific that the active service required "may be in one period or in periods of not less than 15 days each." This provision, read in connection with the requirement contained in the

act of June 4, 1920, 41 Stat. 824, that retainer pay shall not be paid to any member of the Naval Reserve Force "who fails to train as provided by law," requires that the active duty for training shall be in periods of not less than 15 days, and if active duty training is permitted by the Navy Department in periods of less than 15 days, such training is not proper for inclusion in the computation of the active duty for training for retainer pay purposes.

A further question is whether active service of the required duration performed pursuant to orders while the member was of a class of whom no active duty was required by law may be credited during the enrollment and after the member is transferred to a class of whom active duty for training is required. Obviously, as the enrollment is treated as an entirety, all active duty for training meeting the requirements of law should be included.

(A–4593)

CLASSIFICATION OF CIVILIAN EMPLOYEES—EFFECTIVE DATE OF ALLOCATIONS AND REALLOCATIONS

The original allocation or a revised allocation of a position hereafter made under the provisions of the classification act of March 4, 1923, 42 Stat. 1488, is effective only from the beginning of the pay period current at the date of receipt by the administrative office. Payments heretofore made effective from July 1, 1924, under the decision of July 24, 1924, 4 Comp. Gen. 106, will not be questioned.

Comptroller General McCarl to the Secretary of the Treasury, September 8, 1924:

I have your letter of August 8, 1924, requesting decision of the following question:

When a position occupied by an employee on July 1, 1924, is reallocated by the Personnel Classification Board to another grade, involving a change in compensation, from what date should the salary under the new allocation be paid?

Section 4 of the Classification Act of March 4, 1923, 42 Stat. 1489, provides as follows:

That after consultation with the board, and in accordance with a uniform procedure prescribed by it, the head of each department shall allocate all positions in his department in the District of Columbia to their appropriate grades in the compensation schedules and shall fix the rate of compensation of each employee thereunder, in accordance with the rules prescribed in section 6 herein. Such allocations shall be reviewed and may be revised by the board and shall become final upon their approval by said board. Whenever an existing position or a position hereafter created by law shall not fairly and reasonably be allocable to one of the grades of the several services described in the compensation schedules, the board shall adopt for such position the range of compensation prescribed for a grade, or a class thereof, comparable therewith as to qualifications and duties.

The allocations that the Personnel Classification Board are expressly authorized to review by this section are those originally made by the administrative office. However, under the generally recog-

nized principle that a Government officer, or, as in this case, a Government board, may review its own action for the purpose of correcting a mistake, the Personnel Classification Board is authorized to review any allocation erroneously made at any time. The classification act is silent as to the effective date of such a change in the allocation of the position of an employee. Decision of July 24, 1924, A–3967, 4 Comp. Gen. 106, held as follows:

* * * The last action of the Personnel Classification Board in allocation of positions is the proper basis for fixing the rate of compensation, and such rate is in general effective as of and from July 1, 1924. * * *

That particular decision was rendered to the Librarian of Congress on the basis of revisions of allocations made prior to July 1, 1924, and received by the librarian on that date. To apply the same rule to all revised or changed allocations made during the present fiscal year would result in confusion, impossibility of proper accounting, and difficulty in the application of the average provision appearing in the appropriation acts.

It appears to be a fact that all allocations had not been made by July 1, 1924, and hence there were allocations subsequent to that date which were either original allocations or allocations based upon an appeal from an allocation previously made. Employees are understood to have been paid according to the compensation which they were in receipt of where no original allocation had been made and were paid according to the original allocation if there was an appeal from such allocation. This appears to have been as nearly as possible the practical rule to follow, and I see no reason to question the payments thus heretofore made. Hereafter allocations may be given effect to only for the pay period current upon the date of receipt by the administrative office of the allocation, whether it be an original allocation or an allocation resulting from an appeal.

(A–4898)

TRAVELING EXPENSES OF STATE DIRECTORS ATTENDING A CONFERENCE IN WASHINGTON

Where it is administratively determined that the attendance upon a conference in Washington called by the Children's Bureau of State directors who administer the maternity and infancy act locally in the different States is necessary for the accomplishment of the purposes of the statute, the current appropriation providing for the administration of the act under the Children's Bureau is properly chargeable, within the statutory limitations, with the actual expenses of transportation and traveling expenses of the State directors incurred incident to their attendance.

Comptroller General McCarl to the Secretary of Labor, September 8, 1924:

I have your letter of August 27, 1924, requesting decision whether the appropriation for "Promotion of the welfare and hygiene of maternity and infancy" under the Children's Bureau, act of May

28, 1924, 43 Stat. 241, is available for payment of the transportation and traveling expenses of State directors who administer the maternity and infancy act locally in the different States while in attendance upon a conference to be called by the Children's Bureau in Washington.

The appropriation is as follows:

> Promotion of the welfare and hygiene of maternity and infancy: For carrying out the provisions of the Act entitled "An Act for the promotion of the welfare and hygiene of maternity and infancy, and for other purposes," approved November 23, 1921, $1,007,092.51: *Provided*, That the apportionments to the States and to the Children's Bureau for administration shall be computed on the basis of not to exceed $1,240,000, as authorized by the Act entitled "An Act for the promotion of the welfare and hygiene of maternity and infancy, and for other purposes," approved November 23, 1921.

Section 2 of the act of November 23, 1921, 42 Stat. 224, authorizes annual allotments under certain conditions to the several States for the promotion of the welfare and hygiene of maternity and infancy of amounts equal to that appropriated by the States for the same purpose. Section 3 charges the Children's Bureau with the administration of the act. Sections 5 and 6 provide as follows:

> SEC. 5. So much, not to exceed 5 per centum, of the additional appropriations authorized for any fiscal year under section 2 of this Act, as the Children's Bureau may estimate to be necessary for administering the provisions of this Act, as herein provided, shall be deducted for that purpose, to be available until expended.
>
> SEC. 6. Out of the amounts authorized under section 5 of this Act the Children's Bureau is authorized to employ such assistants, clerks, and other persons in the District of Columbia and elsewhere, to be taken from the eligible lists of the Civil Service Commission, and to purchase such supplies, material, equipment, office fixtures, and apparatus, and to incur such travel and other expense as it may deem necessary for carrying out the purposes of this Act.

The traveling expense authorized under this act is primarily that of the personnel of the Children's Bureau in connection with the administration of the act. It has, however, been heretofore recognized that Government funds appropriated for traveling expenses are available for the traveling expenses of other than Government officers and employees, upon submission of satisfactory evidence with the accounts of the disbursing officer showing that such use of the funds is absolutely necessary to accomplish the purposes for which the appropriation is made. Decision of August 26, 1924, 4 Comp. Gen. 210, and MS. decision of July 14, 1924.

In the present case the statute charges the Children's Bureau with the administration of the act and authorizes deduction from the total appropriated of an amount necessary for expenses of administration within a limit therein fixed. A conference of State directors called by the Children's Bureau would be a cost of administration, the necessary expenses of which, including actual and necessary transportation and traveling expenses of the directors incident thereto, constitute a proper charge against the amount set aside

for administering the act, and no part of such expense would be a proper charge against the allotments made to the States.

Accordingly you are advised that if it is administratively determined and certified in the accounts that the attendance of the State directors upon the conference is necessary to the accomplishment of the purposes for which the appropriation is made, the reimbursement of the necessary expenses actually incurred by them for transportation and subsistence incident to such attendance is authorized within the statutory limitations as an administrative expense.

(A–4023)

JURISDICTION OF DISBURSING OFFICERS—REFUNDS

Disbursing officers are not authorized to refund to purchasers of Government property any part of the proceeds of a sale without first submitting the matter to the General Accounting Office for decision.

Comptroller General McCarl to the Secretary of War, September 9, 1924:

I have your letter of August 14, 1924, referring to my decision of July 23, 1924, A–4023, and requesting that you be advised whether it was the intent and purpose of said decision to hold that disbursing officers are not authorized to refund any part of the proceeds of a sale without first submitting the matter to this office.

In reply you are advised that such was the intent and purpose of said decision. The payments which disbursing officers are authorized to make without prior authorization by this office are those involving definitely fixed obligations of the Government not requiring a determination of questions of law or fact, such as salaries to officers and employees in the public service and payments specifically provided for under valid contracts. See particularly 4 Comp. Dec. 332; 22 *id.* 350, and MS. decision of April 24, 1924, A–2083, copy inclosed herewith. The making of a refund to a purchaser of Government property is not a payment of that class. The contract of sale could not properly provide for refunds, and in all such cases the refund would involve a determination of a question of law or fact. In the absence of specific statutory authority for the final determination of such questions by the administrative authorities, they are for submission to this office for determination under authority of sections 305 and 307 of the act of June 10, 1921, 42 Stat. 24 and 25. In this connection see 2 Comp. Gen. 54, 57; MS. decision of October 3, 1922, to Maj. P. G. Hoyt; and MS. decision of August 27, 1923, to Capt. Herbert Baldwin, in each of which it was held that an administrative finding or determination does not authorize a disbursing officer to refund proceeds of

sale. See also MS. decision of May 14, 1924, A–2079, to Maj. C. C. Oakes, in which it was stated to be the duty of a disbursing officer to submit to this office for decision in advance of payment vouchers involving refund of proceeds of sale.

The decisions cited in your letter, to wit, 1 Comp. Gen. 318, 374, 466; 2 Comp. Gen. 54, 481, 484, 656; 3 Comp. Gen. 274, 648, and 684, may serve as guides to the administrative and disbursing officers in determining whether a claim for refund has sufficient merit to justify its submission to this office for decision whether the refund may properly be made, but such decisions were not intended to authorize disbursing officers to make refunds without submission to this office in cases thought to be similar to some case in which a decision had been rendered.

The question submitted is answered accordingly.

(A–4408)

WAR RISK INSURANCE (CONVERTED)—DISPOSITION OF ACCRUED AND UNPAID INSTALLMENTS OF DISABILITY INSURANCE UPON DEATH OF INSURED

In the absence of a specific provision in the policy to the contrary, monthly installments of war risk insurance accrued and unpaid at the date of death of the insured, authorized to be paid under a converted policy because of permanent and total disability, become a part of the estate of the insured and are not payable to the death beneficiary as such. 1 Comp. Gen. 254.

Where a provision of a converted policy that monthly installments of disability insurance shall be payable to the insured so long as he lives is qualified by another provision of the policy that the death beneficiary shall receive as death benefits the full number of monthly installments less only such installments as have been "paid to the insured during his lifetime," the accrued installments of disabilitiy insurance which have not actually been paid to and received by the insured during his life, are not payable upon his death to the estate of the insured, the full number of installments provided for in the policy, less the number actually paid to the insured, being payable to the death beneficiary. 6 MS. Comp. Gen. 286.

Comptroller General McCarl to the Director, United States Veterans' Bureau, September 9, 1924:

I have your letter of July 30, 1924, requesting decision as to the effect, if any, the decision of January 17, 1924, 3 Comp. Gen. 425, had on the decision of November 10, 1921, 1 Comp. Gen. 254, and MS. decision of February 4, 1922, relative to the proper disposition to be made of installments of disability insurance accrued in favor of the insured under a converted policy which had matured by total and permanent disability, but unpaid at the date of death of the insured.

The decision of November 10, 1921, *supra*, held:

Under the provisions of law and the terms of the policy issued pursuant thereto the accrued and unpaid installments on the maturity of the policy because of the permanent and total disability of the insured belonged to the

insured, and upon his death became a part of his estate. No provision of law or of the policy provides for or authorizes payment to a beneficiary under a policy of accrued and unpaid installments due the insured at date of death, and such amounts are not payable to the beneficiary under the policy, as such, the beneficiary's rights under the policy being limited to those provisions for payments to the beneficiary specifically made. See 24 Comp. Dec. 521; 26 *id.* 576, 650, 652.

Upon reconsideration of said decision, the decision of February 4, 1922, 6 MS. Comp. Gen. 286, held, pages 3 and 4, as follows:

* * * I am of the opinion that the decision of November 10, 1921, rightly decided as a matter of law generally that any unpaid installments of such insurance which may accrue to the insured because of his permanent total disability before his death are payable to the personal representatives of his estate and not to the death beneficiary of the policy. Whether or not any installments of converted disability insurance have in fact accrued to an insured at the time of his death depends upon the terms of the policy which he then held.

After quoting provisions from the specimen form of converted policy the decision further held, pages 6 and 7:

The provision of the policy that monthly installments of disability insurance shall be payable to the insured and shall continue to be so payable so long as he lives is subject to the qualification in the provision for disability benefits "except as hereinafter provided." The after provision of the policy is that the beneficiary shall receive as death benefit the full number of monthly installments provided by the policy, less only such installments as have been "paid to the insured during his lifetime." The exception quoted together with this after provision of the policy clearly limits disability benefits under the policy to such installments only as are paid to the insured during his lifetime. There is no provision that installments which had accrued to the insured shall be paid to the beneficiary.

Accordingly I now decide that these provisions of the policy are legal and that they fix clearly and definitely the rights of the insured and of the beneficiary, respectively, in the whole amount of the insurance, and exclude the personal representatives of the insured from any right whatever in the insurance provided in the policy.

The decision of January 17, 1924, in which was considered the legality of a provision in a converted policy for extending insurance benefits by application of the cash surrender value, denying all rights under the policy upon the death of the insured who had become permanently and totally disabled during the extended period but died subsequent thereto, held:

War-risk policies under the basic law and its amendments insure against the happening of two events, viz, total and permanent disability or death, and the happening of either matures the policy. In the event of total and permanent disability, as in this case, the net amount legally due under the particular policy constitutes an obligation of the United States payable in accordance with the terms of the policy. If death occurs before this amount is fully paid to the insured as monthly installments, the remainder not accrued at the date of death is payable to the death beneficiary. Monthly installments accrued and unpaid at date of death of the insured become a part of the estate of the insured and are not payable to the death beneficiary as such. 1 Comp. Gen. 254.

The last two sentences of this paragraph were merely expressive of the general rule as laid down in the decision of November 10, 1921, and had no effect whatever on the conclusion of the decision holding the provision in the policy under consideration unlawful. Said decision of January 17, 1924, was not intended to repudiate the qualifi-

cation of the rule announced in the decision of February 4, 1922, or to modify that decision in any way.

The opinion of the general counsel of the United States Veterans' Bureau dated April 25, 1924, a copy of which you have forwarded, correctly states the effect of the three decisions of this office.

(A-3946)

SALES OF SURPLUS WAR SUPPLIES—WARRANTIES

In the sale of surplus war supplies the common-law rule of *caveat emptor* applies, and where such supplies were sold by the War Department "as is" the agents of the Government were without authority to bind the Government by any special warranties either as to kind, quality, or condition.

Decision by Comptroller General McCarl, September 10, 1924:

The Standard Mercantile Co., in its letter of August 5, 1924, requests reconsideration of decision of July 18, 1924, sustaining settlement No. 013975 of March 21, 1924, in which was disallowed its claim for $750 on account of alleged loss in connection with the purchase by it of surplus material (drills) sold by the Government at auction in May, 1923.

The claimant urgently contends that listing the drills in the sale catalogue as "unused" created an express warranty as to kind and quality and therefore argues that the Government should now respond in damages to cover claimant's alleged loss on a resale of the merchandise because some of the articles in the lot appear to have been used. In view of claimant's insistence, it is deemed proper to reexamine the facts and basis of claimant's demand.

It is assumed that the authority under which the War Department proceeded in making the sale under consideration was the act of July 9, 1918, 40 Stat. 850. This statute authorized the President, through the head of any executive department, "to sell, upon such terms as the head of such department shall deem expedient." The method of sale adopted by the War Department in this case is the one usually adopted in similar cases. The supplies sold were catalogued by number and lot and the explicit terms, condition, and place of sale were set out and the prospective purchaser was afforded the opportunity to examine and inspect all the merchandise offered before sale.

The evidence shows that the claimant's bid was accepted on May 24, 1923, and goods invoiced and delivered to claimant on June 6, 1923, and purchase price thereof paid on said date.

On the foot of the invoice appears the following statements:

in accordance with the terms and conditions of sale continued in auction sale catalog issued by the War Department covering sale at the Army supply base, Brooklyn, New York, May 24, 1923.

It is understood and agreed that the above material is sold "as is, where is," delivery to be accepted by you at the Army supply base and material to be removed therefrom on or before June 25, 1923.

Cash or certified check payable to the order of the finance officer, U. S. Army, New York general intermediate depot, in payment for the above material shall be delivered to the finance officer, U. S. Army, New York general intermediate depot, 1st Avenue and 58th Street, Brooklyn, New York, on or before June 6, 1923.

The proceeds of the guaranty deposit submitted by you at the time of sale will be applied in final payment for the material sold.

In a letter dated July 18, 1923, claimant after reciting the fact of attending the sale and making the purchases and receiving the goods states:

Under the circumstances the goods are absolutely worthless to us and it will be necessary for us to enter our claim for the amount paid therefor, to-wit, $1,400.00, and shall ask you also for instructions for the return of the merchandise at your early convenience.

A reply was made to this letter under date of July 20, 1923, which quoted the following clauses from the sales catalogue:

All property will be sold "as is" at storage point, without warranty or guaranty as to quality, character, condition, size, color, weight, or kind, or that the same is in condition or fit to be used, for the purpose for which it was originally intended or may be intended, or desired to be used by the purchaser, except that subsistence stores will be sold subject to the pure food law and guaranteed to be fit for human consumption at the time of sale.

Certain articles are described as "unused," meaning thereby that they have not been used; such articles may be shopworn or otherwise not in first-class condition.

* * * * * * *

All property listed herein will be available for inspection for a period of one week immediately preceding the date of sale, and each bidder or prospective purchaser is invited and enjoined to inspect the property listed for sale at its point of storage prior to the sales date. The failure of any purchaser to inspect the property herein listed and sold, or to acquaint himself with its true condition or quality, will not be considered as sufficient grounds for a claim by any purchaser for an adjustment of the price or rescission of the sale.

It is further indicated in this letter of July 20 that the merchandise in question had never been used up to the time of sale. It also appears that no examination was made to ascertain the condition of the drills, which numbered about 10,000, until after the sale and delivery thereof by the Standard Mercantile Co. to the DeWitt Tool Co., located at 244 Lafayette Street, New York.

By the affidavit of Samuel A. DeWitt, dated December 11, 1923, it is stated that "on or about the twenty-first day of August, 1923, there were delivered to us * * * certain drills which I had theretofore * * * purchased." The date of purchase does not appear in this affidavit. It is also stated that approximately 30 per cent of the drills were used drills and that they paid $650 for the entire lot.

By the affidavit of Jack Watelsky secretary of the Standard Mercantile Co., dated December 11, 1923, it appears that on or about the 1st day of August, 1923, it sold to the DeWitt Tool Co.

"a lot of drills" for which it charged the tool company $650; that these drills were purchased from the Panama Canal Department at auction sale held May 24, 1923, at the New York general intermediate depot, First Avenue and Fifty-eighth Street, Brooklyn, N. Y.; that the reason these drills were sold at the price of $650 was because of the large proportion of about 30 per cent used drills being in the lot, of which a large majority were also used and in a defective condition.

An inspector representing the Panama Canal engineer office visited the store of the DeWitt Tool Co. and in part reported as follows:

Mr. DeWitt had segregated the "used" from the "unused" items, and, with both his assistance and that of Mr. Watelsky, I made thorough inspection of these goods, counted those that had been set aside as "used" and find that a total of 2,009 pieces show signs of prior use, as follows:

1805 drills show set screw bites and distortion of the metal of the shanks where drills had been drifted into chucks, accompanied by reduction in length due to regrinding.

204 machine auger bits have gimlet points broken, bent, or blunted and shanks bent and twisted, showing signs of improper handling during use as well as chuck jaw bites.

In the lot of drills set aside as "used" I find about 1,000 pieces ranging in sizes from ¾" to 2¼", which, if unused, would have a fair market.

Based on this inspector's report the percentage of used drills was 18.77 instead of about 30 per cent as stated by claimant; and the refund, if claimant were lawfully entitled to any at all, would amount approximately to $259 instead of $750 as claimed.

Upon the facts presented, was the language used in the sale catalogue issued by the War Department such a representation as fairly construed would amount in law to a warranty which would entitle claimant to recover as for a breach thereof, or authorize a rescission of the sale and a return to claimant of the purchase price paid? In this connection the question also arises, were, or are, the Secretary of War and the agents of the Government in making sales of surplus war material empowered or authorized to bind the Government by entering into agreements of sale of war material carrying a special warranty of any sort, other than a warranty of title, which the law implies or imports in every sale of a chattel if the vendor is in the actual possession thereof? See *Deatz and Sterling* v. *The United States*, 38 Ct. Cls. 355; *Charles John Houser* v. *The United States*, 39 Ct. Cls. 508.

The language of the act of July 9, 1918, which authorized the sale of surplus war material, has been noted herein, and by no fair or reasonable construction can it be held to empower the Secretary of War to create new and undetermined liabilities against the Government for damages and breach of contract of sale by including, or writing therein, special warranties which are in conflict with the rule of *caveat emptor* that attaches to public sales. See *Barnard* v. *Kellogg*, 10 Wall. 388.

It is clear that the only power reposed in the head of the executive department relative to the sale must be found in the statute. In a recent case, *Erie Coal and Coke Corp.* v. *United States*, 58 Ct. Cls. 261, 269, when this statute and the powers of the Secretary of War were being considered, the court said:

> * * * Everyone must take notice of the extent of authority conferred by law upon a person acting in an official capacity. Different rules prevail in respect to the acts and declarations of public agents from those which ordinarily govern in the case of mere private agents. * * *

It is clear that the agents of the Government were and are without authority to bind the Government in the sale of surplus property by special contract of warranty, with reference to the kind, character, weight, or condition of the property to be sold, and that in all such cases the rule of *caveat emptor* must apply. *Van Pelt Case*, 6 Ct. Cls. 103; *Erie Coal and Coke Corp.* v. *United States*, 58 Ct. Cls. 261; *Barnard* v. *Kellogg*, 10 Wall. l. c. 388; *Salisbury* v. *Stainer*, 19 Wendell 158; *Wohlers* v. *Peterson*, 192 N. W. 837; *United States* v. *Symonds*, 120 U. S. 46; 21 Ct. Cls. 148.

It is also apparent that the claimant, aside from the principles of law discussed above, is not now in a position to demand a refund of a part of the purchase price of the articles sold. As stated in the decision of July 18, 1924:

> * * * and when a bid has been accepted, the material delivered, and the purchase price paid, the transaction is closed * * *.

This is the general rule, and it is applicable to the instant case, but there is the further fact in evidence admitted by the affidavit of the claimant that about August 1, 1923, it sold and delivered the drills in question to the DeWitt Tool Co. at the agreed price of $650. This voluntary act of claimant effectually closed the door on the question of rescinding the sale, or recovering back the purchase price paid or any part thereof, and was, in fact, an acceptance of or ratification of the sale. *Finch* v. *United States*, 12 Ct. Cls. 405.

When the various paragraphs of the terms and conditions of sale set out in the catalogue are read and considered in accordance with their plain and unequivocal meaning, it is evident that the War Department neither intended to, nor did, convey to the prospective purchaser any idea that a special warranty of any kind went with the sale of the goods. There was no misrepresentation, no fraud, and no concealment, and purchasers were fully advised in the plainest terms that this was a sale of Government surplus war supplies, and that they must buy "as is" and "where is;" hence there is no ground upon which claim for refund of any part of the purchase price can be allowed. *Barnard* v. *Kellogg*, 10 Wall. 388; *Whiteside Case*, 93 U. S. 247.

Upon reconsideration, the disallowance must be, and is, sustained.

(A-4144)

BURIAL EXPENSES—DISCHARGED VETERANS OF ANY WARS

Reimbursement for the expenses of burial of a discharged veteran of any war dying at any time after April 6, 1917, and either before or after the acts of March 4, 1923, 42 Stat. 1523, and June 7, 1924, 43 Stat. 617, and while in receipt of disability compensation under the war risk insurance act, as amended, is authorized to the maximum amount of $100, regardless of any assets left by him and without deduction for any accrued compensation due at the date of his death.

Decision by Comptroller General McCarl, September 10, 1924:

There is for consideration the claim of Mrs. Emma Kinsell, mother of Alfred B. Seaman, deceased, for reimbursement to the extent of the maximum of $100 for burial expenses of her son paid by her. It appears from the evidence submitted that Alfred B. Seaman enlisted in the United States Marine Corps May 18, 1917, and was discharged February 22, 1919; that he was killed in an accident July 19, 1920; that he left no assets other than a small amount of accrued compensation under the war risk insurance act, which has been paid to the mother; and that the mother paid his burial expenses amounting to $220.

At the time of the soldier's death there was no authority for the payment by the Government of the burial expenses of a soldier dying after discharge and who was not receiving medical treatment or vocational training from the Government at the time of his death. The act of March 4, 1923, 42 Stat. 1523, amending section 301 of the war risk insurance act, provided:

> * * * Where a veteran of any war dies after discharge or resignation from the service and does not leave sufficient assets to meet the expense of his burial and the transportation of his body, and such expenses are not otherwise provided for, the United States Veterans' Bureau shall pay the following sums: For a flag to drape the casket, and after burial to be given to the next of kin of the deceased, a sum not exceeding $5; also for burial expenses, a sum not exceeding $100, to such person or persons as may be fixed by regulations: * * *
>
> * * * * * * *
>
> (8) That section 301 of the War Risk Insurance Act, as amended, shall be deemed to be in effect as of April 6, 1917: * * *

In considering the retroactive effect of this amendment it was said in the decision of this office of June 11, 1923, 2 Comp. Gen. 791:

> The section is thus made retrospective in that it is made to cover cases not within the purview of the section as formerly enacted. It is not retroactive as a repeal or modification of laws and regulations in force at the time of its enactment. It does not require a reopening of cases settled under the former laws and regulations nor does it disturb rights vested under those laws and regulations. All cases of death prior to March 4, 1923, coming within laws and regulations in force at the time of death will be settled under those laws and regulations. All other cases will be settled under the amendment of March 4, 1923, and such regulations as may be promulgated in accordance with its terms.

As there were no laws or regulations prior to March 4, 1923, granting reimbursement for burial expenses of soldiers dying after discharge and while not receiving medical treatment, or vocational

training, the burial expenses of Alfred B. Seaman, who died July 19, 1920, would have been payable under the amendment of March 4, 1923, *supra*, which amendment was in force at the time the claim was filed. As this amendment made the reimbursement conditioned upon the lack of sufficient assets to meet the burial expenses and limits the amount to be paid to a sum "not exceeding $100," any assets which the soldier left would, under this amendment, have to be deducted from the $100. This would have required the deduction of the accrued compensation of $17.16. However, the sufficiency of assets in this case was rendered immaterial by the reenactment of the provisions for burial expenses in section 201 of the act of June 7, 1924, 43 Stat. 617, with the following addition:

* * * *Provided*, That when such person dies while receiving from the bureau compensation or vocational training, the above benefits shall be payable without reference to the indigency of the deceased: * * *. *And provided further*, That no accrued pension or compensation due at the time of death shall be deducted from the sum allowed.

* * * * * * *

(7) That this section shall be deemed to be in effect as of April 6, 1917: * * *.

As Seaman was receiving compensation at the time of his death his burial expenses come within section 201 of the act of June 7, 1924, *supra*, to the extent of the $100 maximum, and no deduction of the accrued compensation is required or authorized.

The regulations of the Veterans' Bureau, section 8111, supplemental No. 1, 1923, provide:

Payment of the burial allowances * * * shall be made to the person or firm furnishing the flag or the services authorized. If the person or firm furnishing the flag or services demands and receives payment from a representative or relatives of the deceased, reimbursement up to the authorized allowances may be paid such representative or relative presenting receipted bills showing payment by such representative or relative.

The mother of the deceased soldier has presented with her claim the receipted undertaker's bill showing the payment by her of the son's burial expenses to the amount of $220.

Payment of the voucher is accordingly authorized.

(A–4368)

CLASSIFICATION OF CIVILIAN EMPLOYEES—TEMPORARY EMPLOYEES OF THE CHILDREN'S BUREAU EMPLOYED OUTSIDE THE DISTRICT OF COLUMBIA

The positions of experts and temporary assistants and interpreters and all temporary employees under the Children's Bureau, Department of Labor, outside of the District of Columbia, are not subject to the classification act of March 4, 1923, 42 Stat. 1488, under existing law.

The rate of pay of experts and temporary assistants and interpreters of the Children's Bureau for the fiscal year 1925 is limited to the maximum rate per day while actually employed as fixed in the act of May 28, 1924, 43 Stat. 241, providing appropriations for the Children's Bureau.

Comptroller General McCarl to the Secretary of Labor, September 11, 1924:

I have your letter of July 25, 1924, requesting decision of the following questions:

> The department will appreciate your opinion as to whether the limitations of $6.00 a day when actually employed for "experts and temporary assistants" and $4.00 a day when actually employed for "interpreters," temporarily employed outside of the District of Columbia, must be adhered to in the event that such positions are included in the classification act, and also, whether the omission in the appropriations for general expenses and investigation of child welfare of the provision that salaries or compensation paid therefrom shall be "in accordance with the classification act of 1923" exempts the temporary positions outside of the District of Columbia from the requirements of the said act.

The material portions of the act of May 28, 1924, 43 Stat. 241, providing appropriations for the Children's Bureau, Department of Labor, for the fiscal year 1925 are as follows:

> Salaries: For the chief, and other personal services in the District of Columbia in accordance with the Classification Act of 1923, $117,820.
>
> To investigate and report upon matters pertaining to the welfare of children and child life, and especially to investigate the questions of infant mortality, including personal services in the District of Columbia and elsewhere, $136,080.
>
> For traveling expenses and per diem in lieu of subsistence at not exceeding $4 of officers, special agents, and other employees of the Children's Bureau; experts and temporary assistants, to be paid at a rate not exceeding $6 a day, and interpreters to be paid at a rate not exceeding $4 a day when actually employed * * *.

The classification act of March 4, 1923, 42 Stat. 1488, is at the present time applicable only to employment of personal services in the District of Columbia.

You state in your letter that the Children's Bureau has no field force provided for in its appropriation and that the official station of every permanent employee is necessarily Washington, but that under the quoted provisions of the appropriation act the bureau has temporary positions outside of the District of Columbia. The appropriation act provides for "personal services in the District of Columbia and elsewhere" and has fixed specific rates of compensation for employees of the Children's Bureau in the field which separate them from the provisions of the Classification Act, and in that connection it is immaterial whether the employment is temporary or permanent.

Accordingly, based on your statement and the provisions of the appropriation act, you are advised that under the law as now in existence the positions of "experts and temporary assistants," "interpreters," and positions under the Children's Bureau outside of the District of Columbia are not subject to the classification act of 1923. The compensation of the experts and temporary assistants and interpreters is limited to the maximum rate per day while actually employed as fixed by the appropriation act for the fiscal year 1925. Decision of July 19, 1924, A–3832, 4 Comp. Gen. 93.

The decision of July 14, 1924, A–3614, 4 Comp. Gen. 54, which you cite, holding that the classification act expressly includes temporary employees relates only to personal services in the District of Columbia.

(A–4899)

CLASSIFICATION OF CIVILIAN EMPLOYEES—AVERAGE PROVISION—GOVERNMENT PRINTING OFFICE

The total of funds appropriated for personal services under the subheadings "Office of Public Printer" and "Office of Superintendent of Documents" in the appropriation for the Government Printing Office constitutes one appropriation unit within the meaning of the average provision appearing in section 3 of the act of June 7, 1924, 43 Stat. 593, making appropriations for the legislative branch of the Government for the fiscal year ending June 30, 1925.

Comptroller General McCarl to the Public Printer, September 11, 1924:

I have your letter of August 27, 1924, as follows:

Public act 225, 68th Congress, approved June 7, 1924, provides under the Government Printing Office three separate appropriations, as follows:

1. Office of the Public Printer, for personal services, $157,880;
2. Public printing and binding, for personal services and other expenses, $2,000,000 (working capital only, and subject to increase to about $10,000,000 by repayments for work done for other Government establishments); and
3. Office of the Superintendent of Documents, $339,960 for personal services and $165,000 for other expenses; in all, $504,960.

The duties of the persons employed under these three distinct appropriations are dissimilar, and especially so as regards employees under the appropriation for the Office of the Superintendent of Documents, which office is charged with the distribution and sale of Government publications.

This office has heretofore considered each of the above appropriations as a separate appropriation unit, for classification purposes.

Under decisions of Comptroller General dated June 26, 1924, and August 8, 1924, the question arises as to the correctness of our interpretation that each of these three appropriations is an appropriation unit within the meaning of the classification act of 1923, and your decision thereon is requested.

Decision of August 25, 1924, 4 Comp. Gen. 202, held that the act of June 7, 1924, 43 Stat. 658, authorizing the Public Printer to fix the rates of pay in the Government Printing Office, supersedes the classification act of 1923 to the extent of personal services under the appropriation designated as No. 2, viz: "Public printing and binding." There are for consideration therefore only the two appropriations designated as Nos. 1 and 3, viz "Office of Public Printer" and "Office of Superintendent of Documents," provided in the act of June 7, 1924, 43 Stat. 590.

Section 3 of the act of June 7, 1924, 43 Stat. 593, making appropriations for the legislative branch of the Government for the fiscal year ending June 30, 1925, provides as follows:

In expending appropriations or portions of appropriations, contained in this act, for the payment for personal services in the District of Columbia in accordance with the classification act of 1923, the average of the salaries of the total number of persons under any grade or class thereof in the Botanic

Garden, the Library of Congress, or the Government Printing Office, shall not at any time exceed the average of the compensation rates specified for the grade by such act: *Provided*, That this restriction shall not apply (1) to grades 1, 2, 3, and 4 of the clerical-mechanical service, or (2) to require the reduction in salary of any person whose compensation is fixed, as of July 1, 1924, in accordance with the rules of section 6 of such act, or (3) to prevent the payment of a salary under any grade at a rate higher than the maximum rate of the grade when such higher rate is permitted by the classification act of 1923 and is specifically authorized by other law.

The decision of June 26, 1924, 3 Comp. Gen. 1001, 1002, and decision of August 8, 1924, 4 Comp. Gen. 167, cited by you, in which was considered what constituted an appropriation unit, were based on "average" provisions appearing in appropriation acts which specified "bureau, office, or other appropriation unit"; whereas in the instant appropriation act for the Government Printing Office this phrase does not appear, but the appropriation expressly provides that the "Government Printing Office" shall constitute the unit for the purposes of the section and thus not each separate appropriation therefor.

You are advised therefore that the appropriated funds provided for personal services under the subheadings "Office of Public Printer" and "Office of Superintendent of Documents" constitute one appropriation unit within the meaning of the average provision.

(A–4443)

CLASSIFICATION OF CIVILIAN EMPLOYEES — CHANGES IN GRADES IN WHICH THE PROPER AVERAGE HAS BEEN EXCEEDED

The rule announced in decision of July 19, 1924, 4 Comp. Gen. 79, that any new adjustment of salaries in a grade in which the proper average has already been exceeded must be at the minimum salary rate of the grade, is for universal application to all transfers, reinstatements, promotions, and reductions either between offices or in the same office.

An employee of the Treasury Department in grade 6, clerical, administrative, and fiscal service, receiving $2,500 per annum may be placed in grade 7 of the same service, in which the proper average has already been exceeded, only at the minimum salary rate of the grade, $2,400, notwithstanding the change in grades actually reduced the amount of compensation received by the employee.

Comptroller General McCarl to the Secretary of the Treasury, September 12, 1924:

I have your letter of July 30, 1924, as follows:

The Register of the Treasury has recommended the promotion of Guy H. Sutton from assistant chief of division, at $2,500 per annum, grade C. A. F. 6, to chief of division, at $2,800 per annum, grade C. A. F. 7, in his office, vice Chester E. King, resigned. Before Mr. King resigned there were five employees in grade C. A. F. 7, in the Register's Office, each paid at the rate of $2,800 per annum. Your decision is requested as to whether this transfer and promotion would violate the provisions of the appropriation act for the Treasury Department for the fiscal year ending June 30, 1925.

Reference is made to your decision A–4015, of July 19, 1924, in which you refer to the transfer provision in connection with the average provision of the classification act and state that the rule will be that any new adjustment of salaries by transfer, reinstatement, etc., in a grade in which the average has

already been exceeded due to the exceptions expressed in the average provision of the appropriation act must tend to reduce the excess average so that eventually the average will not be exceeded, and this can be accomplished most expeditiously by requiring the transfers, reinstatements, etc., to be at the minimum rate of salary of the grade. Is this decision mandatory, or does it merely suggest a method by which the average in a grade may be reduced, and does it apply to transfers and promotions or reductions within an appropriation unit?

The range of salary rates of grade 7, clerical, administrative, and fiscal service, is $2,400, $2,500, $2,600 $2,700, $2,800, $2,900, and $3,000, and the mathematical average is $2,700. If there were five employees in this grade each paid at the rate of $2,800 per annum the average of the salaries of the total number of persons in the grade exceeded the average of the compensation rates specified for the grade, and it is assumed that this resulted by reason of the proper allocation of positions held June 30, 1924, and within the exceptions expressed in the average provision of the appropriation act of April 4, 1924, 43 Stat. 64, providing for the Treasury and Post Office Departments for the fiscal year 1925.

Decision of July 19, 1924, 4 Comp. Gen. 79, cited by you, held as follows:

* * * Considering the transfer provision in connection with the average provision, the rule will be that any new adjustment of salaries by transfer, reinstatements, etc., in a grade in which the average has already been exceeded due to the exceptions expressed in the average provision of the appropriation act, must tend to reduce the excess average so that eventually the average will not be exceeded, and this can be accomplished most expeditiously by requiring the transfers, reinstatements, etc., to be at the minimum rate of salary of the grade.

This statement of the rule was followed by the answer to the specific case presented, that of a proposed transfer of an employee from grade 3 of the clerical, administrative, and fiscal service, rate of compensation $1,680 per annum, War Department, to grade 5 of the clerical, administrative, and fiscal service, rate of compensation $2,000, Public Health Service, and it was held that the transfer could be made only at the minimum salary rate in grade 5 of the clerical, administrative, and fiscal service, viz, $1,860 per annum.

In other words, the stated rule was not intended merely as a suggested method by which the average in a grade might be reduced, but as the uniform rule which must be applied in new adjustments in a grade in which the average has already been exceeded.

The specific case cited by you to which the rule was first applied was that of a transfer from one office to another. In decision of July 29, 1924, 4 Comp. Gen. 126, addressed to the Secretary of the Interior, the rule was applied in a general way to promotions and transfers. In decision of August 4, 1924, 4 Comp. Gen. 150, the rule was applied to a transfer from a higher grade to a lower grade in the same office at the request of the employee. It is equally as applicable to reductions within an appropriation unit from a higher grade to a lower grade.

In further explanation of the rule it may be stated that Congress sought by the average provision which it inserted in every appropriation act for personal services in the District of Columbia subject to the classification act to absolutely control the expenditure of these appropriations for personal services in every grade. The exceptions noted were only for allocations of positions held June 30, 1924, in accordance with the rules fixed by the classification act. That there might be promotions from one grade to another and yet result in lesser compensation is shown by the fact that the minimum compensation of a grade at times overlaps the compensation of the next lower grade, so that higher grade positions may be paid less than a lower grade position. It is the view of this office that subsequent to July 1, 1924, when not a matter of allocation, the excess in the average is for elimination as speedily as possible, and to that end adjustments in such a grade should reflect the largest possible elimination or lowering of the excess. Accordingly every new change in such a grade, whether by transfer, reinstatement, promotion, reduction, or whatever the change may be, must necessarily be at the minimum salary rate of the grade.

In the case presented, while the "promotion" if made from grade 6 to grade 7 of the clerical, administrative, and fiscal service actually results in a reduction in the rate of pay of the particular employee due to the overlapping of the range of salaries in the two grades, nevertheless the rule is for application and the employee could be paid only at the rate of $2,400 per annum, the minimum salary rate in grade 7.

(A–4886)

CLASSIFICATION OF CIVILIAN EMPLOYEES—TEMPORARY POSITIONS—DEPARTMENT OF AGRICULTURE

The temporary employment by the Agriculture Department of persons in the positions of unskilled laborer pending certification of a list of eligibles from which to make permanent appointment, of pharmacologist, and special assistants, the duties to be performed arising in the ordinary and usual work of the department, does not justify excluding such positions from the requirements of the classification act of March 4, 1923, 42 Stat. 1488.

Comptroller General McCarl to the Secretary of Agriculture, September 12, 1924:

I have your letter of August 26, 1924, as follows:

Your decision is respectfully requested as to whether it is necessary, under the provisions of the classification act of 1923, to have the following positions allocated when it is only contemplated to appoint persons to fill them temporarily:

1. Unskilled laborer, pending certification of a list of eligibles from which to make a permanent appointment, at $3.16 per diem when actually employed (and overtime when incurred in accordance with existing rules). This position has not as yet been allocated by the Personnel Classification Board.
2. Pharmacologist for a period of six weeks at the rate of $300 per month.

3. Three special assistants at $8 per diem each when actually employed for a period not to exceed six working days, each to perform services in connection with the making of motion pictures.

In view of the temporary character of the proposed employment in each case, it has occurred to me that it might be unnecessary to have the positions allocated. Inasmuch as it is urgent that all of these positions be filled promptly, your early decision in the matter will be greatly appreciated.

The decision of August 29, 1924, 4 Comp. Gen. 239, held as follows:

Section 2 of the classification act defines "position" as "a specific civilian office or employment, whether occupied or vacant" and defines "employee" as "any person temporarily or permanently in a position."

The fundamental purpose and intent of the classification act is that the employment of all personal services in the District of Columbia shall be subject to the provisions of the act unless expressly excluded, or unless the duties to be performed are of such an unusual nature, foreign to the ordinary and usual work of the particular office concerned, the need for which infrequently arises, as to classify the work otherwise than as a "position." The duration of the work to be performed—that is, whether permanent or temporary—is not controlling, but whether the work is that which the particular office is ordinarily and usually required to perform.

I assume that in most of these employments the nature of the work, that is to say, the duties of the positions, are definitely fixed and remain the same from year to year, the uncertainty being only as to the number of employees required and the duration of the employment. If such are the facts I see no reason why the positions should not be allocated, thereby fixing the rate of compensation and leaving for the determination of the administrative office only the questions as to when, how many, and for how long a period employees should be engaged in said positions.

In the three classes of positions submitted there is nothing to indicate any duties involved that might not arise in the ordinary and usual work required of the Department of Agriculture. Bearing in mind that it is the "position" and not the incumbent that is required to be classified, the temporary employment of persons in the positions you mention does not justify excluding such positions from the requirements of the classification act.

Accordingly you are advised that all three classes of temporary positions mentioned are subject to the classification act.

(A–4594)

WAR RISK INSURANCE—OFFICERS' RESERVE CORPS OF THE ARMY

Neither the war risk insurance act of October 6, 1917, 40 Stat. 409, nor the World War veterans' act of June 7, 1924, 43 Stat. 624, authorizes the issuance of war risk insurance policies to members of the Officers' Reserve Corps of the Army based solely upon attendance at a camp for instruction or training in time of peace.

Comptroller General McCarl to the Director, United States Veterans' Bureau, September 13, 1924:

I have your letter of August 7, 1924, requesting decision whether policies of war risk insurance may lawfully be issued to members of the Officers' Reserve Corps of the Army while attending camps of instruction, the "application having been made within 120 days after entry of such officers into active service in such camps." I gather

from the entire context of your submission that you refer to the 15-day periods of training or instruction in time of peace, and not to the war training camps.

Section 400 of the act of October 6, 1917, 40 Stat. 409, specified the persons entitled to war risk insurance as "every commissioned officer and enlisted man and to every member of the Army Nurse Corps (female) and of the Navy Nurse Corps (female) when employed in active service under the War Department or Navy Department." Section 401 of said act fixed the time for filing applications for insurance as "* * * within one hundred and twenty days after enlistment or after entrance into or employment in the active service and before discharge or resignation * * *." See also section 300 of the World War veterans' act of June 7, 1924, 43 Stat. 624, which contains both of the quoted provisions from sections 400 and 401 of the war risk insurance act.

The quoted portion of section 401 does not extend the benefits of war risk insurance to classes of persons other than those specified in section 400, but merely fixes the time within which the applications for the insurance must be filed.

There would appear to be no room for doubt that members of the Officers' Reserve Corps do not come within any of the classes mentioned in section 400 unless they can be regarded as embraced within the term "every commissioned officer" as used therein. Said term has been specifically limited by section 22 (6) of the act of October 6, 1917, 40 Stat. 401, 402, and section 3 of the act of June 7, 1924, to include "only an officer in active service in the military or naval forces of the United States." A member of the Officers' Reserve Corps called to active duty for the sole purpose of attending a camp for instruction or training for a period of 15 days a year in time of peace is not "in active service in the military * * * forces of the United States." In this connection attention is invited to the fact that the same classes of persons are specified as entitled to war risk insurance under section 400 as are specified as entitled to disability compensation under section 300, and this office has held that active service for training in the Naval Reserve Force is not included within the term "active military or naval service of the United States" within the meaning of the said section 300. 3 Comp. Gen. 688. The same principle controlled the decision which you cite, denying treatment under the war risk insurance act to a member of the Officers' Reserve Corps of the Army for an injury sustained while attending a camp of instruction. 3 Comp. Gen. 250.

Accordingly, I am constrained to hold that neither the war risk insurance act nor the World War veterans' act, 1924, authorizes the issuance of war risk insurance policies to members of the Officers'

Reserve Corps based solely upon attendance at a camp for instruction or training in time of peace.

(A-3948)

RAILWAY POSTAL CLERKS—EFFECTIVE DATE OF PROMOTION

Under the act of June 5, 1920, 41 Stat. 1050, railway postal clerks of classes A and B have vested statutory rights to promotion to grade 3, $1,850, and to grade 5, $2,150, respectively, when the required period of satisfactory service has been completed, but the promotion of such clerks beyond those grades respectively to competitive positions, the filling of which requires selection from a number of employees, is not automatic but is dependent upon selection and approval by the appointing power.

As the power of finally approving promotions of railway postal clerks is vested in the Second Assistant Postmaster General, selections for promotion beyond the automatic grades by subordinates are nominations or recommendations only, the effective date of the promotion being the date the nomination or recommendation is finally approved by the Second Assistant Postmaster General.

Decision by Comptroller General McCarl, September 16, 1924:

There is for consideration by this office the rate of compensation to which Charles H. Westerndorf, railway postal clerk, was entitled on and after April 1, 1924, when he was selected for promotion from grade 3, salary $1,850 per annum, to grade 4, salary $2,000 per annum, the promotion having been approved by the Post Office Department April 23, 1924.

It appears from the pay-roll records and correspondence in this office that the promotion was withdrawn and postponed until July 1, 1924, and that the clerk was required to refund an amount which represented the difference in the rates of compensation under an interpretation by the Post Office Department of the decisions of this office dated February 13, 1924, 3 Comp. Gen. 517, and May 12, 1924, 3 Comp. Gen. 844. Later it appears that because the latter decision authorized credit for payments theretofore made contrary to its holding, the clerk was refunded the amount previously deducted, and the promotion allowed as originally made.

The question presented is whether the promotion took effect April 1, the date of selection, which was one year subsequent to the promotion of the clerk to grade 3, or April 23, 1924, the date of approval of the promotion by the Post Office Department. If it took effect April 23, the records would indicate that the clerk is now overpaid $9.08, being the difference between salary at the rate of $1,850 per annum and salary at the rate of $2,000 per annum from April 1 to 22, inclusive.

The act of June 5, 1920, 41 Stat. 1050, provides as follows:

* * * railway postal clerks shall be divided into two classes, Class A and Class B, and into six grades, as follows: Grade one—salary, $1,600; grade two—salary, $1,700; grade three—salary $1,850; grade four—salary, $2,000; grade five—salary $2,150; grade six—salary, $2,300; and laborers in the Rail-

way Mail Service shall be divided into two grades, as follows: Grade one—salary, $1,350; grade two—salary, $1,450.

For the purpose of organization and establishing maximum grades to which promotions may be made successively, as herein provided, runs now in Class A and all terminal railway post offices and transfer offices shall be placed in Class A, and the remainder in Class B.

Road clerks shall be promoted successively to grade three for clerks, and to grade four for clerks in charge of Class A, and to grade five for clerks and to grade six for clerks in charge of Class B.

Terminal railway post office and transfer clerks shall be promoted successively to grade three for clerks of whom general scheme distribution is not required, and to grade four for clerks of whom general scheme distribution is required, and for clerks in charge to grade five in terminals or tours or crews in terminals consisting of not more than nineteen clerks or in transfer offices or tours in transfer offices of not more than four clerks and to grade six in terminals or tours or crews in teminals consisting of twenty or more clerks and in transfer offices or tours in transfer offices of five or more clerks.

* * * * * * *

Pomotions shall be made successively at the beginning of the quarter following a year's satisfactory service in the next lower grade.

Under date of July 16, 1924, the general superintendent of Railway Mail Service stated as follows:

In reply to your letter of July 15 (P–LC), please be informed that the eleven railway postal clerks shown on journal No. 153, dated June 30, 1924, were selected by the department for promotion from their former positions to their present competitive grades. The date of each selection is the approval date shown on the journal.

Westerndorf was one of the 11 mentioned in this letter; and in amplication of the statement the Post Office Department has informally advised this office that the "selection" consisted of choosing terminal railway post office and transfer clerks in grade 3, class A, of whom general-scheme distribution was not required, to fill positions of clerks in grade 4, class A, of whom general-scheme distribution is required.

The decision of February 13, 1924, held that clerks in first and second class post offices have a vested statutory right to promotion under the act of June 5, 1920, 41 Stat. 1049, when the required period of satisfactory service has been completed, such promotion not being dependent upon selection, which right can not be defeated by any delay or miscalculation on the part of the officers or employees whose duty it is to ascertain the date on which the promotion became effective under the law, citing 27 Comp. Dec. 1068, and 1 Comp. Gen. 355, but that promotions to the two grades of special clerks were not thus automatic but dependent upon selection for promotion. Such promotions, depending upon selection, are effective not from the date of selection by a subordinate officer, but from the date of approval by the appointing power. 3 Comp. Gen. 559; *id.* 844.

The promotions of railway postal clerks present an analogous situation under the controlling statute. The statute shows that clerks of classes A and B have a vested statutory right to promotion to grade 3, salary at the rate of $1,850 per annum, and grade 5,

salary at the rate of $2,150 per annum, respectively, when the required period of satisfactory service has been completed; but that the promotions of such clerks beyond those grades, respectively, to positions the filling of which requires selection from a number of employees are not automatic, but are dependent upon selection. In other words, there exists competition for the positions above grade 3, class A, and above grade 5, class B, requiring the action of the appointing officer in comparing the respective qualifications of a number of employees to make proper selections for filling vacancies.

Original appointments of railway postal clerks are made by the Postmaster General, section 1482, Postal Laws and Regulations, 1924, but the authority to take final action on promotions and selections of incumbents for such competitive positions appears to have been vested in the Second Assistant Postmaster General, under whose jurisdiction the Postmaster General has placed the management and control of the Railway Mail Service. Section 12, Postal Laws and Regulations, 1924. The recommendations for promotions of railway postal clerks, other than in the automatic grades, are made by the division superintendents of the Railway Mail Service, through the General Superintendent of the Railway Mail Service. See paragraph 4, section 12, and sections 1481 to 1500 of the Postal Laws and Regulations, 1924.

In this case, April 1, 1924, represents the date of recommendation and April 23, 1924, that of final action by the Second Assistant Postmaster General. The promotion of Westerndorf was to grade 4, class A, which was not an automatic promotion but was dependent upon selection and approval by the proper official, in determining his fitness for the work of general-scheme distribution.

Accordingly, under the proper construction of the law, the promotion was effective on and after April 23, 1924. However, under the decision of May 12, 1924, credit will be allowed for the payment made covering the difference in the rates of compensation between $1,850 per annum and $2,000 per annum from April 1 to 22, inclusive, the same representing salary payable for the period prior to the date of that decision.

(A-4645)

COMPENSATION, DOUBLE—FARM LOAN REGISTRARS OF LAND-BANK DISTRICTS

The total amount of the salaries of farm-loan registrars of land-bank districts for the fiscal year 1925 must be paid from funds appropriated therefor by the act of April 4, 1924, 43 Stat. 70, and may not be supplemented from funds derived by assessments against Federal intermediate credit banks for the payment of additional compensation for the added duties of trust officer of the Federal intermediate credit banks assigned to the registrars, under the direction of the Federal Farm Loan Board.

Comptroller General McCarl to the Secretary of the Treasury, September 16, 1924:

I have your letter of August 11, 1924, requesting decision whether Federal intermediate credit banks may pay farm-loan registrars of land-bank districts additional compensation in an amount authorized by the Federal Farm Loan Board for performing duties as trust officers of the Federal intermediate credit banks.

Under section 3 of the act of July 17, 1916, 39 Stat. 361, and the amendment thereof, act of April 20, 1920, 41 Stat. 570, the Federal Farm Loan Board is required to appoint a farm-loan registrar in each land-bank district, it being expressly provided that the salaries of said registrars " shall be paid by the United States." Beginning with the fiscal year 1919, act of July 3, 1918, 40 Stat. 772, and ending with the fiscal year 1924, act of January 3, 1923, 42 Stat. 1094, appropriations have been provided for " twelve registrars, at $4,000 each." For the fiscal year 1925, the act of April 4, 1924, 43 Stat. 70, provides under the heading " Federal farm loan bureau," a lump sum of $137,000 " for personal services in the field." Accordingly, for the present fiscal year the rate of compensation of the registrars has not been fixed by statute.

Section 2 of the act of March 4, 1923, 42 Stat. 1454, provides as follows:

That the Federal Farm Loan Act is amended by adding at the end thereof a new title, to read as follows:

" TITLE II.—FEDERAL INTERMEDIATE CREDIT BANKS.

" ORGANIZATION.

" Sec. 201. (a) That the Federal Farm Loan Board shall have power to grant charters for 12 institutions to be known and styled as ' Federal Intermediate Credit Banks.'

"(b) Such institutions shall be established in the same cities as the 12 Federal Land Banks. The officers and directors of the several Federal Land Banks shall be ex officio officers and directors of the several Federal Intermediate Credit Banks hereby provided for and shall have power to employ and pay all clerks, bookkeepers, accountants and other help necessary to carry on the business authorized by this title."

Section 206 (a) of the same act, 42 Stat. 1457, provides as follows:

That the Federal Farm Loan Board shall equitably apportion the joint expenses incurred in behalf of Federal Land Banks, Joint Stock Land Banks, and Federal Intermediate Credit Banks, and shall assess against each Federal Intermediate Credit Bank its proportionate share of the expenses of any additional personnel in the Federal Farm Loan Bureau made necessary in connection with the operation of this provision.

Section 302 of the same act, 42 Stat. 1473, amending section 3 of the Federal farm loan act, provides in part as follows:

The salaries and expenses of the Federal Farm Loan Board and farm loan registrars and examiners authorized under this section shall, after June 30, 1923, be paid by the Federal and joint-stock land banks in proportion to their gross assets, as follows:

The Federal Farm Loan Board shall, prior to June 30, 1923, and each six months thereafter, estimate the expenses and salaries of the Federal Farm Loan Board, its officers and employees, farm loan registrars, deputy registrars, the examiners and reviewing appraisers, and apportion the same among

the Federal and joint-stock land banks in proportion to their gross assets at the time of such apportionment and make an assessment upon each of such banks pursuant to such apportionment, payable on the 1st of July or January next ensuing. The funds collected pursuant to such assessments shall be deposited with the Treasurer of the United States to be disbursed in payment of such salaries and expenses on appropriations duly made by Congress for such purpose.

It seems reasonably clear from these quoted provisions of the act of March 4, 1923, that while the officers and directors of several Federal land banks are made *ex officio* officers and directors of the several intermediate credit banks, no provision has been made for the increase of their compensation by reason thereof. The registrars are considered as officers of the Federal land banks within the meaning of section 2 of the act. Section 302 of the same act expressly provides that the compensation of registrars shall be payable from appropriated funds derived by assessments, not on the Federal intermediate credit banks, but on the Federal and joint-stock land banks. As stated in the decision of August 16, 1923, 3 Comp. Gen. 85, the funds derived by assessments on the Federal intermediate credit banks are available "to pay the expenses of such additional personnel as it may be necessary to employ in the Federal Farm Loan Bureau to take care of the additional work occasioned by the Federal intermediate credit banks." But it is not believed that Congress intended such funds to be available for supplementing the salaries of the officers and employees of the Federal land banks which have been otherwise provided for by appropriations.

Accordingly, you are advised that the salaries of farm loan registrars of land bank districts for the fiscal year 1925, must be paid from funds which have been appropriated therefor by the act of April 4, 1924, *supra*, and may not be supplemented from funds derived from assessments against the Federal intermediate credit banks for the performance of duties as trust officer assigned to them under direction of the Federal Farm Loan Board in connection with the work of the Federal intermediate credit banks.

(A–4833)

EFFECTIVE DATE OF PROMOTIONS OF EMPLOYEES IN THE MOTOR VEHICLE SERVICE OF THE POSTAL SERVICE

In the absence of statutory provision for the automatic promotion of employees in the motor vehicle service of the Postal Service, regulations of the Post Office Department which fix the various classes and grades of employees in said service and provide for promotion between grades after one year's satisfactory service in the lower grade, do not vest in the employees an absolute right to the promotion upon completion of the year, but such promotions are effective only from the date of their approval by the First Assistant Postmaster General, in whom is vested the appointing power, or such subsequent date as may be specifically fixed as the effective date thereof.

Decision by Comptroller General McCarl, September 16, 1924:

There is before this office for consideration and decision the question as to what is the effective date of promotions of employees in the motor-vehicle service of the Postal Service.

The act of June 5, 1920, 41 Stat. 1045, reclassifying postmasters and employees of the Postal Service and readjusting their salaries and compensation, under which certain of the personnel are entitled to automatic promotions, and the amendment thereto, act of July 31, 1921, 42 Stat. 144, do not mention employees of the motor vehicle service.

The annual appropriations for the Post Office Department provide for vehicle allowance. For the fiscal year 1925 the act of April 4, 1924, 43 Stat. 86, under the heading "Office of the First Assistant Postmaster General," provides as follows:

> For vehicle allowance, the hiring of drivers, the rental of vehicles, and the purchase and exchange and maintenance, including stable and garage facilities, of wagons or automobiles for, and the operation of screen-wagon and city delivery and collection service, $15,400,000: *Provided*, That the Postmaster General may, in his disbursement of this appropriation, apply a part thereof to the leasing of quarters for the housing of Government-owned automobiles at a reasonable annual rental for a term not exceeding ten years.

Accordingly there is no statute which fixes the rate of pay of employees of the motor vehicle service nor any provision of law authorizing their automatic promotion. July 1, 1922, the Fourth Assistant Postmaster General, under whose jurisdiction the Postmaster General had at that time vested the management and control of the motor vehicle service, issued regulations governing the operation of the motor vehicle service, which includes provision for the fixing of compensation and the grading and promotion of employees. The regulations divide the employees into various classes such as clerks, carriers operating trucks, mechanics, chauffeurs, garage-men, etc., and under certain of the classes provision is made for a number of grades with increases in compensation between the grades. Section 332 provides as follows:

> PROMOTIONS.—Unless otherwise specifically stated in these Rules and Regulations, promotions in the motor vehicle service will be governed by the rules and regulations applicable to clerks, carriers, and other employees on the Post Office rolls and shall be made effective at the beginning of a quarter following one year's satisfactory service in the next lower grade. In recommending the promotion of persons permanently employed in the motor vehicle service, the period of temporary employment may be counted, provided it was continuous up to the time of permanent employment.

These provisions of the regulations do not entitle the employees to a vested right to automatic promotions annually between grades as provided by statute in the case of clerks at first and second class post offices upon the completion of one year's satisfactory service, but constitute merely an expression of the administrative policy in making promotions. The right to the promotion depends on the

action of the appointing power which may not be retroactively effective nor delegated to subordinates, 3 Comp. Gen. 559, 561. Had Congress intended the entire personnel of the Postal Service to have been entitled to automatic promotions annually, or upon the completion of one year's satisfactory service, it would have so provided by statute, but having expressly designated certain classes of employees as entitled to automatic promotions, I am constrained to hold that other classes are excluded from that right.

Under section 11 of the Postal Laws and Regulations, 1924, the First Assistant Postmaster General is charged, among other duties, with the authorization of allowances for vehicle hire and the conduct of the vehicle service in cities, and under the First Assistant Postmaster General the Division of Post Office Service is charged, among other duties, with the appointment, disciplining and fixing of salaries of motor vehicle service employees. See also 3 Comp. Gen. 846.

Accordingly it must be held that subject to direction of the Postmaster General the appointment of employees of the motor vehicle service is for the First Assistant Postmaster General and that the effective date of the promotions of such employees is the date of approval by the First Assistant Postmaster General, unless a subsequent date be specified, and not the date of selection or recommendation by a postmaster or other subordinate.

(A–4512)

NATIONAL GUARD—DRILL PAY OF WARRANT OFFICERS

Under paragraph 928b of the National Guard Regulations, as amended by Changes No. 9 of October 30, 1923, a warrant officer of a band section is entitled to the maximum pay for attending four drills per month and to the proportionate pay for attending a lesser number per month.

Decision by Comptroller General McCarl, September 17, 1924:

There is before this office for decision the amount of armory drill pay to which Warrant Officer Charles T. Carrol, band section, Service Company, 127th Infantry, Wisconsin National Guard, is entitled, who during the quarter ended March 31, 1924, attended four drills in January, three in February, and four in March, five drills having been prescribed for the organization each month.

In 2 Comp. Gen. 375, December 12, 1922, it was held (quoting from the syllabus):

Warrant officers of the National Guard, in time of peace and under present regulations, are members of organizations, and may be required by the regulations to attend and satisfactorily perform their appropriate duties at all drills properly prescribed for the organization of which they are members, and their monthly pay may be reduced proportionately to their failure to attend such drills, but the regulations may not fix a rate of pay per drill or unit of service in lieu of the statutory monthly rate.

At the time this decision was rendered no regulations had been promulgated covering the pay of warrant officers, but subsequent thereto, on October 30, 1923, paragraph 928b of the National Guard Regulations was amended by Changes No. 9 as follows:

(b) Officers below the grade of major not belonging to organizations, and warrant officers, shall receive not more than four-thirtieths of the monthly base pay of their grades as prescribed for the Regular Army for satisfactory performance of their appropriate duties as prescribed in these regulations. Except as provided in paragraph 928 (f) of these regulations, these officers and warrant officers will be entitled to the maximum pay herein provided if they shall have attended not less than four assemblies for drill or other instruction and satisfactorily performed all other appropriate duties of their grades during any one month, and to a proportionate part of said maximum pay for attendance at a lesser number of assemblies at which they have satisfactorily performed their appropriate duties. * * *

In passing upon the validity of this change, by decision of March 22, 1924, 31 MS. Comp. Gen. 822, it was held:

* * * if it is proposd to pay the commanding officer of the band section, a warrant officer, the maximum pay allowed by law for attendance at 20% less drills (48 per annum), the regulation accomplishes the purpose, and a regulation to that effect is within the discretion conferred upon the Secretary of War by the * * * language of section 14 of the act of June 10, 1922.

In accordance with the above quoted decision, payment to Warrant Officer Charles T. Carrol of the maximum pay for January, three-fourths of the maximum pay for February, and the maximum for March, 1924, was correct.

(A—4013)

PUBLIC BUILDING CONTRACTS—LIQUIDATED DAMAGE CLAUSE

The act of June 6, 1902, 32 Stat. 326, requiring the insertion of a liquidated damage stipulation in public building contracts under the control of the Treasury Department declares general principles of law in making such stipulation binding on both parties and the authority therein given to the Secretary of the Treasury to remit liquidated damages "as in his discretion may be just and equitable" contemplates the exercise of legal discretion and authorizes the remission of liquidated damages only for causes specified in the contract, or for delays which under general principles of contract law authorize remission of liquidated damages, or for delays for which it would be inequitable and unjust to hold the contractor responsible.

Decision by Comptroller General McCarl, September 18, 1924:

The Secretary of the Treasury requested, July 12, 1924, review of settlement No. C–11467–T, dated June 10, 1924, of the accounts of J. L. Summers, disbursing clerk, Treasury Department, wherein was disallowed credit for $1,050 as liquidated damages not deducted from $6,165.35 paid on voucher No. 1, December, 1923, accounts under contract dated July 17, 1922, with Devault & Deitrick for the construction of a post office and customhouse building at Apalachicola, Fla. Credit for the amount of the liquidated damages not deducted was disallowed on the ground that the delay in

completion of the work did not result from causes entitling the contractors to an extension of time with remission of liquidated damages.

The act of June 6, 1902, 32 Stat. 326, provided that thereafter in all contracts for the construction and repair of any public building or public works under the control of the Treasury Department a stipulation should be inserted for liquidated damages for delay, and the Secretary of the Treasury was thereby "authorized and empowered to remit the whole or any part of such damages as in his discretion may be just and equitable," with the further provision that in all suits under such contracts "it shall not be necessary for the United States, whether plaintiff or defendant, to prove actual or specific damages sustained by the Government by reason of delays." The construction of the post office and customhouse building at Apalachicola, Fla., was under the control of the Treasury Department, and the contract of July 17, 1922, required completion of the building and of all its parts within 12 months of the date of the contract and, conformably to the act of June 6, 1902, *supra*, contained a stipulation that:

> It is expressly covenanted and agreed by and between the parties hereto that time is and shall be considered as of the essence of the contract on the part of the party of the second part, and in the event that the said party of the second part shall fail in the due performance of the entire work to be performed under this contract, by and at the time herein mentioned or referred to, the said party of the second part shall pay unto the party of the first part, as and for liquidated damages, and not as a penalty, the sum of ten dollars for each and every day the said party of the second part shall be in default, which said last-named sum per day, in view of the difficulty of estimating such damages with exactness, is hereby expressly fixed, estimated, computed, determined, and agreed upon as the damages which will be suffered by the party of the first part by reason of such default, and it is understood and agreed by the parties to this contract that the liquidated damages hereinbefore mentioned are in lieu of the actual damages arising from such breach of this contract; which said sum the said party of the first part shall have the right to deduct from any moneys in its hands otherwise due, or to become due, to the said party of the second part, or to sue for and recover compensation or damages for the nonperformance of this contract at the time or times herein stipulated or provided for.

The contract further provided that the contractors should have an extension of time equal to any delays caused by the United States in suspending the whole or any part of the work and that—

> * * * a similar allowance of extra time will be made for such other delays as the Supervising Architect may find to have been caused by the United States, provided that a written claim therefor is presented by the contractor within ten days of the occurrence of such delays; provided further, that no claim shall be made or allowed to the contractor for any damages which may arise out of any delay caused by the United States.

The "work was practically completed on October 31, 1923," or after a delay of 2 months and 14 days. On September 15, 1922, the contractors reported that they were being delayed on account of inability to secure cement, which delay they attributed to coal and

railroad strikes, and on November 1, 1922, they requested the Supervising Architect to forward full-size details in connection with the interior finish of the buildings, which should have been theretofore furnished, but were not furnished until December 30, 1922. See *Plumley* v. *United States*, 226 U. S. 545. The Supervising Architect, in letter dated December 8, 1923, to the Secretary of the Treasury, referred to a report of the supervising superintendent as follows:

> * * * He * * * stated that there had been no delays of consequence in connection with the contract, except for a period of 30 days on account of failure to receive material and a similar period on account of inclement weather. None of the delays were due to negligence on the part of the contractor and he recommended that all penalty be waived and full payment made. He submitted a letter from the contractor in regard to the delays in which they attributed the same to failure to provide sufficient plaster and stucco material on time, due to overestimates made in their office and in the office of the subcontractor, and that this delay was aggravated by the lack of proper material in near-by cities, necessitating shipment of considerable quantities by express; that neither trouble nor expense was spared in rectifying the error with the least possible delay.

and recommended that the liquidated damages stipulated in the contract be waived. The recommendation was approved as made and as heretofore stated, the final payment under the contract was made by the disbursing clerk of the Treasury Department without deduction of liquidated damages for all or any part of the 2 months and 14 days' delay in completion of the building.

The act of June 6, 1902, requiring the insertion of a stipulation for liquidated damages in all contracts thereafter entered into for the construction of public buildings or public works under the control of the Treasury Department, providing that the stipulation should be binding on both parties, and authorizing and empowering the Secretary of the Treasury to remit the whole or any part of such damages as in his discretion might be just and equitable, was enacted by the Congress at a time when the decisions of both the accounting officers and the courts were inclined to place a strict construction on liquidated damage provisions in contracts and to hold, on slight pretext, that their enforcement would result in the exaction of a penalty. Shortly thereafter and on December 13, 1902, the United States Supreme Court in *Sun Printing and Publishing Co.* v. *Moore*, 183 U. S. 642, exhaustively considered the question of liquidated damages and held that parties may, in a case where the damages are of an uncertain nature, estimate and agree upon the measure of damages which may be sustained from the breach of an agreement and that the naming of a stipulated sum to be paid for nonperformance of a contract is conclusive upon the parties in the absence of fraud or mutual mistake. The holding has been subsequently affirmed in many cases, including *Wise* v. *United States*, 249 U. S. 361, and *Robinson* v. *United States*, 261 U. S. 486. The act of June 6, 1902, which must be read into and as a part of each public building

contract under the control of the Treasury Department, merely expresses the general principles of law on the binding effect of a liquidated damage provision in a contract, with the additional authority in the Secretary of the Treasury to remit the whole or any part of such damages "as in his discretion may be just and equitable."

By its contract the Government acquired a right to completion of the work at the time specified therein, and any delay beyond such date necessarily operated to its damage. For excusable delays as defined by the contract no compensation for the damage was chargeable, but for delays resulting from other causes damages accrued, and to avoid the necessity of establishing by proof the amount of such damage, the act of June 6, 1902, *supra*, provided that the amount of such damage should be agreed upon in advance and stipulated in the contract, as was done.

The act of 1902 is not, of course, authority for simply waiving damages that have accrued in favor of the United States under a building contract and which in equity and good conscience the United States is entitled to deduct from funds due from it to the contractor or to otherwise recover from the contractor. Any remission of such damage by the Secretary must not only be just and equitable to the contractor but just and equitable to the United States, which has necessarily sustained damage by reason of the delay—the measure of which damage was known to the contractor prior to making bid and was subsequently agreed to in the contract—and by reason of which the United States was doubtless required to pay an increased contract price. In other words, the discretion which the Secretary of the Treasury may exercise in the remission of liquidated damages, either in whole or in part, is a legal discretion, and, as stated in *Pacific Hardware Co.* v. *United States*, 49 Ct. Cls. 327, 335: "It is unquestionably true that an official of the Government is not authorized to give away or remit a claim due the Government. This rule is grounded in a sound public policy and is not to be weakened," also, that where damages are authorized to be remitted in the discretion of an official of the United States (p. 337), "if there were fraud or such gross error as implies bad faith or a failure to exercise an honest judgment in deciding that the deductions be not made, the Government would not be bound and the contractor would remain liable."

The contract authorized an extension of time for delays caused by the United States. It appears that the United States did delay the contractors from about November 21 to December 30, 1922, or for a period of 1 month and 10 days, in failing to furnish the full-size details in connection with the interior finish of the building. It also appears that the contractors were delayed 30 days on account of failure to receive material, due, it is alleged, to railroad and coal

strikes. It appears the coal strike commenced April 21, 1922, and the railroad strike July 1, 1922, and that both were in existence before the contractor assumed the obligations imposed by the contract on July 17, 1922, the date of its execution. The facts appearing disclosing no apparent basis for the exercise of the discretion authorized by the act of 1902—i. e., a condition in which, the acquired rights of the United States considered, an extension of time to contractor with remission of liquidated damages for delays attributable to such strikes, could be justified—the action was properly questioned in the audit. See *Link Belt Engineering Co.* v. *United States*, 142 Fed. Rep. 243; *Simpson* v. *United States*, 172 U. S. 217; *Phoenix Bridge Co.* v. *United States*, 38 Ct. Cls. 492. However, the action of the Secretary in resolving all doubt in favor of contractor and against the United States will not in this case be further questioned, and the disallowance of credit for $1,050 in the accounts of the disbursing officer will be credited.

(A–4503)

PENSION CHECKS—DELIVERY

Where a pension check, issued without the prior execution of a voucher, was placed in a post-office lock box of the pensioner in violation of the postal laws and regulations, and the box was rifled, the check stolen, forged, and cashed, there was no delivery to the pensioner or to anyone in his behalf during his lifetime, within the meaning of the act of August 17, 1912, 37 Stat. 312, and the proceeds of a Treasurer's check issued in lieu thereof, subsequent to the death of the pensioner, to which no different rights attach than to the original check, must be deposited to the credit of the proper appropriation subject to disposition as accrued unpaid pension and not as a part of the estate of the pensioner.

Decision by Comptroller General McCarl, September 19, 1924:

There is before this office the question as to the proper disposition to be made of Treasurer's check No. 2612, dated July 14, 1924, for $50, drawn by F. J. F. Thiel (symbol 17301), Assistant Treasurer, to the order of Henry W. Creed. This check was issued in lieu of Interior pension check No. 13308891, dated February 4, 1924, which was forged and cashed, and reclamation thereof made. The payee is dead and the disbursing clerk, Bureau of Pensions, transmitted the check to the Treasurer of the United States, requesting that the proceeds be placed to the credit of appropriation account, "Army pension, 1924," as unpaid accrued pension, it appearing that the original pension check, drawn without the prior execution of a voucher, was never delivered to the pensioner, the payee, nor to anyone in his behalf during his lifetime. The Treasurer has forwarded the case to this office for proper action.

The facts show that the original pension check, dated February 4, 1924, was delivered to the post-office address of the pensioner

and placed in his post-office lock box; that one Carl Danmenfelser rifled the box, the glass in which was broken, forged the check, and cashed the same. The pensioner received three monthly pension checks subsequent thereto and died some time between May 4 and June 4, 1924, without ever having received either the original pension check or the Treasurer's check issued in lieu thereof.

The act of March 2, 1895, 28 Stat. 964, provides as follows:

That from and after the twenty-eighth day of September, eighteen hundred and ninety-two, the accrued pension to the date of the death of any pensioner, or of any person entitled to a pension having an application therefor pending, and whether a certificate therefor shall issue prior or subsequent to the death of such person, shall, in the case of a person pensioned, or applying for pension, on account of his disabilities or service, be paid, first, to his widow; second, if there is no widow, to his child or children under the age of sixteen years at his death; third, in case of a widow, to her minor children under the age of sixteen years at her death. Such accrued pension shall not be considered a part of the assets of the estate of such deceased person, nor be liable for the payment of the debts of said estate in any case whatsoever, but shall inure to the sole and exclusive benefit of the widow or children. And if no widow or child survive such pensioner, and in the case of his last surviving child who was such minor at his death, and in case of a dependent mother, father, sister, or brother, no payment whatsoever of their accrued pension shall be made or allowed except so much as may be necessary to reimburse the person who bore the expense of their last sickness and burial, if they did not leave sufficient assets to meet such expense. And the mailing of a pension check, drawn by a pension agent in payment of a pension due, to the address of a pensioner, shall constitute payment in the event of the death of a pensioner subsequent to the execution of the voucher therefor. And all prior laws relating to the payment of accrued pension are hereby repealed.

Section 3 of the act of August 17, 1912, 37 Stat. 312, provides as follows:

That not later than January first, nineteen hundred and thirteen, pensions shall be paid by checks drawn, under the direction of the Secretary of the Interior, in such form as to protect the United States against loss, without separate vouchers or receipts, and payable by the proper assistant treasurer or designated depositary, except in the case of any pensioner in which the law authorizes the pension to be paid to some person other than the pensioner, or in which the Secretary of the Interior may consider a voucher necessary for the protection of the Government. Such checks shall be transmitted by mail to the payee thereof at his last known address.

That postmasters, delivery clerks, letter carriers, and all other postal employees are prohibited from delivering any such mail to any person whomsoever, if the addressee has died or removed, or in the case of a widow believed by the postal employee intrusted with the delivery of such mail to have remarried; and the postmaster in every such case shall forthwith return such mail with a statement of the reasons for so doing, and if because of death or remarriage, the date thereof, if known. Checks returned as herein provided on account of the death or remarriage of the pensioner shall be canceled.

The effect of the act of August 17, 1912, in addition to authorizing the issuance of pension checks in certain cases without the prior execution of a voucher by the pensioner, was to make the delivery of a check thus issued to the pensioner (instead of the mailing of it), the pivotal fact which changes the character of a pension check from accrued pension to assets of a pensioner's estate. 19 Comp. Dec. 529; *id.* 423.

As no different rights can attach to the proceeds of the Treasurer's check issued subsequent to the death of the pensioner than attached to the proceeds of the original pension check, the only question in the present case is whether there was delivery of the original pension check. If delivery was made the proceeds constitute a part of the assets of the estate of the pensioner, whereas if delivery was not made the proceeds constitute unpaid accrued pension payable in accordance with the provisions of the act of March 2, 1895, *supra*.

Delivery within the meaning and intent of these statutes is actual receipt by the pensioner in person or by some one authorized to receive the check for the pensioner. The act of August 17, 1912, so specifically prohibits postmasters, etc., from delivering pension checks of the class here under consideration to any person whomsoever if the addressee has died or removed, requiring the return and cancellation of the check in such cases, that the postal laws and regulations have provided explicit directions governing the delivery of letters containing such checks. A portion of section 590, paragraph 4, Postal Laws and Regulations, 1924, provides as follows:

* * * Such letters must not be * * * placed in lock or call boxes in the post office, nor delivered by city or rural carriers into receptacles on their routes. Upon receipt of such a letter addressed to the holder of a post-office box, notice should be placed in the addressee's box requesting him to call or send a proper representative for the letter. * * *

The same provision appears in section 608 Postal Laws and Regulations, 1913, as amended by order 9338, dated December 16, 1915.

In the present case not only was this provision violated but, in addition, the letter containing the check was placed in a box in which the glass was broken. This action could not be considered as a delivery of the pension check to the pensioner or to anyone representing him.

Accordingly, as the original pension check was not delivered as required by the statute, the proceeds of Treasurer's check No. 2612, issued in lieu thereof, must be credited to the proper appropriation and disposition thereof made as accrued unpaid pension.

(A–4924)

ACCOUNTING, SET-OFF—FOREIGN SERVICE RETIREMENT AND DISABILITY FUND

Under the provisions of section 18 of the act of May 24, 1924, 43 Stat. 144, authorizing the establishment of a Foreign Service retirement and disability system and providing that none of the moneys pertaining to the retirement and disability fund shall be assignable, either in law or equity, or be subject to execution, levy, or attachment, garnishment, or other legal process, no refund of amounts deducted from the salary of an officer separated from the service should be made until the officer's accounts have been finally settled and the amount to his credit has been applied in satisfaction of any disallowance.

While the annuity due a retired officer of the Foreign Service may be withheld to satisfy any indebtedness of the officer to the United States, no annuity payments should be withheld pending the final settlement of the fiscal accounts of the officer.

Comptroller General McCarl to the Secretary of State, September 19, 1924:

I have your letter of August 27, 1924, requesting decision of the question therein presented, as follows:

The act of Congress of May 24, 1924, for the reorganization and improvement of the foreign service of the United States, and for other purposes, provides in section 18 thereof, for the establishment of a Foreign Service retirement and disability system to be administered under the direction of the Secretary of State and in accordance with certain principles laid down in the said section 18.

Among those principles is that embodied in paragraph (h): " None of the moneys mentioned in this section shall be assignable, either in law or equity, or be subject to execution, levy, or attachment, garnishment, or other legal process."

A number of Foreign Service officers have already, under the provisions of this act, been placed upon the retired list, and the department is endeavoring to make monthly payments of the pensions due these officers. Many of the Foreign Service officers have suspensions in their accounts which arose during the administration of the offices from which they have been retired, and the department requests your decision as to whether, under the provisions of the paragraph (h) of section 18 just quoted, such pensions are payable to the officers or whether they should be retained in the hands of the Government until all suspensions in the officers' accounts have been settled.

Your early opinion in this connection will be greatly appreciated.

So much of section 18 of the act of May 24, 1924, 43 Stat. 144, referred to, as is here material, reads:

SEC. 18. The President is authorized to prescribe rules and regulations for the establishment of a Foreign Service retirement and disability system to be administered under the direction of the Secretary of State and in accordance with the following principles, to wit:

(a) The Secretary of State shall submit annually a comparative report showing all receipts and disbursements on account of refunds, allowances, and annuities, together with the total number of persons receiving annuities and the amounts paid them, and shall submit annually estimates of appropriations necessary to continue this section in full force and such appropriations are hereby authorized: *Provided*, That in no event shall the aggregate total appropriations exceed the aggregate total of the contributions of the Foreign Service officers theretofore made, and accumulated interest thereon.

(b) There is hereby created a special fund to be known as the Foreign Service retirement and disability fund.

(c) Five per centum of the basic salary of all Foreign Service officers eligible to retirement shall be contributed to the Foreign Service retirement and disability fund and the Secretary of the Treasury is directed on the date on which this Act takes effect to cause such deductions to be made and the sums transferred on the books of the Treasury Department to the credit of the Foreign Service retirement and disability fund for the payment of annuities, refunds, and allowances: *Provided*, That all basic salaries in excess of $9,000 per annum shall be treated as $9,000.

(d) When any Foreign Service officer has reached the age of sixty-five years and rendered at least fifteen years of service he shall be retired: *Provided*, That the President may in his discretion retain any such officer on active duty for such period not exceeding five years as he may deem for the interest of the United States.

(e) Annuities shall be paid to retired Foreign Service officers under the following classification, based upon length of service and at the following percentages of the average annual basic salary for the ten years next preceding the date of retirement: Class A, thirty years or more, 60 per centum; class B, from twenty-seven to thirty years, 54 per centum; class C, from twenty-four to twenty-seven years, 48 per centum; class D, from twenty-one to twenty-

four years, 42 per centum; class E, from eighteen to twenty-one years, 36 per centum; class F, from fifteen to eighteen years, 30 per centum.

(f) Those officers who retire before having contributed for each year of service shall have withheld from their annuities to the credit of the Foreign Service retirement and disability fund such proportion of 5 per centum as the number of years in which they did not contribute bears to the total length of service.

(g) The Secretary of the Treasury is directed to invest from time to time in interest-bearing securities of the United States such portions of the Foreign Service retirement and disability fund as in his judgment may not be immediately required for the payment of annuities, refunds, and allowances, and the income derived from such investments shall constitute a part of said fund.

(h) None of the moneys mentioned in this section shall be assignable, either in law or equity, or be subject to execution, levy, or attachment, garnishment, or other legal process.

* * * * * * *

(i) Whenever a Foreign Service officer becomes separated from the service except for disability before reaching the age of retirement, 75 per centum of the total amount of contribution from his salary without interest shall be returned to him.

The question presented involves the right of the Government to withhold moneys in its possession in the Foreign Service retirement and disability fund, that would otherwise be payable in monthly installments to retired employees until such time as suspensions or disallowances appearing in the fiscal accounts of such employees have been properly adjusted, and also the right of the Government to use such funds as an offset against the amounts of unauthorized or illegal payments, made by such employes while disbursing public funds, that may finally be found due the United States.

A provision similar in all respects to section 18(h) above quoted was incorporated as section 14 in the act providing for the retirement of employees of the classified civil service approved May 22, 1920, 41 Stat. 620. Under that enactment it has been held that the amount of the indebtedness of employees to the United States, but not the private debts of such employees, is properly deductible from credits in the retirement fund due the employees. 3 Comp. Gen. 98; 25 MS. Comp. Gen. 819, September 26, 1923; 29 *id.* 325, January 14, 1924. In the decision of September 26, 1923, it was said that the only exception to the restriction placed by Congress on the payment of the fund to those specified in the act is the inherent right of the Government to appropriate the amount in the retirement fund as an offset against any amount due from the former employee.

The construction placed upon section 14 of the act of May 22, 1920, is applicable to the provisions of section 18(h) of the act of May 24, 1924, and replying specifically to your question, you are advised that payment of annuities authorized under section 18(e) need not be withheld pending final settlement of the fiscal accounts of an annuitant, but when such accounts are finally settled a sufficient amount of the annuity payments due a retired Foreign Service officer

should be withheld and applied to cover the amount of any indebtedness to the United States as determined by disallowances made in the settlement of his fiscal accounts.

With reference to the amount carried to the credit of an officer in the annuity fund which is authorized to be refunded under section 18(l) to those officers of the Foreign Service who become separated from the service otherwise than for disability before reaching the age of retirement, the provisions of section 1766, Revised Statutes, would preclude the payment of any such refunds pending final settlement of such officers' fiscal accounts, as such refunds represent compensation rather than annuities.

(A-4717)

DIPLOMATIC OFFICERS—RETIREMENT UNDER THE ACT OF MAY 24, 1924, 43 STAT. 145

Secretaries of embassies or legations who were promoted to the grade of ambassador or minister prior to the act of February 5, 1915, 38 Stat. 805, providing for the classification of secretaries in the Diplomatic Service, were not promoted from the classified service and are not entitled, under paragraph (o) of section 18 of the act of May 24, 1924, 43 Stat. 145, to the benefits of retirement as provided in said act.

Comptroller General McCarl to the Secretary of State, September 20, 1924:

There has been received your letter dated August 14, 1924, submitting for decision the question as to whether Arthur Bailly-Blanchard, minister to Port au Prince, and William W. Russell, minister to Santo Domingo, are eligible for retirement and to the payment of annuities under the terms of the act of May 24, 1924, 43 Stat. 140, entitled "An act for the reorganization and improvement of the Foreign Service of the United States, and for other purposes."

Section 2 of this act provides that the official designation Foreign Service officer shall be deemed to denote permanent officers in the Foreign Service below the grade of minister, all of whom are subject to promotion on merit and who may be assigned to duty in either the diplomatic or consular branch of the Foreign Service at the discretion of the President.

Section 18 authorizes the President to prescribe rules and regulations for the establishment of a Foreign Service retirement and disability system and for the payment of annuities to retired or disabled Foreign Service officers in accordance with the conditions set forth in said section. Paragraph (o) of this section provides that:

Any diplomatic secretary or consular officer who has been or any Foreign Service officer who may hereafter be promoted from the classified service to the grade of ambassador or minister, or appointed to a position in the Depart-

ment of State shall be entitled to all the benefits of this section in the same manner and under the same conditions as Foreign Service officers.

You state:

The record of Mr. Bailly-Blanchard as it pertains to the diplomatic service follows: Appointed third secretary of embassy at Paris, July 9, 1900; second secretary June 17, 1901; secretary of the embassy at Paris, August 4, 1909; representative to the International Conference for the Discussion of the Suppression of the International Traffic in Obscene Literature, Paris, April, 1910; delegate, with the personal rank of minister plenipotentiary, to the International Sanitary Conference at Paris, November 7, 1911; secretary of the embassy at Tokyo, February 1, 1912; envoy extraordinary and minister plenipotentiary to Haiti, May 22, 1914; assigned for duty in the Department of State in connection with the Conference on the Limitation of Armament, November 11, 1921; assigned for special duty in the Department of State, temporarily, March 1, 1923.

The record of Mr. William W. Russell, as it applies to the diplomatic service is as follows: Appointed secretary of the legation at Caracas, November 15, 1895; secretary of the legation at Panama City, February 5, 1904; chargé d'affaires ad interim from February 13, 1904; appointed envoy extraordinary and minister plenipotentiary to Colombia, March 17, 1904; envoy extraordinary and minister plenipotentiary to Venezuela, June 21, 1905; appointed commissioner to the National Exposition in Quito, Ecuador, and served from August 19, 1908, to January 12, 1909; appointed minister resident and consul general to the Dominican Republic, June 24, 1910; envoy extraordinary and minister plenipotentiary to the Dominican Republic, July 6, 1911; retired August, 1913; reappointed August 16, 1915.

Since no ministers or ambassadors except those promoted from the classified service to the position of minister or ambassador are entitled to the benefits of the retirement provisions, the question submitted is dependent upon the status of Messrs. Bailly-Blanchard and Russell at the time they were appointed or promoted to their positions as ministers, which in the case of Mr. Bailly-Blanchard was May 22, 1914, and in that of Mr. Russell March 17, 1904.

The appointments as secretaries of embassies or legations, from which positions Messrs. Bailly-Blanchard and Russell were promoted to ministers, were made under the provisions of chapter 1, Title XVIII, of the Revised Statutes, and section 1684 contained therein stipulates that:

To entitle any charge d'affaires, or secretary of any legation or embassy to any foreign country, or secretary of any minister plenipotentiary, to compensation, they shall respectively be appointed by the President, by and with the advice and consent of the Senate; but in the recess of the Senate the President is authorized to make such appointments, which shall be submitted to the Senate at the next session thereafter, for their advice and consent; and no compensation shall be allowed to any charge d'affaires, or any of the secretaries hereinbefore described, who shall not be so appointed.

Since their appointments as secretaries required confirmation by the Senate, they were not embraced in the classified service as defined by the " Civil Service act, rules, and Executive orders, amended to September 15, 1914," as follows:

The classified service shall include all officers and employees in the executive civil service of the United States, heretofore or hereafter appointed or employed, in positions now existing or hereafter to be created, of whatever function or designation, whether compensated by a fixed salary or otherwise, except persons employed merely as laborers, and persons whose appointments are subject to confirmation by the Senate. * * * (Rule 2, p. 37.)

The classified service does not include positions under the government of the District of Columbia, the Library of Congress, the legislative and judicial branches, the Consular and Diplomatic Services, or the Pan American Union. (Note on p. 68.)

It is suggested that the Executive order of November 26, 1909, promulgating regulations governing appointments and promotions in the diplomatic service placed the secretaries of legations in the classified service.

The Executive order referred to did not specifically place such employees in the classified service nor make them subject to the Civil Service act, it being stated that the extension was of the general principles embraced in the act and providing only for the examination of those specially designated by the President for appointment.

Upon the facts presented, I am constrained to hold that as Messrs. Bailly-Blanchard and Russell were promoted to the grade of ambassador or minister prior to the enactment of the act of February 5, 1915, 38 Stat. 805, providing for the classification of secretaries in the diplomatic service, they were not promoted from the classified service and are therefore not entitled to the benefits conferred upon Foreign Service officers by section 18 of the act of May 24, 1924.

(A–5105)

ARMY PAY—RETIRED GENERAL

An officer appointed General of the Armies, pursuant to the act of September 3, 1919, 41 Stat. 283, upon his retirement is entitled, under the provisions of the act of June 30, 1882, 22 Stat. 118, to the pay and allowances he was receiving as an officer on the active list at the time of his retirement.

Comptroller General McCarl to the Secretary of War, September 20, 1924:

There has been received your letter of September 8, 1924, presenting for decision the following question:

Will General John J. Pershing, who was appointed pursuant to the act of September 3, 1919 (41 Stat. 283), be entitled, in his retirement, to the pay and allowances that he is receiving as an officer on the active list at the time of retirement?

It is understood that General Pershing was placed on the retired list September 12, 1924. The act of September 3, 1919, 41 Stat. 283, provides in part:

That the office of General of the Armies of the United States is hereby revived, and the President is hereby authorized, in his discretion and by and with the advice and consent of the Senate, to appoint to said office a general officer of the Army who, on foreign soil and during the recent war, has been especially distinguished in the higher command of military forces of the United States; and the officer appointed under the foregoing authorization shall have the pay prescribed by section 24 of the Act of Congress approved July 15, 1870, and such allowances as the President shall deem appropriate; * * * *Provided*, That no more than one appointment to office shall be made under the terms of this Act.

Section 4 of the national defense act, as amended by the act of June 4, 1920, 41 Stat. 760, provides:

> There shall be one general, as now authorized by law, until a vacancy occurs in that office, after which it shall cease to exist.

Such difficulty as exists results from the fact that the act of 1919 revived the office of "General of the Armies of the United States," while the office in existence when the act of 1882, hereafter referred to, was passed was that of "General of the Army of the United States" (sec. 1095, Revised Statutes, and act of July 25, 1866, 14 Stat. 223); and the fact that section 1274, Revised Statutes, limits the pay of officers retired from active service to 75 per cent of the pay of the rank upon which they are retired, while the act of June 30, 1882, 22 Stat. 118, contains a proviso:

> That the General of the Army, when retired, shall be retired without reduction in his current pay and allowances; * * *.

The act of 1919 revived an office which had existed at some time in the past and which had lapsed either by repeal of the law creating it or by prohibition against filling it. Section 1094 of the Revised Statutes provides that the Army of the United States shall include "one general," with a proviso, evidently based on the provision contained in the act of July 15, 1870, 16 Stat. 318:

> That when a vacancy occurs in the office of General or Lieutenant-General such office shall cease, and all enactments creating or regulating such offices shall, respectively, be held to be repealed.

The office was, however, continued in existence, or in effect revived, for Gen. P. H. Sheridan by the act of June 1, 1888, 25 Stat. 165, and lapsed with his death August 5, 1888. After the office was revived in 1866 and before the limitation upon filling a vacancy was enacted in 1870, Gen. William T. Sherman had succeeded to the office vacated by General Grant on his elevation to the Presidency.

The act of July 25, 1866, 14 Stat. 223, provided:

> That the grade of "general of the army of the United States" be, and the same is hereby, revived; * * *.

Section 9 of the act of March 3, 1799, 1 Stat. 752, provided:

> That a commander of the army of the United States shall be appointed and commissioned by the style of "General of the Armies of the United States," and the present office and title of Lieutenant-General shall thereafter be abolished.

It thus appears that the office of general was first created in 1799 by the title of "General of the Armies of the United States"; that it was revived in 1866 as "General of the Army of the United States"; and that it was again revived in 1919 by the title of "General of the Armies of the United States." That it is one and the same office, that of general, is unquestioned. Whether the plural was used in 1799 because of the prospects of war with armies operating in several theaters, the singular in 1866 after the close of the Civil War and with a view to a small Regular Army operating in time of peace in

the continental limits of the United States, and the plural in 1919 because of the technical state of war, the expansion of the Regular Army, and the existence of units thereof at far distant stations beyond the limits of the United States, it would be fruitless to inquire. The office of general was revived, specifically the pay theretofore authorized for the General of the Army by the act of 1870 was fixed as the pay of the revived office, and, except as specifically otherwise provided, all other attributes of the office of general attach to the revived office. The provision for allowances was a modification of the prior laws applicable to the office of general, and the reference to the pay fixed by the act of 1870 was probably thought necessary to completely fix the emoluments of the revived office and was not a fixing of the pay proper of a new and different office. It should be observed that Congress was providing a reward for exceptionally meritorious service, and the design was to so specifically fix the emoluments that the matter could not become one of embarrassment to the recipient because of doubt as to what was intended to be provided.

In the matter of aids to the general, it has been held he was entitled to the number prescribed for the General of the Army, 27 Comp. Dec. 275 and 280. Any other attribute, right, privilege, etc., of the office not specifically modified would necessarily also apply to the office, including the act of 1882. The act of 1882 first established the compulsory retirement of officers at the age of 64, and the proviso here considered was a part of that provision, evidencing a purpose to provide for the officer holding the title of general otherwise than under section 1274, Revised Statutes. The act of 1882 was applicable to General Sherman upon his retirement in 1884. General Sheridan died before reaching the age for retirement, and General Grant after the expiration of his terms as President was reappointed to the retired list under the act of March 3, 1885, 23 Stat. 434, authorizing the appointment on the retired list of the Army of one person having the qualifications indicated "with the rank and full pay of such General, or General-in-Chief." Of the three officers who, prior to 1919, held the permanent title of general, but one reached the retired list upon retirement for age, and he received the benefits of the 1882 act. Another was placed upon the retired list by a special act and with a special pay, to wit, full pay of general. So far as a policy of Congress can be gleaned from the limited occasions arising, that policy would seem to be that the general when retired shall suffer no reduction of emoluments.

Answering your question specifically, I am of opinion that under the act of 1882 Gen. John J. Pershing will be entitled in his retirement to the pay and allowances he was receiving as an officer on the active list at the time of retirement.

(A–3645)

SUBSISTENCE, PER DIEM IN LIEU OF AT HEADQUARTERS

The payment to an employee of the Lighthouse Service of a per diem in lieu of subsistence while at his official headquarters is unauthorized, notwithstanding a provision therefor in his appointment.

Decision by Comptroller General McCarl, September 22, 1924:

The Secretary of Commerce requested, June 16, 1924, review of settlement C–10193–C, dated May 9, 1924, wherein disallowance was made in the accounts of James A. Woolley, special disbursing agent, Department of Commerce, of credit for per diem in lieu of subsistence paid to Thomas P. Fowler, superintendent of construction, Lighthouse Service, Bath, Me., from June 1, 1923, to November 30, 1923, as follows:

Voucher	3644	$87.00
"	3745	93.00
"	3854	93.00
"	3975	90.00
"	4142	93.00
"	4260	90.00
Total		546.00

In his request for review the Secretary states:

* * * the General Accounting Office proceeds upon the assumption that the payments to Mr. Fowler were made under the act of August 1, 1914 (38 Stat., 680), as being in a travel status. This, however, was not the situation in Mr. Fowler's case. Mr. Fowler was formerly an engineer on a lighthouse tender in which position he received as consideration of his service, in addition to money compensation, his subsistence (or commutation thereof) in accordance with law and regulation, including quarters on shipboard, as is the general practice in shipping services. By reason of his familiarity with vessel machinery and construction it was deemed advantageous by the department to utilize his services in the construction of new vessels for the Lighthouse Service, authorized by Congress, and he was accordingly given appointment as assistant superintendent of construction and later as superintendent of construction, payable from the appropriations applicable to the construction of the respective vessels on which he was employed. As Mr. Fowler had formerly been receiving subsistence as part of his contract of employment, it was agreed that he should be allowed his subsistence (or its equivalent in cash) under the new arrangement, and provision to this effect was included in his appointment, or contract of employment. * * * In this appointment the allowance for subsistence was fixed at $2.50 per day, but by the department's letter of May 15, 1922 * * *, modifying said appointment, the rate was changed to $3.00.

In Mr. Fowler's appointment the term "per diem in lieu of subsistence" is not used in the strict sense employed in sec. 13 of the act of August 1, 1914 (38 Stat. 680), but as equivalent to "commutation of subsistence," the words "per diem" being used because the subsistence is on a daily basis.

It would of course have been entirely feasible for the department, instead of granting Mr. Fowler an allowance for subsistence, to have granted additional salary, but for administrative reasons deemed to be advantageous to the Government, it was considered preferable to fix his compensation part in salary and part in subsistence.

Mr. Fowler was appointed to his present position August 29, 1921, by an order which reads:

Mr. THOMAS P. FOWLER,
(Through the Commissioner of Lighthouses.)

SIR: You have been appointed, subject to taking the oath of office, superintendent of construction in the Lighthouse Service at a salary of two thousand

one hundred dollars per annum, effective on the date on which you enter upon duty in the above-mentioned position.

(By change from assistant superintendent of construction.)

(Your actual and necessary traveling expenses while in a travel status, and per diem of $2.50 in lieu of subsistence while on duty at Bath, Me., have been authorized.)

By direction of the Secretary.

Respectfully,

(Signed) CLIFFORD HASTINGS,
Chief of Appointment Division.

The appropriation act of November 4, 1919, 41 Stat. 339, provides:

General service: For constructing or purchasing and equipping lighthouse tenders and light vessels, to replace vessels worn out in service, in the third, fifth, and eighth lighthouse districts, or for use in the Lighthouse Service gen erally, $760,000.

The urgent deficiency appropriation act of April 6, 1914, 38 Stat. 312, 318, contains the following:

On and after July first, nineteen hundred and fourteen, unless otherwise expressly provided by law, no officer or employee of the United States shall be allowed or paid any sum in excess of expenses actually incurred for subsistence while traveling on duty outside of the District of Columbia and away from his designated post of duty, nor any sum for such expenses actually incurred in excess of $5 per day; nor shall any allowance or reimbursement for subsistence be paid to any officer or employee in any branch of the public service of the United States in the District of Columbia unless absent from his designated post of duty outside of the District of Columbia, and then only for the period of time actually engaged in the discharge of official duties.

The act of August 1, 1914, 38 Stat. 680, provides:

That the heads of executive departments and other Government establishments are authorized to prescribe per diem rates of allowance not exceeding $4 in lieu of subsistence to persons engaged in field work or traveling on official business outside of the District of Columbia and away from their designated posts of duty when not otherwise fixed by law. * * *

The travel regulations of the Department of Commerce provide:

66. Per diem in lieu of subsistence will in no case be allowed at the official station of the employee. The place of official station is fixed either by the law or the certificate of appointment.

67. The limits of the official station are the territorial limits of the city where the official station of the employee is located.

The disallowance in this case was made upon the theory that Bath, Me., was the headquarters or official station of Superintendent Fowler during the period in which the per diem in lieu of subsistence was paid. It is noted that Mr. Fowler's detail stated thereon "New position." On May 15, 1922, his per diem allowance was increased to $3 a day. He remained at this station for more than three years.

The Secretary does not contend that the employee was in a travel status or on temporary duty at Bath, Me., but suggests that as the compensation was not fixed by law it was proper for the department in the contract of employment to provide for the payment of a per diem in lieu of subsistence at headquarters as a part of the compensation.

It is to be noted in this connection that the laws of April 6, 1914, and August 1, 1914, *supra*, make no distinction between employees

receiving salaries fixed by law and those receiving salaries from lump-sum appropriations.

In a similar question considered by the former Comptroller of the Treasury it was held in 21 Comp. Dec. 508, as follows:

> It is to be noticed that while the act of April 6, 1914, does not specifically state that an employee shall not be allowed or paid any sum in excess of expenses actually incurred for subsistence while at his designated post of duty, the law of August 1, 1914, which is in the nature of an amendment to the former law, authorizes the granting of a per diem in lieu of subsistence only to persons away from their designated posts of duty. Taking the two laws together, I think it was clearly intended by Congress that an employee should not be reimbursed for actual expenses of subsistence incurred at his post of duty unless it be in cases where such reimbursement is specifically authorized by law. * * * (See also 21 Comp. Dec., 641.)

The appropriation act of November 4, 1919, *supra*, for "vessels" for "Lighthouse Service" does not specifically authorize reimbursement of subsistence or per diem in lieu thereof to persons engaged thereunder while at their headquarters, and the department's regulations provide in specific terms that in no case will per diem be allowed at the official station of employees. Consequently, there was no authority to include per diem while at headquarters in Superintendent Fowler's appointment as stated therein.

Upon review the disallowance is sustained.

(A–5028)

LEAVE OF ABSENCE—ARSENAL EMPLOYEES

As regulations governing leave for employees of the Ordnance Department at large provide that in all years after the second year the entire 30 days' annual leave, under the act of August 29, 1916, 39 Stat. 617, may be granted at any one time in the year or in installments, at the discretion of the commanding officer, where 30 days' leave is granted an arsenal employee at the beginning of a service year after the second, such employee can not be compelled to refund the pay for the difference between the leave granted and that accrued to the date of his cessation of service.

Comptroller General McCarl to the Secretary of War, September 23, 1924:

By fourth indorsement, dated September 5, 1924, of the acting assistant and chief clerk, I have your request for decision of questions presented by the Chief of Ordnance (1) whether, if an arsenal employee is granted 30 days' leave at the beginning of any service year after the second and if later during the service year he should have to be laid off due to lack of work, insufficient funds, or should resign, the employee would be compelled to refund the difference between the pay for the leave granted and that actually earned; and (2) if refund must be made, whether it can be collected from the 2½ per cent retirement deductions and from pay due, if sufficient to cover.

The act of August 29, 1916, 39 Stat. 617, provides as follows:

> * * * That each and every employee of the navy yards, gun factories, naval stations, and arsenals of the United States Government is hereby granted thirty days' leave of absence each year, without forfeiture of pay during such

leave: *Provided further*, That it shall be lawful to allow pro rata leave only to those serving twelve consecutive months or more: *And provided further*, That in all cases the heads of divisions shall have discretion as to the time when the leave can best be allowed: *And provided further*, That not more than thirty days' leave with pay shall be allowed any such employee in one year: *Provided further*, That this provision shall not be construed to deprive employees of any sick leave or legal holidays to which they may now be entitled under existing law.

Under the act quoted and the previous act of February 1, 1901, 31 Stat. 746, which was practically identical therewith except that the earlier act granted only 15 days' leave with pay instead of 30, it is obvious that employees of navy yards, etc., are not entitled to any leave with pay during their first service year. At the beginning of the second service year they are entitled to 30 days' leave with pay for service performed during the first service year. During any service year subsequent to the first they are entitled to 30 days' leave with pay for services performed during said subsequent year. The leave earned during any service year after the first must be taken during the year in which earned. See 23 Comp. Dec. 724.

Since the employees in question are not entitled to any leave with pay during the first service year and since the leave earned during any year after the first must be taken during the year in which it is earned, the employees are entitled to 60 days' leave with pay during the second service year. It does not violate the proviso that not more than 30 days' leave shall be allowed an employee in one year since only 30 days are allowed for the first and 30 for the second service year. See 16 Comp. Dec. 788.

It was held in decision of November 2, 1916, 23 Comp. Dec. 277, that the statute did not expressly require that the leave during the second and subsequent service years should be prorated but that such prorating had been deemed necessary to a proper administration of the act of August 29, 1916.

General Orders No. 7 governing the Ordnance Department at large has the following provision in regard to leave:

* * * In all years after the second, the entire 30 days may be granted at any one time in the year or in installments, at the discretion of the commanding officer. * * *

The proviso as to pro rata leave prohibits granting pro rata leave before the end of the first service year, the object being to deny leave to transient employees, and to encourage employees to remain in employment. The prohibition does not carry the implication that only pro rata leave can be granted after the first service year.

In view of the language of the statute under consideration and of the decisions construing it, it must be held that the provision in

General Orders No. 7 referred to is valid. If leave with pay is granted in accordance with said provision, the employee to whom the leave is granted would be entitled to pay for the period of leave granted and taken and there would be no authority of law to compel the employee to refund the pay for the difference between the leave granted and that accrued to the date of cessation of service.

It is for your consideration whether or not the provision in question should be changed in the interest of better administration. In view of the answer to the first question the second does not require an answer.

(A-5019)

APPROPRIATIONS—BURIAL EXPENSES—PUBLIC HEALTH SERVICE

Where an American seaman died while a patient in a Public Health Service hospital and was permanently buried on a reservation of the Public Health Service, any subsequent expenses incident to the disinterment and reburial of the body made necessary by reason of the erection of new buildings on the reservation for the Veterans' Bureau, which also occupies a portion of the reservation, are not chargeable to any Public Health Service appropriation.

Comptroller General McCarl to the Secretary of the Treasury, September 24, 1924:

I have your letter of September 5, 1924, requesting decision of a question presented as follows:

The body of Lawson Tate, a colored American merchant seaman, is buried on the reservation at Perry Point, Md., near a location where new buildings are being constructed.

The U. S. Veterans' Bureau, which occupies a portion of the reservation, desires that the remains of this merchant seaman be removed from the present grave and that the Public Health Service assume responsibility for such removal inasmuch as Lawson Tate was not a beneficiary of that bureau, but was a patient of the Public Health Service at the time of his death.

An investigation of the records of the Public Health Service shows that Lawson Tate died on May 9, 1920, at the Public Health Service hospital at Perryville, but the books do not reveal that any burial expenses were incurred.

Please advise whether expenditures incidental to such removal, including reburial, legally can be charged to the appropriation "Pay of personnel and maintenance of hospitals, Public Health Service, 1925," or any other appropriation under the control of that service.

The pertinent part of the appropriation specifically referred to by you, being the act of April 4, 1924, 43 Stat. 75, is as follows:

For medical examinations, including the amount necessary for the medical inspection of aliens, as required by section 16, of the Act of February 5, 1917, medical, surgical, and hospital services and supplies for beneficiaries (other than patients of the United States Veterans' Bureau) of the Public Health Service, and persons detained under the Immigration Laws and Regulations at Ellis Island Immigration Station, including * * * reasonable burial expenses (not exceeding $100 for any patient dying in hospital) * * *.

It is assumed from the facts set forth that the burial of this seaman on the reservation was a proper one and that administrative authority in making it was duly obtained. That it was intended to be a permanent burial is evidenced by the fact that the body has remained in its original resting place for the past four years, and no question raised as to its removal until the construction of new buildings for the use of the United States Veterans' Bureau was begun. Accordingly the duty owed to this seaman by the Public Health Service was entirely performed when he was buried, at which time under existing law reasonable burial expenses, if any, not exceeding $100 were available from a like appropriation for the fiscal year involved. As the burial was a permanent one and the duty of the Public Health Service fully discharged, no new duty to remove the remains is imposed on that service by reason of the fact that the records may not reveal that an expense was incurred in the original interment of the deceased.

Upon the facts appearing, it must be held that the appropriation in question is not legally chargeable with the expenses, incident to removal and reburial of this seaman's body, and there is no other appropriation under the control of the Public Health Service available to meet the proposed expenditure.

Accordingly your question is answered in the negative.

(A–5114)

CLASSIFICATION OF CIVILIAN EMPLOYEES—COMMISSIONER OF WAR MINERALS RELIEF, INTERIOR DEPARTMENT

Offices or employments, the appointment to and termination of which are subject to the will of the head of an executive department, are "positions" within the meaning of the classification act of March 4, 1923, 42 Stat. 1488.

The position of Commissioner of War Minerals Relief, Interior Department, having been created and filled in the discretion of the Secretary of the Interior under authority of the act of March 2, 1919, 40 Stat. 1274, is subject to the classification act of March 4, 1923, 42 Stat. 1488, and the salary attaching thereto is that fixed by the Personnel Classification Board.

The rates of pay fixed by the classification act of March 4, 1923, 42 Stat. 1488, are applicable to positions paid from appropriations originally authorized prior to July 1, 1924, but continuing available by law for payment of personal services subsequent to that date.

Comptroller General McCarl to the Secretary of the Interior, September 24, 1924:

I have your letter of September 10, 1924, requesting decision whether you are bound by the allocation under the classification act of 1923, made by the Personnel Classification Board of the position of Commissioner of War Minerals Relief, now occupied by John

Briar, or whether you are authorized to fix the salary of such position.

The act of March 2, 1919, 40 Stat. 1274, authorizing the Secretary of the Interior to adjust losses growing out of certain war mineral enterprises, provided in part as follows:

> The said Secretary shall make such adjustments and payments in each case as he shall determine to be just and equitable; that the decision of said Secretary shall be conclusive and final, subject to the limitation hereinafter provided; that all payments and expenses incurred by said Secretary, including personal services, traveling and subsistence expenses, supplies, postage, printing, and all other expenses incident to the proper prosecution of this work, both in the District of Columbia and elsewhere, as the Secretary of the Interior may deem essential and proper, shall be paid from the funds appropriated by the said Act of October fifth, nineteen hundred and eighteen, and that said funds and appropriations shall continue to be available for said purpose until such time as the said Secretary shall have fully exercised the authority herein granted and performed and completed the duties hereby provided and imposed; *Provided, however,* That the payments and disbursements made under the provisions of this section for and in connection with the payments and settlements of the claims herein described, and the said expenses of administration shall in no event exceed the sum of $8,500,000: * * *.

The act of June 7, 1924, 43 Stat. 634, repealed the limitation on the aggregate expenditure.

You state that prior to July 1, 1924, John Briar held the position of Commissioner of War Minerals Relief created under authority of said act and was paid a salary at the rate or $7,500 per annum. The Personnel Classification Board assumed jurisdiction and allocated the position in grade 5 of the Professional and Scientific Service with maximum compensation at the rate of $6,000 per annum, which resulted in a reduction in the salary received by Commissioner Briar from $7,500 per annum to $6,000 per annum.

In support of the contention that the salary of the commissioner is not subject to the classification act, it is urged, first, that the position is not one under the Interior Department, but merely a temporary position as assistant to the Secretary, and, second, that no appropriation for the position was made for the fiscal year 1925, subsequent to the effective date of the classification act.

The classification act provides for the classification of positions, and the term "position" has been defined in section 2 as follows:

> The term "position" means a specific civilian office or employment, whether occupied or vacant, in a department other than the following: * * *

The term "department" is defined in the same section as follows:

> The term "department" means an executive department of the United States Government, a governmental establishment in the executive branch of the United States Government which is not a part of an executive department * * *

Thus the definition of the term "position" is very broad, including "employment" as well as "office." No requirement appears as

to the method of employment or appointment, or duration of service, in order to bring a "civilian office or employment" within the law. That is to say, offices or employments, the appointment to and termination of which, are subject to the will of the head of an executive department under authority of law are equally included in the term "position" as are offices or employments regularly created and filled. The authority of the Secretary to appoint the commissioner was because of his official position as Secretary of the Interior, head of Interior Department, who was charged with the duties of carrying out the so-called war minerals relief act, and, consequently, any employment of personal services made by him in the execution of those duties must be considered as coming under the Interior Department.

See also decision of August 29, 1924, 4 Comp. Gen. 239, and decision of September 12, 1924, 4 Comp. Gen. 296, considering temporary positions.

The classification act fixes a schedule of rates of pay for civilian offices and employments made effective for positions in the District of Columbia on and after July 1, 1924. Those rates are derived from the classification act itself, not, as suggested in your submission, from the acts providing appropriations for the payment of such rates of compensation, and it is immaterial whether personal services are paid from appropriations originally authorized prior to July 1, 1924, continuing available for expenditure subsequent to that date, or from annual appropriations made exclusively for the fiscal year 1925.

You are advised, therefore, that the position of commissioner of War Minerals Relief is subject to the classification act and that the salary attaching thereto is that fixed in accordance with said act under the allocation made by the Personnel Classification Board.

(A-4608)

COMPENSATION AND RENTAL OF QUARTERS—MATRONS OF THE INDIAN SERVICE

The compensation and rental of quarters for outing and field matrons of the Indian Service are payable only from the Interior Department appropriation "Industrial work and care of timber." Payments heretofore made from other appropriations of the Interior Department should be corrected by transfer settlements. (Modified by 4 Comp. Gen. 550.)

Decision by Comptroller General McCarl, September 25, 1924:

There is before this office for consideration the question as to the proper appropriation chargeable with the salary and rental of

quarters for outing and field matrons of the Indian Service. The Indian Office reports that it has been the practice to charge the salary of such matrons to the appropriation "Indian schools support," and that the expenses for rental of quarters have been divided between the appropriation "Industrial work and care of timber (field matrons)" and the appropriation "Indian school and agency buildings." It is explained that the duties of the position are not entirely those of field matron, but in part to care for Indian girl students or ex-students either temporarily or permanently within or in the vicinity of Los Angeles, some of these girls being employed in private families.

The appropriations in question for the fiscal year 1924 are found in the act of January 24, 1923, 42 Stat. 1182, 1183, the applicable portions thereof being as follows :

SUPPORT OF INDIAN SCHOOLS

For support of Indian day and industrial schools not otherwise provided for, and other educational and industrial purposes in connection there with, * * *.

INDIAN SCHOOL AND AGENCY BUILDINGS

For construction, lease purchase, repair, and improvement of school and agency buildings, * * * *Provided further*, That the Secretary of the Interior is authorized to allow employees in the Indian Service, who are furnished quarters, necessary heat and light for such quarters without charge, such heat and light to be paid for out of the fund chargeable with the cost of heating and lighting other buildings at the same place.

INDIAN SCHOOL TRANSPORTATION

For collection and transportation of pupils to and from Indian and public schools, and for placing school pupils, with the consent of their parents, under the care and control of white families qualified to give them moral, industrial, and educational training * * *.

INDUSTRIAL WORK AND CARE OF TIMBER

For the purposes of preserving living and growing timber on Indian reservations and allotments, and to educate Indians in the proper care of forests; for the employment of suitable persons as matrons to teach Indian women and girls housekeeping and other household duties, for necessary traveling expenses of such matrons, and for furnishing necessary equipments and supplies and renting quarters for them where necessary, * * * $375,000, of which sum not less than $50,000 shall be used for the employment of field matrons and nurses: * * *.

Appropriations in identical terms are found in the act of June 5, 1924, 43 Stat. 399, 404, and 405, for the fiscal year 1925.

The only portion of the appropriation in which any provision is made for matrons is that under the heading of "Industrial work and care of timber," which provides both for the employment of matrons and for the rental of quarters for them and for furnishing necessary

equipment and supplies for such matrons, and appears to have been intended as an all-inclusive appropriation for expenditures pertaining to the employment of such matrons.

No explanation is offered by the Indian Office as to the duties of field matrons or wherein they differ from outing matrons. It is inferred, however, that "field matrons" is the designation applied to those actively engaged in teaching Indian girls and women housekeeping and other household duties, while "outing" matrons apparently are not actively engaged in teaching but in supervising Indian girls or women employed in private families from which practical training in housekeeping and household duties may be obtained. Upon this basis, while there may be a technical difference between outing and field matrons, they both appear to be working to accomplish the purpose of the appropriation for matrons found under the heading "Industrial work and care of timber"; that is, the training of Indian girls and women in household duties and housekeeping. In view of the specific provision in that appropriation for the salary and rent of quarters for such matrons, it is available therefor to the exclusion of any other appropriation of a more general nature. Such charges already made against other appropriations during the fiscal year 1924 or 1925 will be corrected by transfer settlements, and payments for such charges hereafter accruing should be made accordingly.

(A–3799)

LEASES—RENT—POST OFFICE DEPARTMENT

Credits for payments of rental of buildings by the Post Office Department may not be allowed on the basis of accepted proposals pending the filing of a copy of the formally executed lease agreement in the General Accounting Office, except in those cases where a satisfactory showing is made that the lessor, having submitted a bid which had been accepted, refused to execute a formal lease.

Comptroller General McCarl to the Postmaster General, September 26, 1924:

I have your letter of September 10, 1924, reading:

I beg to acknowledge the receipt of your decision of August 16, 1924, based upon my request of June 27, 1924, concernng the payment of rentals to lessors of post office buildings and the necessity for the filing promptly of the original copies of leases for post office quarters.

In declining to comply with the request of this department that you continue the previous policy of accepting original proposals and acceptances as evidences of contracts entered into pending the completion of the formal lease, you say:

"It is not understood why one who desires to rent his premises to the Government, and who has submitted a proposal which is accepted, should hesitate to execute a formal lease based thereon."

While this situation may be difficult of comprehension, yet it nevertheless exists, and the fact that the attitude of this class of lessors is inconsistent does not render the problem before this department less troublesome.

As a remedy for delays due to the time required by county officials in which to record and return leases you make the following suggestion:

"To avoid any delays in the depositing of the leases, it is suggested that they be executed in duplicate. If so executed, both duplicate originals may then be forwarded for recording, one to be returned immediately with a notation of its receipt for recording by the recording officer, giving the date of such recording and the index number, etc., the other to be retained by the recording officer for recording in the records, and when so recorded to be promptly returned and substituted for the duplicate original first returned. Following the plan thus outlined, the leases may be promptly deposited in this office as required by law, which dispenses with any necessity for considering the making of payments, or the allowance of credits for payments made, on other than the formal leases."

There are two obvious objections to this procedure: In the first place, much additional clerical work would be required; and in the second place, this department has no jurisdiction over county officers so as to induce them to undertake the additional work which would devolve upon them in the operation of the proposed plan.

For the foregoing reasons, I have the honor to request that you give further consideration to the request made in my letter of June 27, 1924.

As to the matter of the refusal of the lessor to execute a formal lease it was said in decision of August 16, 1924, that:

* * * Generally, no payments should be made, nor credits for payments allowed, unless and until the formal leases are executed. Cases involving refusals to execute formal leases may be submitted to this office for consideration and advice as to the action to be taken.

The formal lease is highly desirable; however, it is not indispensable in the sense that it may be with respect to other departments of the Government which, pursuant to the requirements of specifically applicable statutes, are required to enter into formal leases, as, for instance, in the case of the War, Navy, and Interior Departments, under section 3744, Revised Statutes. If a lessor refuses to enter into a formal lease after having agreed so to do, and such cases must be and are understood to be exceptional, the accepted proposal should be submitted to this office with a full explanation and you will be advised as to the action, if any, to be taken. There would be for consideration questions as to whether lessor has fulfilled his proposal and, if not, whether any payment can be made notwithstanding such breach.

As to the matter of the filing in this office of the recorded original copy of a lease, it would seem that one duplicate original could be forwarded for recording, and when thereafter returned, transmitted for filing in this office in lieu of a duplicate original promptly deposited in this office as required by law, the latter to be then returned to the department. Unless and until such leases are deposited in this office no installments of rent may be certified for allowance (nor may credit be allowed in the accounts of officers paying such installments of rent) except in those cases where it is

satisfactorily shown that the lessor properly refused to execute a formal lease.

The practice heretofore existing of certifying payments and allowances of credit for payments made, on the basis of the accepted proposal, was improper and for that reason I have to inform you that your request to "continue the previous policy of accepting original proposals and acceptances as evidences of contracts entered into pending the completion of the formal lease" cannot be complied with.

(A–4904)

SUBSISTENCE EXPENSES — FRACTIONAL DAYS — INTERNAL REVENUE EMPLOYEES

An employee who is absent from his official station on official business for a period of ten hours or less between the hours of 8 a. m. and 6 p. m., is not in a travel status within the meaning of the laws authorizing reimbursement of subsistence expenses, either on an actual expense basis or a per diem in lieu of basis, and is consequently not entitled to reimbursement for any subsistence expenses incurred therein.

Decision by Comptroller General McCarl, September 30, 1924:

Galen L. Tait, collector of internal revenue, Baltimore, Md., by a letter dated August 16, 1924, requests review of settlement C–11369–Ti, in which there was disallowed on vouchers 607 and 640 of his accounts for September and October, 1923, the sum of $2.80, of which amount $1.40 was paid to Samuel G. Coale, and a similar amount to John E. Shaw, both of whom, from the facts disclosed, were deputy collectors of internal revenue with headquarters in Washington, D. C.

It appears that these deputies at 10.30 a. m. on September 18, 1923, in the performance of their official duties, left Washington and went to Rockville, Md., where they had dinner at $1.25 each, plus tip, 15 cents each. They returned to Washington at 4.30 p. m.

In support of the request for review attention is invited to Internal Revenue Manual, Part IV, and the collector, in letter dated July 2, 1924, states:

> As these deputies were away from their respective posts of duty between the hours from 10.30 a. m. to 4.30 p. m. and in accordance with Internal Revenue Manual, Part IV, section 1555, par. 5, this office is of the opinion that employees are entitled to their midday meal.

The Internal Revenue Manual, Title XII, "Traveling expenses," section 1555, paragraph 5, provides:

> In connection with the departure of an officer or employee from his post of duty on official business and his return thereto, such officer or employee will not be allowed reimbursement for breakfast if he arrives at his post of duty at or before 7 a. m. or departs therefrom at or after 8 a. m., nor for a

midday meal if he arrives at his post of duty at or before 12 noon or departs therefrom at or after 1 p. m., nor for an evening meal if he arrives at his post of duty at or before 6 p. m. or departs therefrom at or after 7 p. m

The provision just quoted must be construed as pertaining only to meals taken in connection with the beginning or end of a period of travel, and as having no application to such short periods of absence as are here involved.

The act of March 3, 1875, 18 Stat. 452, provides:

* * * hereafter only actual travelling-expenses shall be allowed to any person holding employment or appointments under the United States * * *; and all allowances for mileages and transportation in excess of the amount actually paid, * * * are hereby declared illegal; and no credit shall be allowed to any of the disbursing-officers of the United States for payment or allowances in violation of this provision.

The foregoing provision is supplemented by the act of April 6, 1914, 38 Stat. 318, which provides:

On and after July first, nineteen hundred and fourteen, unless otherwise expressly provided by law, no officer or employee of the United States shall be allowed or paid any sum in excess of expenses actually incurred for subsistence while traveling on duty outside of the District of Columbia and away from his designated post of duty, nor any sum for such expenses actually incurred in excess of $5 per day; * * *.

Under the terms of the act, *supra*, it is essential that the deputies be in a travel status in order to entitle them to reimbursement for the meals in question. The facts show that they were not in such a status. They were merely in the status of employees operating from a central office to near-by points in the surrounding country, involving an absence of such short duration as would not necessarily cause any increase in the employee's expenses for subsistence. See decisions of March 7, 1924, 3 Comp. Gen. 598; March 31, 1924, Review 6243; April 10, 1924, 3 Comp. Gen. 739; May 3, 1924, A–2226; May 6, 1924, A–669; June 16, 1924, 3 Comp. Gen. 966; July 19, 1924, Re. Review 6243; September 6, 1924, 4 Comp. Gen. 274. In this connection it may be stated generally that in no case can an officer or employee be regarded as in a travel status and entitled to reimbursement of subsistence expenses when the absence from his official station is only for a period of 10 hours or less between the hours of 8 a. m. and 6 p. m.

As has been held by this office heretofore, the purpose of travel allowance is to reimburse an employee for any additional necessary expenditures that he has made through travel on the public business, and as was stated in 3 Comp Gen. 739, 740—

* * * an employee absent from his official station for such short periods during the day as would not ordinarily and necessarily cause the employee to incur expenses for subsistence in addition to such expenses as would have been incurred if he had remained at his official station is not entitled to any reimbursement on account of subsistence either on a per diem or an actual expense basis.

Any regulation which purports to authorize an allowance for subsistence in such cases transcends the law and is to that extent null and void. See decision of September 6, 1924, A–4482, 4 Comp. Gen. 274.

In view of the practice which obtained with the apparent sanction of the accounting officers prior to the publication of the decisions of March and April, 1924, hereinbefore cited, disallowances will not be made in the settlement of disbursing officers' accounts covering periods prior to July 1, 1924, on account of payments made in accordance with said practice if otherwise correct and proper.

(A–4908)

CLASSIFICATION OF CIVILIAN EMPLOYEES—AVERAGE APPLICABLE TO GRADE

In determining and maintaining the proper average under the classification act of March 4, 1923, 42 Stat. 1488, and the appropriation acts for the fiscal year 1925, the average of the salaries for any grade should be on the basis of the total number of employees in a grade as a whole and not on the basis of the total number of employees in a class within the grade.

Comptroller General McCarl to the Secretary of the Interior, September 30, 1924:

I have your letter of August 28, 1924, requesting decision of the question whether the "grade" or the "class," established under the classification act controls in applying the "average" provision of the act of June 5, 1924, 43 Stat. 390, making appropriations for the Department of the Interior for the fiscal year 1925.

The act of June 5, 1924, 43 Stat. 391, provides as follows:

* * * That in expending appropriations or portions of appropriations, contained in this Act, for the payment for personal services in the District of Columbia in accordance with "The Classification Act of 1923," the average of the salaries of the total number of persons under any grade or class thereof in any bureau, office, or other appropriation unit, shall not at any time exceed the average of the compensation rates specified for the grade by such Act: * * *

Section 2 of the classification act of March 4, 1923, 42 Stat. 1488, as amended by joint resolution of June 7, 1924, defines "grade" and "class" as follows:

The term "grade" means a subdivision of a service, including one or more positions for which approximately the same basic qualifications and compensation are prescribed, the distinction between grades being based upon differences in the importance, difficulty, responsibility, and value of the work.

The term "class" means a group of positions to be established under this Act sufficiently similar in respect to the duties and responsibilities thereof that the same requirements as to education, experience, knowledge, and ability are demanded of incumbents, the same tests of fitness are used to choose qualified appointees, and the same schedule of compensation is made to apply with equity.

Section 3 of the classification act provided as follows:

> The board shall make all necessary rules and regulations not inconsistent with the provisions of this Act and provide such subdivisions of the grades contained in section 13 hereof and such titles and definitions as it may deem necessary according to the kind and difficulty of the work. Its regulations shall provide for ascertaining and recording the duties of positions and the qualifications required of incumbents, and it shall prepare and publish an adequate statement giving (1) the duties and responsibilities involved in the classes to be established within the several grades, illustrated where necessary by examples of typical tasks, (2) the minimum qualifications required for the satisfactory performance of such duties and tasks, and (3) the titles given to said classes. * * * The board may from time to time designate additional classes within the several grades and may combine, divide, alter, or abolish existing classes. Department heads shall promptly report the duties and responsibilities of new positions to the board. * * *

In pursuance thereof the Personnel Classification Board has issued, July 30, 1924, a pamphlet entitled "Class Specifications for Positions in the Departmental Service," which has given rise to the question here presented, illustrated by you as follows:

> An instance of the question may be presented by referring to the professional and scientific service. There are 7 grades in the service. In each grade there are a number of classes. In grade 3, which provides for salaries of from $3,000 to $3,600 per annum, there are associate attorneys, associate engineers, associate dentists, etc. The question is whether in maintaining the average the basis for determination is all positions of the grade in any bureau or other appropriation unit, i. e., grouping all attorneys, engineers, dentists, etc., of the associate grade, or all attorneys of the grade, all engineers of the grade, etc., i. e., the average to be maintained in each class.

The appropriation act provides for two averages which may be designated in the order mentioned in the act as the salary average and the rate average. In determining the salary average "grade or class" is specified as controlling, whereas in determining the rate average the grade only is specified. In view of this, and because of the fact that there were no classes within a grade established at the time of the enactment of the appropriation acts containing this provision, which Congress could have had in mind, I am of the opinion that the words "grade" and "class" in this connection were intended to be synonymous. The phrase "grade or class" established one unit; that is, the one then in existence, the grade. Other considerations would appear to support this view. For instance, in discussing this restrictive provision in the hearings on the agricultural appropriation bill, 1925 (pp. 7 and 8) the "grade" is the unit mentioned and not the "class." Also in making certain exceptions from the restrictive provision in the act, it is the "grade" that is mentioned throughout and not the "class." Furthermore, section 3 of the classification act expressly provides that the Personnel Classification Board may from time to time designate additional classes within the several grades and is authorized to combine, divide, alter, or abolish existing classes. This gives a medium

through which the administrative offices may meet changing conditions in their offices, but there appears no intention to require the striking of a new average upon every change. The average provision has a stabilizing effect on the rates of compensation paid under the classification act which would be defeated were a change in the average to occur by a change in the classes within a grade.

Accordingly, you are advised that in determining and maintaining the proper average under the classification act and the appropriation acts for 1925, the average of the salaries for any grade should be on the basis of the total number of employees in a grade as a whole and not on the basis of the total number of employees in a class as fixed by the Personnel Classification Board within the grade. In the example you cite, the salary average is to be determined from the total salaries of all attorneys, engineers, dentists, etc., of the associate grade as a whole.

(A–5023)

NAVY PAY—RETIRED OFFICERS

Commissioned officers and warrant officers of the Navy retired subsequent to June 30, 1922, who were entitled while on the active list to saved pay under section 16 of the act of June 10, 1922, 42 Stat. 632, should have their retired pay computed on such saved pay pursuant to the provisions of section 6 of the act of May 31, 1924, 43 Stat. 252.

Comptroller General McCarl to the Secretary of the Navy, September 30, 1924:

I have your letter of September 5, 1924, transmitting a proposed change in sections A and H of the "Instructions for carrying into effect the joint service pay bill, act of 10 June, 1922," with request for an expression of opinion whether the instructions, in so far as they involve disbursements, are in conformity with law.

The proposed changes are necessitated by the amendment of the act of June 10, 1922, by the act of May 31, 1924, 43 Stat. 252, and are for the purpose of informing the service as to the effect the amendment will have upon the computation of the retired pay of officers and warrant officers provided by section 17 of the act of June 10, 1922, 42 Stat. 632.

The proposed change in the wording of the instructions, is as follows:

SECTION "A"

Page A–23, paragraph 11: Strike out all of paragraph 11, beginning with the words "Section 17. Pay of officers on the retired list" and ending with the words "is not affected by this act."

Page A–23, paragraph 12: Renumber as paragraph 11.

SECTION "H"

Page H–1, paragraph 1: Strike out subparagraph (a) of paragraph 1 and substitute therefor the following:

1. (a) Section 17 of the act of 10 June, 1922, as amended by the act of 31 May, 1924, is as follows:

"That on and after 1 July, 1922, retired officers and warrant officers shall have their retired pay or equivalent pay, computed as now authorized by law on the basis of pay provided in this act: *Provided*, That nothing contained in this act shall operate to reduce the present pay of officers, warrant officers, and enlisted men now on the retired list, or officers or warrant officers in an equivalent status of any of the services mentioned in the title of this act: *Provided*, That the pay saved to an officer by section 16 of this act, or by the act of 14 September, 1922, shall be construed as the pay provided in this act for the purpose of computing retired pay."

(NOTE.—The act of 14 September, 1922, does not apply to the Navy.)

Page H–1, paragraph 1: Strike out subparagraph (d) of paragraph 1 and substitute therefor the following:

(d) The retired pay of officers retired on or subsequent to 1 July, 1922, however, is to be computed on the pay they were receiving on the date of retirement; i. e., either the pay provided under the new schedule prescribed by the act of 10 June, 1922, or the pay saved by section 16 of that act.

There appears to be no legal objection why the aforesaid proposed changes in the instructions should not be promulgated.

(A–5024)

NAVY PAY—LONGEVITY—ENLISTED MEN

This decision involves the prior service enlisted men of the Navy are entitled to count for longevity pay purposes under section 10 of the act of June 10, 1922, 43 Stat. 630, as amended by section 3 of the act of May 31, 1924, 43 Stat. 251. For points involved see decision.

Comptroller General McCarl to the Secretary of the Navy, September 30, 1924:

I have your letter of September 5, 1924, transmitting a proposed change in section B of the "Instructions for carrying into effect the joint service pay bill, act of 10 June, 1922," with request for an expression of opinion whether the instructions, in so far as they involve disbursements, are in conformity with law.

The proposed changes are necessitated by the amendment of the act of June 10, 1922, by section 3 of the act of May 31, 1924, 43 Stat. 251, and are for the purpose of informing the service as to the effect the amendment will have upon the computation of service which an enlisted man of the Navy may count for the purpose of computing increases of pay for length of service provided by section 10 of the act of June 10, 1922. 42 Stat. 630.

The proposed change in the wording of the instructions, is as follows:

SECTION "B"

Page B3, paragraph 3: Cancel subparagraph (e) and substitute therefor the following:

(e) Under this act only time actually served is to be computed in determining the four-year periods of service which carry increases of pay. The only service which an enlisted man of the Navy may count for the purpose of computing increases of pay for length of service is as follows:

(1) Enlisted service in the Navy.

(2) Enlisted service in the Revenue Cutter Service or Coast Guard.

(3) Active duty service with the Navy as a member of the Naval Reserve Force while holding an enlisted rating, but not including active service for training.

(4) Warrant and commissioned service in the Army, Navy, Marine Corps, Coast Guard, Coast and Geodetic Survey, and Public Health Service, and adjunct forces thereof, from 6 April, 1917, to 31 December, 1921.

The service does not have to be continuous. Each period of service must be figured into years, months, and days, and the total represents the total naval service for pay purposes. For example, a man who enlisted for four years and was discharged within three months of date of expiration of enlistment is entitled to count only the actual time served, and not four years.

The following periods shall not be included in determining length of service:

Abbreviation	Designation
AWOL	Absence without leave (including over leave, desertion, and imprisonment while in civil arrest resulting in sentence and while serving said sentence).
SICK MISC	Sickness, disease, or injury resulting from own intemperate use of drugs or alcoholic liquors or other misconduct.
NPDI	Nonperformance of duty because imprisoned both while in arrest resulting in court-martial sentence and while serving said sentence. (See page 7936 S and A Memoranda).
FWOP	Furlough without pay.
INACTIVE RF	Inactive service as a member of the Naval Reserve Force.
TRAINING RF	Training service as a member of the Naval Reserve Force.

Pages B4, B5, B6, B7, B8, B9, and B10: Eliminate the designations "Temp. Off." and "Off. R. F." from the specimens shown on these pages.

The proposed changes conform to the construction of the law as set forth in decision of July 19, 1924, 35 MS. Comp. Gen. 756, and there appears no reason why they may not be promulgated.

(A-5260)

VETERANS' BUREAU—TRANSPORTATION OF REMAINS—EXPENSES OF ATTENDANT

The provision in subdivision (1) of section 201 of the World War veterans' act of June 7. 1924, 43 Stat. 617, authorizing the payment of actual and necessary cost of transportation of an attendant who accompanies the body of a deceased beneficiary of the Veterans' Bureau back to his home, includes not only items ordinarily classed as transportation, such as railroad fare, but also the reasonable and necessary expenses of subsistence incident to the journey, such as meals en route, if the Director in the exercise of the discretion vested in him under said provision should see fit to authorize reimbursement of such expenses.

Comptroller General McCarl to the Director, United States Veterans' Bureau, September 30, 1924:

I have your letter of September 15, 1924, requesting decision whether the United States Veterans' Bureau is authorized to pay for the meals of a person while traveling as an attendant accompanying the body of a former beneficiary of the United States Veterans' Bureau back to his home, where death occurs while the beneficiary was away from his home and under the care of the bureau.

The provision for payment of burial expenses and transportation of the remains of a beneficiary of the United States Veterans' Bureau dying away from home and while under the care of the bureau, appearing in the act of March 4, 1923, 42 Stat., 1523, is reenacted in the World War veterans' act dated June 7, 1924, 43 Stat. 617, as subdivision (1) of section 201, and the following provision has been added thereto:

* * * and including also, in the discretion of the director, the actual and necessary cost of transportation of an attendant: * * *.

Prior to the enactment of this provision it had been the practice to use funds appropriated for transportation of remains to pay the actual, necessary, and reasonable expenses of an attendant, including both transportation and subsistence expenses, where the services of an attendant were required by State health laws. In fact, regulations to that effect which had received the consideration of this office in decision of June 11, 1923, 2 Comp. Gen. 791, 795, were in force prior to the enactment of June 7, 1924. See sections 8102 and 8103, Regulations, United States Veterans' Bureau, 1923, and section 8106, supplements Nos. 1 and 3, dated September 30, 1923, and March 31, 1924, respectively. See also 27 Comp. Dec. 556, authorizing payment of transportation and subsistence expenses of an escort accompanying the remains of a deceased trainee of the Federal Board for Vocational Education. Regulations to the same effect applicable to deceased patients of the Public Health Service have been recognized. See 27 Comp. Dec. 739.

These decisions and regulations were not based on any express statutory authority for transportation and subsistence expenses of escorts or attendants to the remains of a person dying while in the charge of the Government, but as necessarily included by implication under the terms of the appropriations for transportation of the remains, and no distinction was made between the cost of railroad fare and necessary and reasonable subsistence expenses incident to the journey.

I am of opinion that the provision in the act of June 7, 1924, *supra*, was enacted in the light of, and for the purpose of giving statutory recognition to, the prior existing practice, and was not in

tended to restrict payment of expenses of attendants to those of transportation as distinguished from subsistence expenses incident to the journey. In other words, I think the clause "the actual and necessary cost of transportation of an attendant" was intended to include not only items ordinarily classed as transportation expenses, such as railroad fare, but also reasonable and necessary expenses of subsistence incident to the journey, such as meals en route, if in the exercise of the discretion vested in you under the provision, *supra*, you should see fit to authorize reimbursement of such expenses. In connection with the promulgation of any regulations with reference to such expenses, there would be for consideration the maximum allowances for actual expenses of subsistence fixed for officers and employees of the Government traveling on official business.

The question submitted is answered accordingly.

(A–4925)

CONTRACTS—INCREASE IN RATES—BUREAU OF INTERNAL REVENUE

Under a proposal and acceptance agreement for the rental of accounting machines and equipment wherein it was provided that the agreement might be terminated by either party upon giving 30 days' written notice, the prices specified therein for rental are binding on both parties until terminated in the manner provided, and the payment of rental at increased rates based on current commercial rates prior to such termination is unauthorized.

Decision by Comptroller General McCarl, October 1, 1924:

There has been presented for decision a question concerning the proper rental that should have been paid the Powers Accounting Machine Corporation for certain accounting equipment installed in and being used by the Bureau of Internal Revenue during the period prior to August 8, 1924, the effective date of a new agreement therefor.

It appears that the agreement for rental of the equipment in question in force prior to January 20, 1920, was terminated by said corporation by giving 30 days' written notice dated December 11, 1919, in accordance with the terms of the preexisting agreement. Upon termination of that agreement, a proposal was submitted by the corporation offering to furnish equipment at rates different from those theretofore existing. The proposal was accepted by the Commissioner of Internal Revenue February 16, 1920, effective as of January 20, 1920. It was agreed therein that the equipment, etc., would be furnished the bureau for the purpose of tabulating and compiling statistics at prices as follows:

Automatic key punching machines at a rental of $10 per month; automatic sorting machines at a rental of $20 per month; counting sorting machines at a rental of $35 per month; printing tabulators at a rental of $30 a month for

each machine base, $3.60 a month for each unit and additional unit, and 60 cents a month additional for each additional printing section connected.

Cards and supplies were to be furnished at the following rates provided orders were placed for not less than 10,000 cards of a given form or color:

Manila cards, 7⅜ by 3¼ inches, at $1.25 per thousand; colored cards of the same dimensions at $1.35 per thousand; small card boxes at 20 cents each; large card boxes at $1.25 each.

The equipment and cards were to be supplied and accepted on the following terms and conditions:

1. That all shipments at the above prices are f. o. b. your factory in Brooklyn, N. Y. Government bills of lading to be supplied by the Treasury Department to cover the shipments to Washington, and upon the discontinuance of any or all of the above equipment similar bills of lading to be supplied to cover its return to the factory of the company.
2. That the monthly rentals, as above stated, shall begin upon the installing in proper working order of each machine rented.
3. That payment for the cards, boxes, and sorting racks above listed shall be made upon the delivery in proper condition of the same.
4. That your company agrees to maintain in good working order all equipment furnished under this proposal at its own expense, excepting repairs made necessary by damages to the equipment due to the negligence of the employees of the Treasury Department.
5. Rental shall be payable at the end of each calendar month.
6. That all cards handled on the above equipment shall be purchased from Powers Accounting Machine Company.
7. That the Treasury Department shall pay the cost of composition of type matter on card forms ordered, as well as the cost of any changes therein.
8. That the terms and conditions hereof shall apply to such additional equipment as may hereafter be installed.
9. That this agreement may be terminated by either party to the agreement upon giving thirty days' notice in writing of its desire so to do.

There is nothing of record to indicate that the agreement as per acceptance of February 16, 1920, was ever terminated as provided for in paragraph 9 thereof, or was superseded by another agreement until the acceptance on August 8, 1924, by the Commissioner of Internal Revenue, of a proposal submitted under date of June 16, 1924, in which the rates of rental for the equipment were increased. Regardless of this fact and on the authority, apparently, of a letter from the then Commissioner of Internal Revenue, dated January 10, 1921, and without any consideration to the United States for the changed rates being apparent, payments of increased rental for the equipment, commencing January 10, 1921, were made to said corporation by the disbursing clerk of the Treasury Department at the rate of $15 per month for automatic punching machines, $30 per month for automatic sorting machines, $50 per month for counting sorting machines, and $95 per month for tabulators with six printing units. These rates of rental have been paid from month to month since that date and have now been made the basis of rental in the new agreement above referred to.

By way of explanation of the increased rental being paid for the equipment, the head, Division of Supplies and Equipment, Office

of the Commissioner of Internal Revenue, advised on May 12, 1924, that the

> equipment was installed by the company several years ago for use in connection with the compilation of statistics on narcotic and tobacco work, at prices prevailing commercially. No formal contract was in effect during the fiscal year 1923, although, if required by the General Accounting Office, a statement of current prices at that time can be secured from the company, * * *

and again on June 14, 1924, that—

> * * * The fact that the prices of the June, 1923, voucher differ from the prices given in the proposal is due to the fluctuation in the standard rates charged by the company. The installation of the tabulating machine equipment was in accordance with an oral agreement with the company and the prices charged are the standard commercial rates of the company.

The Treasury Department is not required by law to enter into so-called formal contracts for supplies of this nature, but when proposals therefor are made and accepted, such proposal and acceptance become the contract under which the supplies are to be furnished and the terms and conditions thereof are just as binding on the parties thereto as though the agreement had been consummated in a more formal manner. The proposal and acceptance agreement effective January 20, 1920, constituted such an agreement in this case and the prices specified for rental of the equipment could not be increased or decreased except by termination of that agreement as provided for in paragraph 9 of its terms and conditions. The agreement was not to run for any specified time, but its provisions were to be effective until either party gave 30 days' notice in writing of its desire to terminate same. The payment of rental for the equipment at an increased rate was not properly authorized to be made, nor could such increased rates be legally authorized except by termination of the agreement in the manner provided for and the entry into a like agreement that would be equally binding on both parties thereto.

From the evidence now on file there does not appear to have been any legal authority for the payment of increased rental to the Powers Accounting Machine Corporation, and, accordingly, the accounts of the disbursing clerk of the Treasury Department will be reopened and the amount of the excessive rental paid for the period from January 10, 1921, to the effective date of the new agreement will be charged against that officer on account of such unauthorized and illegal payments to said corporation.

With reference to any payments made at the increased rates prescribed in the acceptance of August 8, 1924, none of which is now before this office, it does not appear that the agreement effective January 20, 1920, has ever been terminated by a 30 days' written notice, as provided therein, the absence of which raises the presumption that the agreement of January 20, 1920, is still in full force and effect. There is no obligation upon the Government to volun-

tarily increase the rates, there being no consideration therefor so long as the service may be required at a lower rate.

A copy hereof will be furnished the disbursing clerk.

(A–5195)

CLASSIFICATION OF CIVILIAN EMPLOYEES—UNIT OF APPROPRIATION—DEPARTMENT OF COMMERCE

The total amounts provided for personal services in the District of Columbia under each of the following major appropriation headings appearing in the act of May 28, 1924, 43 Stat. 224, providing appropriations for the Department of Commerce for the fiscal year 1925, constitute separate appropriation units for the purpose of computing the average of compensation under the classification act of March 4, 1923, 42 Stat. 1488:

Office of Secretary.
Bureau of Foreign and Domestic Commerce.
Bureau of Census.
Steamboat Inspection Service.
Bureau of Navigation.
Bureau of Standards.
Bureau of Lighthouses.
Coast and Geodetic Survey.
Bureau of Fisheries.

(Modified by 4 Comp. Gen. 456; *id.* 817.)

Comptroller General McCarl to the Secretary of Commerce, October 1, 1924:

I have your letter of September 11, 1924, submitting the list of appropriation headings and subheadings provided for the Department of Commerce for the fiscal year 1925, in the act of May 28, 1924, 43 Stat. 224, and requesting decision as to which constitute a "bureau, office, or other appropriation unit" within the meaning of the "average" provision appearing in the same appropriation act which controls payments for personal services in the District of Columbia under the Classification Act of 1923.

The decision of August 8, 1924, 4 Comp. Gen. 167, held as follows:

> In decision of June 26, 1924, 3 Comp. Gen. 1001, in answer to question one the following was stated:
>
> "* * * If a bureau or office is operating under one appropriation the unit is the bureau or office, whereas if the bureau or office is operating under two or more appropriations the unit is the appropriation. If there be an instance of two or more bureaus or offices operating under one appropriation, the unit would be the bureau or office."
>
> This quoted statement was and is intended merely as a general rule subject to amplification upon submission of specific cases. It may be said that the statement "if the bureau or office is operating under two or more appropriations the unit is the appropriation" was intended to relate more particularly to a bureau or office in which there are dissimilar or unrelated activities provided for under separate appropriations.

The act of May 28, 1924, *supra*, provides under "Title III, Department of Commerce," the following major or general appropriation headings:

Office of Secretary.
Bureau of Foreign and Domestic Commerce.
Bureau of the Census.
Steamboat Inspection Service.
Bureau of Navigation.
Bureau of Standards.
Bureau of Lighthouses.
Coast and Geodetic Survey.
Bureau of Fisheries.

Under each of these major or general appropriation headings are a number of items in separate paragraphs. Some of these items do not provide for personal services in the District of Columbia, and in so far as they are concerned the Classification Act has no application. The major appropriation headings appear to be for dissimilar and unrelated activities. The activities for which the separate paragraph items provide show a similarity of purpose, all having a common relationship to the major or general appropriation heading under which they appear.

Accordingly the total amounts provided for personal services in the District of Columbia under each of the several major or general appropriation headings above enumerated constitute the bureaus the units within the meaning of the average provision.

(A-5307)

RETIREMENT DEDUCTIONS—EMPLOYEES OF NAVAL ESTABLISHMENTS

The difference in the rate of compensation for a position in the regular trade or occupation of an employee of the Naval Establishment and that of a position requiring special qualifications to which a regular employee may be temporarily assigned or detailed is not additional compensation attaching to that of the regular trade or occupation, such as is excepted from the provisions of the retirement act of May 22, 1920, 41 Stat. 614, but the higher rate paid for a position requiring special qualifications is itself the "basic salary, pay, or compensation" of a different and higher-classed position temporarily filled by the employee and the total amount thereof is subject to retirement deductions.

Under the provisions of the retirement act of May 22, 1920, 41 Stat. 615, the retirement deductions from compensation of Naval Establishment employees paid by the piece should be based on the total amount earned by the employees during the regular working hours, excluding earnings during overtime.

Comptroller General McCarl to the Secretary of the Navy, October 1, 1924:

I have your letter of September 17, 1924, requesting decision whether additional pay of civilian employees in the Naval Establishment for work not ordinarily required of an employee in his regular trade or occupation is "basic salary, pay, or compensation" subject to retirement deductions, and also upon what basis retirement deductions should be made from the compensation of employees paid by the piece.

You have submitted a schedule of wages for civilian employees in the Naval Establishment which provides, in addition to the regular rate of compensation for specified trades and occupations, additional pay for work not ordinarily required of an employee in those trades and occupations.

You cite the following example and make comment thereon as follows:

> A mechanic, whether he is rated machinist, blacksmith, patternmaker, or joiner, when assigned as planner and estimator or progressman does not perform the regular duties of his trade but those of a planner and estimator or progressman. The additional pay of $0.05 per hour more than the pay for patternmaker, provided on page 13 of the schedule, for mechanics assigned as planners and estimators or progressmen, is the difference in value of the services of employees when working at their trades and as planners and estimators or progressmen.
>
> It is the practice of the department to detail those employees who have the requisite qualifications and who are willing to perform the special service covered by the above-mentioned notes. * * * This practice of imposing additional pay for special service on the flat rate of pay for the trade or occupation obviates the necessity for establishing ratings for each special employment requiring the maintenance of eligible registers for numerous positions for which there is only occasional need.

The retirement act of May 22, 1920, 41 Stat. 614, 615, provides that retirement deductions shall be made from the "basic salary, pay, or compensation" of employees who are subject to the provisions of the act, which phrase has been defined in section 2 as follows:

> The term "basic salary, pay, or compensation" wherever used in this Act shall be so construed as to exclude from the operation of the Act all bonuses, allowances, overtime pay, or salary, pay, or compensation given in addition to the base pay of the positions as fixed by law or regulation.

Under the procedure adopted for paying civilian employees of the Naval Establishment the increased rate for the employment or position requiring special qualifications to which an employee may be assigned or detailed is not in fact pay or compensation given in addition to the basic pay of the regular position held by the employee, but a higher or increased rate for a different position. The base pay of the regular position is used only for the purpose of computing a higher rate of pay for a higher-classed position. Accordingly, the difference in the rate for the two positions does not attach as compensation to the regular position of the employee, but for the time being the employee is in another position with a different and higher base pay, the total amount of which is subject to retirement deductions.

The "basic salary, pay, or compensation" of employees paid by the piece is the total amount earned by the employees during the regular hours of work, which in the case of employees of the Naval Establishments, it is understood, is eight hours per day. Hence retirement deductions should be based on the total amount earned by the employees during eight hours per day, excluding earnings during overtime.

(A–5053)

RETAINER PAY OF TRANSFERRED MEMBERS OF THE FLEET NAVAL RESERVE

Under the act of May 31, 1924, 43 Stat. 251, members of the Fleet Naval Reserve who were transferred members thereof on June 30, 1922, and who do not come within the special provisions of the act of May 18, 1920, 41 Stat. 603, are entitled on and after July 1, 1922, to retainer pay computed on the rates of pay authorized by the act of June 10, 1922, 42 Stat. 630, only in the rating held by them when transferred.

Under the act of May 31, 1924, 43 Stat. 251, members of the Fleet Naval Reserve who were transferred members thereof on June 30, 1922, and who come within the special provisions of the act of May 18, 1920, 41 Stat. 603, are entitled on and after July 1, 1922, to retainer pay computed on the rates of pay authorized by the act of June 10, 1922, 42 Stat. 630, on the grade held when released from active duty, as authorized in said act of May 18, 1920.

Decision by Comptroller General McCarl, October 2, 1924:

There is before me for decision the question whether John Maycock, c.c. std. Fleet Naval Reserve, who was transferred to the Fleet Naval Reserve on September 17, 1918, as chief commissary steward, acting appointment, and who while on active duty on September 1, 1919, was issued a permanent appointment in that rating, is by reason of the provision in the act of May 31, 1924, 43 Stat. 251, entitled to retainer pay based on permanent rating of chief commissary steward and on rates of pay provided in the act of June 10, 1922, 42 Stat. 630.

It appears that on June 30, 1922, Maycock was receiving retainer pay computed under laws in effect prior to July 1, 1922, on the rating of chief commissary steward, permanent appointment, with base pay at $126, amounting to $94.27 per month. Such pay being greater than the pay of a chief commissary steward, acting appointment, under the act of June 10, 1922, his pay has been adjusted at the rate he was receiving on June 30, 1922. He claims that he is entitled to retainer pay computed on the rating of a chief commissary steward, permanent appointment, under the act of June 10, 1922, at which rate he would be entitled to $103.75 per month.

The act of May 31, 1924, 43 Stat. 251, which is an amendment to the act of June 10, 1922, 42 Stat. 625, 633, provides:

> Sec. 3. That section 10 of said Act be, and the same is hereby, amended by adding thereto the following paragraphs:
> "The retainer pay of all men who were on that day transferred members of the Fleet Naval Reserve or the Fleet Marine Corps Reserve shall be computed on the rates of pay authorized for enlisted men of the naval service by the Act approved June 10, 1922: *Provided*, That the retainer pay of such reservists shall be not less than that to which they were entitled on June 30, 1922, under decisions of the Comptroller of the Treasury in force on that date."

The act of August 29, 1916, 39 Stat. 590, provides:

> Members of the Fleet Naval Reserve who have, when transferred to the Fleet Naval Reserve, completed naval service of sixteen or twenty or more years shall be paid a retainer at the rate of one-third and one-half, respectively, of the base pay they were receiving at the close of their last naval service plus all permanent additions thereto: * * *

Under the act of August 29, 1916, the retainer pay of members of the Fleet Naval Reserve is not affected or modified by promotion during active service after transfer, or by changes in the base pay of ratings after transfer, but remains fixed as determined by the pay to which entitled when transferred, unless otherwise specifically provided by law. 2 Comp. Gen. 85. The decision cited, however, was not applied to retainer pay received prior to June 30, 1922, computed on higher ratings given while on active duty after transfer, or on permanent increases authorized by law in base pay of ratings after members were transferred, such increased retainer pay having been paid in accordance with decisions of the Comptroller of the Treasury, 26 Comp. Dec. 789, and 27 *id.* 126.

The act of May 31, 1924, confers on transferred members of the Fleet Naval Reserve and the Fleet Marine Corps Reserve who were members on June 30, 1922, right to retainer pay computed on base rates of pay authorized for enlisted men of the naval service by section 10 of the act of June 10, 1922, 42 Stat. 630, with the provision that the retainer pay of such reservists shall not be less than the retainer pay to which entitled under decisions of the Comptroller of the Treasury in force on June 30, 1922. It extends to all transferred members in the Fleet Naval Reserve or Fleet Marine Corps Reserve on June 30, 1922, right to retainer pay based on rates of pay provided in the act of June 10, 1922, and to that extent modifies the application to them of provision in the act of August 29, 1916, that members of the Fleet Naval Reserve transferred thereto after 16 or 20 or more years shall be paid a retainer at the rate of one-third and one-half, respectively, of the base pay they were receiving when transferred, plus all permanent additions thereto. It gives to that particular class right to retainer pay based on rates of pay established by the act of June 10, 1922. It does not, however, otherwise change the law of August 29, 1916, as to the measure of retainer pay generally, and the rule announced in 2 Comp. Gen. 85, that retainer pay is not affected or modified by promotion while on active service or by changes in base pay of ratings after transfer, but remains fixed as determined by the pay to which they were entitled when transferred, is not affected in its application to any other transferred members nor to that particular class except as to rates of pay. The act does not confer on such members right to have base pay, as provided in the act of June 10, 1922, computed on a higher rating attained after date of transfer. The rating on which their retainer pay is computed is the rating held when transferred.

Applied to the instant case, the act of May 31, 1924, authorizes retainer pay under the act of June 10, 1922, for Maycock, based on the rating he held when transferred; viz, chief commissary steward,

acting appointment, the base pay of which is $99, or the pay he was actually receiving June 30, 1922, under the decisions in effect on that date if greater.

The foregoing conclusion is on the assumption that claimant is not of the class of transferred members of the Fleet Naval Reserve, respecting which special provision was made in the act of May 18, 1920, 41 Stat. 603, and whose grade was changed while on active duty under the provisions of that act. In 2 Comp. Gen. 93, the rights of this class were stated as follows:

> Transferred prior to May 18, 1920, and who returned to active duty within one month after May 18, 1920, and continued thereon "until the Navy shall have been recruited up to its permanent authorized strength, or until the number in the grade to which they may be assigned is filled, but not beyond June 30, 1922," on reserve grade pay for active duty as it existed at the time of their release from said active duty, plus the permanent additions to which entitled under the act of August 29, 1916, 39 Stat. 590. See 27 Comp. Dec. 26.

As to such members retainer pay based on the rates provided by act of June 10, 1922, and on the grade held when released from active duty as contemplated by the act of May 18, 1920, is authorized.

The facts will be developed and settlement made accordingly.

(A–4472)

TRAVELING EXPENSES—NAVAL OFFICER CHANGING STATION

Where the orders requiring a naval officer to travel by airplane on change of station are modified at the officer's own request and for his own convenience so as to permit travel otherwise than by airplane, the officer may not commute the expenses of travel by air that might have been incurred to apply toward expenses of travel by the method of his choosing.

Decision by Comptroller General McCarl, October 3, 1924:

There is before this office for decision the question whether Lieut. Commander Charles P. Mason, U. S. Navy, is entitled to reimbursement as claimed for travel expenses amounting to $47 for travel from Naval Air Station, Anacostia, D. C., to Pensacola, Fla., under orders issued by the Bureau of Navigation April 23, 1924, and April 24, 1924, respectively, as follows:

> 1. When directed by the Commandant, Navy Yard, Washington, D. C., you will regard yourself detached from duty at the Naval Air Station, Anacostia, D. C., and from such other duty as may have been assigned you; will proceed via air to Pensacola, Fla., and report to the commanding officer of the U. S. S. *Langley* for duty involving flying as the relief of Lieutenant Commander Virgil C. Griffin, U. S. N., as head of the aviation department of that vessel.
>
> 2. These orders constitute your assignment to duty in a part of the Aeronautic Organization of the Navy and your existing detail to duty involving flying continues in effect.
>
> Subject: Authorized proceed via commercial transportation.
>
> Reference: (a) Bureau's orders of 23 April, 1924.
>
> 1. Should you desire to proceed to Pensacola, Fla., via commercial transportation in carrying out the above-mentioned orders you are authorized to do so with the understanding that you will be entitled to no mileage in excess of that allowed by reference (a).

2. In case you do not desire to bear this expense you will regard this authorization as revoked and return this letter to the Bureau of Navigation for cancellation.

The indorsements on the said orders show that claimant was detached from the Naval Air Station, Anacostia, D. C., April 26, 1924, and reported on board the U. S. S. *Langley*, Pensacola, Fla., May 2, 1924.

Section 20 of the act of June 10, 1922, 42 Stat. 632, provides in part, as follows:

That all officers, warrant officers, and enlisted men of all branches of the Army, Navy, Marine Corps, and Coast Guard, when detailed to duty involving flying, shall receive the same increase of their pay and the same allowance for traveling expenses as are now authorized for the performance of like duties in the Army. * * *

The act of July 11, 1919, 41 Stat. 109, provides, in part, as follows:

* * * That hereafter actual and necessary expenses only, not to exceed $8 per day, shall be paid to officers of the Army and contract surgeons when traveling by air on duty without troops, under competent orders: * * *.

Commissioned officers of the Navy become entitled on and after July 1, 1922, to actual and necessary expenses only, not to exceed $8 per day when traveling by air on duty without troops, under competent orders. 2 Comp. Gen. 185.

It appears that claimant proceeded from Anacostia, D. C., to Pensacola, Fla., by automobile, and claims reimbursement for necessary expenses actually incurred by him while performing the travel during the period April 26 to 30, 1924, amounting to $47.

Had the travel been performed as directed by his orders of April 23, 1924, only actual and necessary expenses, not exceeding $8 per day, would have been payable to him under the law.

Where an officer is ordered to travel in the United States he is entitled to mileage if the travel be not ordered by airplane and it is not repeated travel under orders authorizing actual expenses. If the officer is ordered to travel by airplane he is entitled to reimbursement of actual and necessary expenses not exceeding $8 per day. An officer may not substitute private transportation for available Government transportation and change one basis of reimbursement for another; the method of travel having been specified by his orders, the statute determines the basis of reimbursement.

Claimant did not travel by air and he is not entitled to reimbursement as though so traveling. The modification of his orders for his convenience to permit travel otherwise than by air with a proviso that he would be " entitled to no mileage in excess of that allowed " by his original orders does not authorize mileage. The original order fixed his rights as to method of reimbursement, and he may not commute expenses which might have accrued under those orders to apply on

travel by another method for which in proper cases the law provides mileage.

Accordingly, the claim should be disallowed.

(A-4557)

ACCOUNTING, SET-OFF—DISBURSING OFFICERS

A disbursing officer who deposited a certified check upon which payment was refused on account of the failure of the bank upon which drawn, and who upon learning of such refusal requested the Treasurer of the United States to stop payment upon his own check issued in refund thereof, which request was inadvertently ignored, is chargeable with the amount of such unpaid certified check; and the question of whether such disbursing officer may offset the said amount against other moneys of the payee placed with him for a specific purpose is one between the officer and the payee, in which the officer is responsible for any action he may take with respect thereto, there being no direct claim of the United States against such moneys.

Comptroller General McCarl to the Secretary of the Treasury, October 3, 1924:

Reference is made to your letter of August 8, 1924, in which you state:

Harry Caden, special fiscal agent of the Bureau of Reclamation, Department of the Interior, received from the Gering Foundry and Machine Co. a check for $200, drawn on the First National Bank of Gering, Nebraska, and deposited it on December 21, 1923, with the Denver branch of the Federal Reserve Bank of Kansas City, which latter bank issued the usual certificate of deposit for credit in Mr. Caden's special deposit account on the books of the Treasurer. On January 11, 1924, the branch Federal Reserve Bank advised the depositor that it was unable to collect the amount of the check by reason of the failure of the drawee bank. In the meantime, on January 3, 1924, Mr. Caden issued a check on his special deposit account with the Treasurer of the United States in favor of the Gering Foundry and Machine Co. to refund the proceeds of the $200 check, and when he received notice on January 11 that the check deposited by him had been dishonored he requested the Treasurer of the United States to stop payment on his check dated January 3. The Treasurer, however, inadvertently paid the check on January 21, 1924. Mr. Caden subsequently received from the Gering Foundry and Machine Company another check for $300, which he is understood to hold for determination of the question as to whether he may deduct from the amount of this check the $200 improperly returned to the Gering Foundry and Machine Company by check dated January 3.

A copy of a letter from the Acting Commissioner of the Bureau of Reclamation, dated July 29, 1924, to the Treasurer of the United States is forwarded herewith and your decision is requested as to whether a deduction of $200 may properly be made from the subsequent deposit of $300 under the circumstances.

From the foregoing it appears that the certified check which Special Disbursing Officer Caden received from the Gering Foundry and Machine Co. and deposited in the Denver branch of the Federal Reserve Bank of Kansas City on December 21, 1923, for credit in his special deposit account, was upon its presentation to the First National Bank of Gering, charged in the company's account on the books of the bank, but instead of paying cash, the drawee bank made remit-

tance by draft on the Omaha National Bank for the amount, which draft was dishonored, the First National Bank of Gering having failed.

As the facts are understood, there is a deficiency of $200 in the accounts of Special Fiscal Agent Caden. What may be the liability as between the agent and the Treasurer of the United States because the check was paid, notwithstanding the stoppage of payment, need not be determined. There must be a charge for the amount in the accounts of the agent. The question of whether the agent may withhold payment of other moneys of the company receiving the $200, such other moneys being moneys of the company placed with the agent for a specific purpose, is a question between the agent and the company in which the agent must be responsible for such action as he may take with respect thereto. It is to be understood that the situation here is different from that where the right of the United States to withhold payment of an indebtedness from it to another is involved because of the indebtedness of the latter to the United States, in which event withholding by the United States is proper. Here the transactions concerned are those of deposits of private funds for particular purposes, and while there is an official accountability therefor of the fiscal agent, yet the matter of withholding return of those moneys to the party depositing is one in which the responsibility is not to be placed upon the United States, there appearing no direct claim of the United States upon such moneys.

(A–4715)

MEDICAL TREATMENT—RETIRED OFFICERS AND ENLISTED MEN OF THE COAST GUARD

Officers and enlisted men of the Coast Guard on the retired list are not entitled to medical treatment by the Public Health Service.

Comptroller General McCarl to the Secretary of the Treasury, October 3, 1924:

There has been received your letter of August 13, 1924, requesting decision as follows:

In view of the provisions of section 8 of the act of May 18, 1920 (41 Stats. 603), and of the decision of the Comptroller of the Treasury of December 24, 1920 (27 Comp. 573), to the effect that officers and enlisted men of the Coast Guard are entitled to medical treatment by the Public Health Service under the same general conditions that officers and men of the Navy are furnished medical treatment by the Medical Corps of the Navy, your decision is requested as to whether officers and men of the Coast Guard on the retired list are entitled to said medical treatment.

The law referred to provides that officers, warrant officers, petty officers, and other enlisted men of the Coast Guard shall receive the

same pay, allowances, and increase as are then, therein, or thereafter authorized for the corresponding grades or ratings and length of service in the Navy.

No provision of law is known to this office and none is suggested by you authorizing medical care and treatment of retired officers and enlisted men of the Navy.

Retirement of officers of the Revenue Cutter Service was provided by the act of April 12, 1902, 32 Stat. 100, and authorized for officers placed upon the retired list 75 per cent of the duty pay, salary, and increase of the rank upon which they were retired. The act of June 28, 1915, 38 Stat. 802, created the Coast Guard by consolidation of the Revenue Cutter Service and the Life Saving Service, extended the provisions as to retirement of the act of 1902 to the commissioned officers, warrant officers, and enlisted men of the Coast Guard and limited the pay to 75 per cent "of the duty pay, salary, and increase of his grade or rating."

Section 1 of the act of March 3, 1919, 40 Stat. 1302, authorized the Secretary of the Treasury to provide additional hospital facilities for the treatment of discharged soldiers, sailors, etc.—

> * * * and the following persons only: Merchant marine seamen, seamen on boats of the Mississippi River Commission, officers and enlisted men of the United States Coast Guard, officers and employees of the Public Health Service, certain keepers and assistant keepers of the United States Lighthouse Service, seamen of the Engineer Corps of the United States Army, officers and enlisted men of the United States Coast and Geodetic Survey, civilian employees entitled to treatment under the United States Employees' Compensation Act, and employees on Army transports not officers or enlisted men of the Army, now entitled by law to treatment by the Public Health Service.

At the time of this enactment Public Health Regulations, 1913, by paragraph 413 included among the beneficiaries of the service "Officers and crews of the Revenue Cutter Service" and "Keepers and crews of the United States Life Saving Service" and by paragraph 444 provided:

> Officers of the Revenue Cutter Service on leave, on sick leave, or retired, will be furnished relief by the Public Health Service at marine hospitals owned by the service and dispensaries conducted by the service, provided no bills for the same are incurred. * * *.

The uniform and long-continued practice, it is apparent, has been to deny a right to retired officers or enlisted men of the Coast Guard, or of the services preceding them, to medical treatment except when on active duty. The statute under which they are retired authorizes only pay, no provision is made for medical treatment, and in the absence of a statutory provision therefor a regulation attempting to give such a right would not be valid.

(A-4799)

PURCHASE OF PAPER UNDER THE ACT OF JUNE 7, 1924, 43 STAT. 592

Under the act of June 7, 1924, 43 Stat. 592, providing for the procurement of paper from the Public Printer, the question as to the kinds of paper which may be procured is dependent upon whether the paper is such as is customarily purchased by the Public Printer for the conduct of the Government Printing Office, or as he can advantageously furnish under authority of said provision.

Comptroller General McCarl to the Secretary of the Treasury, October 3, 1924:

I have your letter of September 23, 1924, submitting a list of various kinds of paper and paper articles, with request for an advance decision as to which of the listed items are required to be procured from the Public Printer in accordance with the act of June 7, 1924, 43 Stat. 592.

In my decision of September 15, 1924, to the Secretary of Commerce, a general definition of the term " paper " was given as follows:

> The term " paper " as used in the act of June 7, 1924, *supra*, is, however, to be taken in its general meaning as pertaining to all forms of paper and paper articles dependent upon paper as the basis of their usefulness, excepting and excluding such paper articles as are manufactured and sold to the public generally, copyrighted or patented articles, and such forms of paper as depend for their use mainly upon special surfacing in the process of manufacture, such as carbon paper, photographic paper, and blue-print paper. * * *

The legislative history of the provision in question discloses that it was enacted after a comparison between the costs of paper purchased by the Public Printer and paper furnished the various Government services by the contractors on the General Supply Schedule, and upon the statement of the Public Printer that he could supply the various Government services without any additional increase in force and with a very small additional expense for handling and cutting in the warehouse. (See page 140, Hearings before the Subcommittee of House Committee on Appropriations on the legislative bill for 1925.) The proposition originated in the Permanent Conference on Printing and that body recommended legislation authorizing the Public Printer (who was chairman of the Permanent Conference on Printing) to furnish " paper stocks and articles made of paper, * * * which are similar to items of paper stock procured by the Joint Committee on Printing for the use of the Government Printing Office, or items which it would be advantageous for the Public Printer to supply to the departments."

It is very evident from the history of this provision that it was not the intention of Congress to require the Public Printer to enlarge his force to any great extent, but only to supply paper stock and paper articles such as he had been in the practice of purchasing or could advantageously purchase.

It is noted that in the General Supply Schedule for 1925 various paper supplies are noted as procurable from the Public Printer. If these notations are based upon information obtained from the Public Printer to the effect that the noted articles include all the classes of paper supplies which the Public Printer is prepared to furnish under the provision in question, they may be accepted as a guide in the furnishing of like supplies for the present fiscal year. If not based on such information, it is suggested that immediate steps be taken to procure from the Public Printer an itemized list of the paper supplies which advantageously can be furnished by him under authority of the provision under consideration, such list to serve as a guide for purchases hereafter.

In view of what is said herein it would appear to be neither necessary nor practicable at this time for this office to specify which of the articles or supplies listed by you should be procured from the Public Printer.

(A-4910)

MILEAGE—ARMY OFFICERS TRAVELING OVER CIRCUITOUS ROUTE ON GOVERNMENT TRANSPORTATION REQUESTS

Where an Army officer traveling on a mileage status under the act of June 12, 1906, 34 Stat, 246, as amended by the act of June 10, 1922, 42 Stat. 631, is furnished transportation over a route other than the established route, for his own convenience, and the total cost of such transportation is greater than that of through transportation over the esablished shortest usually traveled route, there should be deducted from the officer's mileage account, in addition to the deduction of 3 cents per mile for the distance over the established route, the difference between the cost to the Government for through ransportation via the established route and the cost to the Government for the transportation actually furnished. 7 Comp. Dec. 301, modified.

Comptroller General McCarl to the Secretary of War, October 4, 1924:

I have your letter of August 27, 1924, as follows:

Your decision is requested: (1) As to the specific application which should be given your decision of April 23, 1924 (3 Comp. Gen. 787); and (2) as to the extent to which, if any, the decision of the Comptroller of the Treasury of January 5, 1901 (7 Comp. Dec. 301), is nullified.

To illustrate the questions concerning which your decision is requested two cases are set forth below:

(a) An officer ordered from Washington, D. C., to St. Louis, Mo., in a mileage status obtains and uses Government transportation by way of Chicago, Ill., instead of via the official route which is via the Baltimore and Ohio Railroad through Cincinnati, Ohio. The distance via the latter route, which is the official distance, is 892 miles, while via the route of travel the distance is 1,071 miles, The cost to the Government of transportation via the two routes is $31.56 for the shorter route and $32.84 for the longer. With the stop-over privilege at Chicago, Ill., the cost is $2.77 more, or $35.61. If he be paid mileage at the rate of 8 cents per mile for 892 miles with a deduction of 3 cents per mile for 1,071 miles; under the principal established in the decision of January 5, 1901, he would be paid $39.23. If, however, under the decision of April 23, 1924, he be paid on the basis of 892 miles at 8 cents per mile with a deduction at 3 cents per mile for the same distance, and with a further deduction of $1.28 as the difference in cost of transportation, he would be paid $43.32.

(b) An officer ordered from Salt Lake City, Utah, to Vancouver Barracks, Washington, travels on Government transportation via San Francisco, Cal., a distance of 1,600 miles, of which 664 miles is via a land-grant railroad. The official distance via the direct route is 896 miles, of which no part is via a land-grant road. The cost to the Government of transportation via route of travel is $32.55 and via the official route, $31.48. Under the earlier decision the amount of mileage due the officer would be $23.68, while if the later decision is to govern the amount payable would be $43.73, resulting in a loss to the Government of $20.05.

The question in each case is whether mileage would be payable under the conditions cited according to the 1901 or the 1924 decision.

In connection with the submission of these questions for your decision it is deemed appropriate to set forth briefly the views of the department as to the method of settlement required by law in this class of accounts:

First: The decision of January 5, 1901, was effective for more than 23 years, during which period it governed the settlement of all such claims. It would seem that a method used for such a length of time in obedience to a decision of the Comptroller of the Treasury should not be suddenly overturned unless shown to be clearly in error. When it is considered that in most cases the earlier decision affords a greater protection to the Government and that the use of circuitous routes is generally for the convenience of the traveler, the reasons for reversing the principle of the earlier decision are not apparent to this department.

Second: The law provides that for transportation furnished there shall be deducted 3 cents per mile; and, according to your decision of August 22, 1922 (2nd Comp. Gen. 1345), this is required, whether the cost of transportation furnished is more or less than 3 cents per mile. Had the Congress intended to deduct the cost of transportation furnished, it would seem that such provision would have been incorporated in the law instead of a proviso requiring deduction to be made at a flat rate of 3 cents per mile. The act of March 3, 1899 (30 Stat. 1068), contained a provision for deducting cost of transportation furnished under certain conditions, as did some earlier annual appropriation acts; but the act of May 26, 1900 (31 Stat. 210), established a mileage basis for making deduction for transportation furnished, instead of a cost basis, and since that time the mileage basis has been continued in the succeeding mileage laws. The settlement on a mileage basis simplifies the paying and auditing of mileage accounts as compared with settlements on an actual cost basis, which is one of the reasons for the passage of the mileage laws in the past.

The act of June 12, 1906, 34 Stat. 246 (amended by the act of June 10, 1922, 42 Stat. 631, as to the rate of the mileage allowance), provides:

* * * and payment and settlement of mileage of officers shall be made according to distances and deductions computed over routes established and by mileage tables prepared by the Paymaster-General of the Army under the direction of the Secretary of War. * * * *Provided further*, That officers who so desire may, upon application to the Quartermaster's Department, be furnished under their orders transportation requests for the entire journey by land, exclusive of sleeping and parlor car accommodations, or by water; and the transportation so furnished shall, if travel was performed under a mileage status, be a charge against the officer's mileage account, to be deducted at the rate of three cents per mile by the paymaster paying the account, and of the amount so deducted there shall be turned over to an authorized officer of the Quartermaster's Department three cents per mile for transportation furnished, except over any railroad which is a free or fifty per centum land-grant railroad, for the credit of the appropriation for the transportation of the Army and its supplies; *And provided further*, That when the established route of travel shall, in whole or in part, be over the line of any railroad on which the troops and supplies of the United States are entitled to be transported free of charge, or over any fifty per centum land-grant railroad, officers traveling as herein provided for shall for the travel over such roads, be furnished with transportation requests, exclusive of sleeping and parlor car accommodations, by the Quartermaster's Department: *And provided further*, That when transportation is furnished by the Quartermaster's Department, or when the established route of travel is over any of the railroads above

specified, there shall be deducted from the officer's mileage account by the paymaster paying the same three cents per mile for the distance for which transportation has been or should have been furnished: * * *

In the Comptroller's decision referred to by you, 7 Comp. Dec. 301, it was held that under the similar act of May 26, 1900, 31 Stat. 210:

1. Where the travel is by one or more usually traveled routes over which the rate of fare between terminal points is the same to the general public or by special agreement with the Government, a deduction of 3 cents per mile should be made for the number of miles for which transportation is actually furnished or should have been furnished, not exceeding, however, the number of miles for which mileage is allowed.

2. Where the travel is by a longer route for the convenience of the officer, and the rate of fare thereby, ascertained as in paragraph 1, is greater than by the usually traveled route, a deduction of 3 cents per mile should be made for the number of miles for which transportation is or should have been furnished by such route.

In the decision of this office of April 23, 1924, 3 Comp. Gen. 787, on submission by the Navy Department, the provisions of the 1906 act having been extended to officers of the Navy by section 12 of the act of June 10, 1922, 42 Stat. 631, it was held that where an officer traveling on a mileage status is issued separate transportation requests covering the entire journey to enable him to make stop-overs en route for his own convenience, or where transportation requests are issued for circuitous travel, and the total cost of such transportation is greater than that of through transportation over the shortest usually traveled route, there should be deducted from the officer's mileage account, in addition to the deduction of 3 cents per mile for the distance over the shortest usually traveled route, the difference between the cost to the Government for through transportation via the shortest usually traveled route and the cost to the Government for the transportation actually furnished.

It will be observed that the law expressly fixes the basis on which the mileage and the deduction shall be computed in the following language:

Payment and settlement of mileage accounts of officers shall be made according to distances and deductions computed over routes established and by mileage tables prepared by the Paymaster-General of the Army under the direction of the Secretary of War * * *.

It thus appears that the law directs both mileage and deduction be computed over the shortest usually traveled route as determined and established by the Paymaster General of the Army.

The law contemplates that when application is made by an officer for transportation under his orders for the entire journey through transportation will be furnished over the established shortest usually traveled route, and it makes no provision for the furnishing of transportation by other routes at a greater cost, and prescribes no method for the adjustment of such excess cost. While the law does

not prohibit the furnishing of transportation by a circuitous route, it does fix the Government's liability, and there is no authority of law to exceed the liability so fixed. The deduction of 3 cents per mile via the route of circuitous travel is purely arbitrary and may or may not cover the excess cost of such travel. Apparently, in the cases referred to by you such deduction more than covers the excess cost, while in some other cases such deduction would be less, as shown in 35 MS. Comp. Gen. 258, July 8, 1924, copy of which decision is herewith inclosed. Under the principle of the said decision of this office, 3 Comp. Gen. 787, there would be deducted from the officer's mileage account in addition to the deduction of 3 cents per mile via the established route the exact amount of the additional cost to the Government, and neither the officer nor the Government loses or gains by the transaction.

The principles of 3 Comp. Gen. 787, will therefore be applied to all payments made to officers of the Army on or after November 1, 1924, to which they are applicable, and 7 Comp. Dec. 301, in so far as it may be in conflict therewith, will not thereafter be followed.

(A-4558)

PERSONAL SERVICES—REAL ESTATE BROKER

The appropriation in the act of June 12, 1922, 42 Stat. 646, for the purchase of certain tracts of land in the District of Columbia as sites for Government buildings contained no specific authorization for the employment of personal services at the seat of Government and was not applicable to the payment of commissions to a real estate broker employed under a prior contract to secure options on the land and to perform certain other services incident to its acquisition, such employment and payment being prohibited by section 4 of the act of August 5, 1882, 22 Stat. 255.

The negotiating for the purchase of land in the District of Columbia for the United States is an administrative duty which may not be delegated by a commission charged therewith to other than a responsible officer of the Government, and the fact that such commission may not have possessed officers or employees qualified to perform such service on its behalf did not justify the procurement for the purpose of the services of a real estate broker or authorize payment to him of commissions for his services out of an appropriation which contained no specific authorization for personal service at the seat of Government.

Decision by Comptroller General McCarl, October 6, 1924:

In connection with the settlement of the accounts of Edward F. Batchelor, disbursing clerk, State, War, and Navy Departments Buildings, for the period July 1 to September 30, 1923, there is for consideration and decision the question whether payments aggregating $10,437.60 made to Edward P. Schwartz, real estate broker, in commissions or brokerage fees as reimbursement for personal services performed in securing options to purchase for the Government on certain tracts of land occupied by temporary Government

buildings are a proper charge against the appropriation for the purchase of such sites provided by the act of June 12, 1922, 42 Stat. 646.

The act in question provided as follows:

> The commission in charge of the State, War, and Navy Departments Buildings, to wit, the Secretary of State, the Secretary of War, and the Secretary of the Navy, is hereby authorized and directed to acquire by purchase, so far as they may be able to at prices deemed by them to be reasonable and fair, otherwise by condemnation in accordance with the provisions of the Act of Congress, approved August 30, 1890, providing for a site for the enlargement of the Government Printing Office, the following squares of land for public purposes, to wit, the whole of squares known as numbers east of eighty-seven; east of eighty-eight; one hundred and twenty-four; one hundred and twenty-five; one hundred and forty-five; one hundred and forty-six; and one hundred and forty-seven, in the city of Washington, District of Columbia, as officially recorded in the office of the surveyor, District of Columbia. The commission is further authorized to reduce the area to be acquired where by reason of improvements constructed, or unreasonable prices asked, or for other reasons in their judgment the public interests may require: *Provided*, That if acquired by purchase, the cost of the squares, including expenses incident thereto, shall not exceed the sum of $1,500,000, which sum is hereby authorized and the same is hereby appropriated: *Provided further*, That the squares authorized to be acquired herein shall be under the control of the Superintendent of the State, War, and Navy Departments Buildings.

The facts presented show that under date of April 24, 1922, which it is noted was prior to the passage of the appropriation act, the Superintendent of the State, War and Navy Departments Buildings, entered into contract with Edward P. Schwartz, Washington, D. C., for his personal services in securing options on the land authorized to be purchased under the quoted appropriation act and to perform certain other services incident to the acquisition of said land. The contract provided as compensation and reimbursement for expenses a fee or commission amounting to 3 per cent on the purchase price of all land purchased provided that in no case should the compensation amount to more than $24,000. Under this contract $6,453.47 was paid May 14, 1923, and $3,984.13 was paid June 16, 1923, credit for all of which has been suspended in the accounts of the disbursing officer making the payments.

It is contended by the disbursing officer that the payment of the commissions or fees to the real estate broker in this case was fully justified because of the saving to the Government in the amount required to be paid for the land, which saving is alleged to greatly exceed the amount paid in fees, and because among the employees of the office of the Superintendent of the State, War, and Navy Departments Buildings, there was none qualified to consumate the purchases.

Section 4 of the act of August 5, 1882, 22 Stat. 255, prohibits the employment of personal services at the seat of Government except only at such rates and in such numbers as may be specifically appropriated for by Congress. This prohibition is applicable not only

to employments under regular appointments but also to contract employments for personal services. See 26 Comp. Dec. 559; *id.* 635.

The act of June 12, 1922, appropriating for the purchase of the land in question did not expressly provide for the employment of personal services, nor was the object for which the appropriation provided, viz, purchase of lands, of such a nature as to necessarily imply that employment of personal services in connection therewith was authorized. The appropriation for "expenses incident thereto" contemplated only those which might be lawfully incurred. It may be the administrative office employed the real estate broker to procure the property at a fair price. While economy and saving to the Government is desirable, that consideration does not justify an unlawful procedure, such as the employment of personal services in the absence of specific authority of law therefor. The matter of negotiating for the purchase of land for the United States is an administrative duty which may not be delegated to any one other than a responsible officer of the Government, and if such officers are unable to obtain the property desired at a fair price, condemnation proceedings have been authorized by law under which the property may be acquired. See 3 Comp. Gen. 720, 721. Furthermore, the fact that the employees of the office of the Superintendent of the State, War, and Navy Departments Buildings were not qualified to perform the services did not justify or authorize the use of the appropriation. 26 Comp. Dec. 800. The act authorizing the acquisition of these lands specifically imposes upon the commission in charge of the State, War, and Navy Departments Buildings the duties incident thereto and vests in the Secretary of State, the Secretary of War, and the Secretary of the Navy the authority to determine the reasonable and fair prices of the said lands.

Accordingly, it must be held that the employment of Edward P. Schwartz was unlawful and that the total amount paid to him in commissions for his services in obtaining options to purchase the land in question must be disallowed in the accounts of the disbursing officer.

(A–5055)

ESTATES OF DECEDENTS—PENSION CHECKS

The conservator of the property of a mentally incompetent pensioner has no right by virtue of such conservatorship upon a voucher executed after the death of the pensioner to the proceeds of a pension check payable to the pensioner and received either by him or the conservator prior to the death of the pensioner but not negotiated or indorsed. Any claim there may be is for accrued pension.

Decision by Comptroller General McCarl, October 6, 1924:

There is before this office for consideration the claim of Addie B. Marsh as conservator of the estate of Emily S. Cole, a pensioner, for

the proceeds of Interior Pension check No. 16008720, dated July 4, 1924, for $30 drawn on pension certificate No. 455715, by E. E. Miller, disbursing clerk, in favor of the said Emily S. Cole.

From the facts as disclosed by the evidence on file it appears that the check was delivered to the payee, or to the legally appointed conservator of her estate, prior to July 18, 1924, the date of her death, but that the check was not negotiated or indorsed prior to said date.

By letter dated July 7, 1924, the check was returned by attorneys for the conservator to the Commissioner of Pensions, Washington, D. C., requesting information as to the evidence required in order to make payment of the check to Addie B. Marsh, who, it was stated, had been appointed conservator of the estate of Emily S. Cole.

On August 8, 1924, Addie B. Marsh filed with the Pension Office a court certificate signed by the register of probate, Belknap County, N. H., certifying that Addie B. Marsh was on May 13, 1924, duly appointed conservator of the estate of Emily S. Cole, the latter being described as a person under disabilities. With this certificate the conservator submitted a voucher for payment of the pension represented by the check in question. In the body of the voucher it is stated that Emily S. Cole died on July 18, 1924. The Pension Office canceled the check, in accordance with its procedure in such cases, and forwarded the papers to this office for consideration.

The question presented for decision is whether the conservator by virtue of the conservatorship is entitled to the amount represented by this check.

It is a well-recognized principle of law that the relation of conservator and ward is terminated of necessity by the death of the ward, and thereafter any exercise of legal authority on the part of the conservator over property of the ward not then in the conservator's possession would be unauthorized. The check in this case did not legally come into the possession of the conservator, for the reason that after appointment of a conservator checks may not legally be issued in the name of or delivered to the pensioner, and can be issued in the name of and legally delivered to the conservator only upon and after the execution of a proper voucher for the amount of the pension. As the voucher in this case was not executed until after the death of the pensioner, payment thereon is not authorized. Such claim as there may be in this case is for presentation by the person or persons, if any, entitled to the accrued pension, and is for consideration by the Commissioner of Pensions under the laws relating to payment of accrued pensions.

(A–5082)

PURCHASES—MEDALS—RESERVE OFFICERS' TRAINING CORPS

The appropriation "Reserve Officers' Training Corps, 1924–December 31, 1924," act of March 2, 1923, 42 Stat. 1381, is not applicable to the purchase of medals for award to the successful competitors in athletic contests held at Reserve Officers' Training Corps camps, as such medals do not constitute an item of "maintenance" within the meaning of said act.

Comptroller General McCarl to the Finance Officer, United States Army, October 6, 1924:

There was received September 10, 1924, your submission of a voucher in favor of J. O. Pollack & Co., Chicago, Ill., in the sum of $307.75, for medals purchased for award to successful competitors in athletic contests held at the recent Reserve Officers' Training Corps camp at Camp Custer, Mich., for a decision as to whether you are authorized to pay the sum from the appropriation "Reserve Officers' Training Corps, 1924–December 31, 1924," act of March 2, 1923, 42 Stat. 1381–1382.

It appears that purchase order 18–A 5 of July 12, 1924, corrected July 24, 1924, was issued to J. O. Pollack & Co., Chicago, Ill., for immediate delivery, f. o. b. Battle Creek, Mich., destination Quartermaster, Camp Custer, Mich., of the following:

Quantity	Article	Unit Price	Total Price
9	Medals, solid gold, with bar and ribbon	$18	$162
9	Medals, solid pure fine silver, with bar and ribbon	10	90
11	Medals, bronze, with bar and ribbon	5. 068	55. 75
	Total		307. 75

The medals were received and accepted by the quartermaster at Camp Custer August 2, 1924.

Section 34, act of June 4, 1920, 41 Stat. 778, substituting section 47–A for section 48 of the National Defense Act, authorizes the Secretary of War to maintain camps for the further practical instruction of the members of the Reserve Officers' Training Corps and to prescribe regulations for the government of such camps.

Special Regulations No. 44–A, War Department, revised 1920, promulgating regulations for training camps for the Reserve Officers' Training Corps, prescribes in paragraphs 55 to 58, inclusive, that physical training shall constitute a prominent part of the instruction at these camps and that athletic contests shall be held for the purpose of developing the esprit of the personnel.

The appropriation made by the act of March 2, 1923, is as follows:

For the procurement, maintenance, and issue, under such regulations as may be prescribed by the Secretary of War, to institutions at which one or more units of the Reserve Officers' Training Corps are maintained, of such public animals, means of transportations, supplies, tentage, equipment, and uniforms as he may deem necessary, and to forage at the expense of the United States public animals so issued, and to pay commutation in lieu of uniforms at a rate to be fixed annually by the Secretary of War; for transporting said animals and other authorized supplies and equipment from place of issue to the several institutions and training camps and return of same to place of issue when necessary; for the establishment and maintenance of camps for the further practical instruction of the members of the Reserve Officers' Training Corps, and for transporting members of such corps to and from such camps, and to subsist them while traveling to and from such camps and while remaining therein so far as appropriations will permit; or in lieu of transporting them to and from such camps and subsisting them while en route, to pay them travel allowance at the rate of 5 cents per mile for the distance by the shortest usually traveled route from the places from which they are authorized to proceed to the camp and for the return travel thereto, and to pay the return travel pay in advance of the actual performance of the travel; for pay for students attending advanced camps at the rate prescribed for soldiers of the seventh grade of the Regular Army; for the payment of commutation of subsistence to members of the senior division of the Reserve Officers' Training Corps, at a rate not exceeding the cost of the garrison ration prescribed for the Army, as authorized in the Act approved June 3, 1916, as amended by the Act approved June 4, 1920, $3,500,000, to remain available until December 31, 1924: *Provided*, That uniforms and other equipment or material issued to the Reserve Officers' Training Corps in accordance with law shall be furnished from surplus or reserve stocks of the War Department without payment from this appropriation, except for actual expense incurred in the manufacture or issue: *Provided further*, That in no case shall the amount paid from this appropriation for uniforms, equipment, or material furnished to the Reserve Officers' Training Corps from stocks under the control of the War Department be in excess of the price current at the time the issue is made: *Provided further*, That none of the funds appropriated in this Act shall be used for the organization or maintenance of additional mounted, motor transport, tank, or air units in the Reserve Officers' Training Corps: *Provided further*, That not to exceed $10,000 of the total appropriated by this Act may be expended for the transportation of authorized Reserve Officers' Training Corps students, who may be competitors in the national rifle match, and to subsist them while traveling to and from said match and while remaining thereat.

While the physical development of the personnel of a Reserve Officers' Training Camp may constitute an essential part of their instruction for the better performance of the required military duties, medals to be awarded to successful competitors in athletic contests held at the camp at termination of such training do not constitute an item of maintenance of the camp within the meaning of the act cited. 1 MS. Comp. Gen. 257.

You are not authorized, therefore, to pay the voucher which is returned herewith.

(A—3551)

CHECKS—INDORSEMENT UNDER GENERAL POWERS OF ATTORNEY

The practice of accepting indorsements under general powers of attorney on disbursing officers' checks is not applicable to checks for disability compensation under the war risk insurance act, as amended, or for other payments the right to which ceases with the death of the payee. In such cases the power must satisfy the requirements of section 3477, Revised Statutes.

Veterans' Bureau checks for disability compensation payable to beneficiaries who are residents of foreign countries should be drawn to the order of the payee in care of the diplomatic representative (not consular representatives) of the country in the United States, and the indorsement thereon of such diplomatic representative may be accepted. Indorsements by a foreign consul for and in behalf of the payees of such checks should be supported by individual powers of attorney in each case.

Comptroller General McCarl to the Secretary of the Treasury, October 7, 1924:

I have the request of the Treasurer, presumably by your direction, for an advanced decision on his right to accept indorsements under general powers of attorney, on checks issued by the Veterans' Bureau, the specific case in question being that of the power of attorney executed March 13, 1923, by Karol Chudzicki, Karolina Chudzicka, and Franciszek Bartkiewicz, guardians of certain minor beneficiaries under the war risk insurance act, in favor of the consul of the Republic of Poland, which authorized the consul to indorse and collect money due on checks drawn in their favor by any disbursing officer of the United States for whatever account and is to remain in force until revoked.

In decision of February 12, 1916, 22 Comp. Dec., 393, the acceptance of indorsements under powers of attorney in the case of pension checks was considered and it was stated that the purpose of the pension laws was to place the pension check and its proceeds directly in the hands of the pensioner and that a general power of attorney to indorse future pension checks would be in the nature of an assignment and should not be accepted. Said decision, however, permitted the indorsement of such checks under specific powers of attorney executed as are powers of attorney under section 3477, Revised Statutes.

The acceptance of general powers of attorney would deprive the Government of the evidence of the continued existence of the payee otherwise supplied by his personal indorsement on such checks and which evidence is necessary to establish the validity of the payment.

As to disbursing officers' checks which have been heretofore cashed on indorsements under general powers of attorney no question will be raised at this time, but in all future cases disbursing officers' checks showing upon their face that they constitute payments of disability compensation under the war risk act, or payments pursuant to any other laws under which the right to payment ceases with the death of the payee, if not indorsed personally by the payee, except as hereinafter indicated, must be accompanied by specific powers of attorney executed as required by section 3477, Revised Statutes; i. e., the power of attorney must be—

* * * executed in the presence of at least two attesting witnesses, after * * * the issuing of a warrant [or check] for the payment thereof * * * must recite the warrant [or check] for payment, and must be acknowledged by the person making them before an officer having authority to take acknowledgments of deeds. * * *.

In the particular case submitted, however, the power of attorney runs to the consul of the Republic of Poland, the individual beneficiaries of the payments being resident in that country. The difficulty of identifying particular beneficiaries in foreign countries or of collecting erroneous payments to persons residing in foreign countries, or of determining whether a particular power of attorney executed in a foreign country is legal under the laws of that country, make it desirable, whenever it can be done, that payments to natives of and residents in foreign countries be made through the representative of that country in the United States. The advantages of making payments in that manner more than overbalance any objection to a general power of attorney. 22 Comp. Dec., 254; 6 MS. Comp. Gen., 1671.

It is desirable where the facts make it impossible to make payment direct to the party concerned in a foreign country that the remittances be made through the diplomatic representative of such foreign country. In such instances the check should be drawn to the order of the party in care of the diplomatic representative and the indorsement thereon of such diplomatic representative may be accepted. The transaction in such form may reasonably be considered as with the foreign government. A consular officer is not such a representative as to entitle transactions such as in question to be considered as with the foreign government and in such cases there should appear power of attorney to receive and indorse the respective checks the same as is required by other individuals acting under powers of attorney to sign Government checks.

It appears that the Republic of Poland has a diplomatic representative to this Government.

Indorsements by the consul of the Republic of Poland for and in behalf of the payees of war risk insurance or disability compensation should be supported by individual powers of attorney in accordance with the above.

(A–4884)

POSTAL SERVICE—VILLAGE DELIVERY CARRIERS—APPOINTMENTS AND PROMOTIONS

The act of June 5, 1920, 41 Stat. 1052, having provided pay for village delivery carriers from $1,000 to $1,200 per annum " under such rules and regulations as the Postmaster General may prescribe," the regulations prescribed thereunder by the Postmaster General providing for entrance salaries of $1,000 and for two increases of $100 each only after completion of one year's satisfactory service in the preceding grade, are regulations made in pursuance of law and may not be waived in individual cases, or revoked, modified, or superseded retroactively, so as to authorize appointments or promotions in contravention thereof.

59344°—25——25

Comptroller General McCarl to the Postmaster General, October 7, 1924:

There has been received your letter of August 23, 1924, requesting decision whether, under the provisions of the act of June 5, 1920, 41 Stat. 1052, you are authorized to appoint carriers in the village delivery service at an entrance salary above $1,000 per annum but not exceeding $1,200 per annum, and to promote a carrier in that service from $1,000 per annum to $1,200 per annum before the carrier has completed one year's satisfactory service.

The act of June 5, 1920, 41 Stat. 1052, provides as follows:

> That the pay of carriers in the village delivery service, under such rules and regulations as the Postmaster General may prescribe, shall be from $1,000 to $1,200 per annum.

The rules and regulations prescribed by the Postmaster General pursuant to said provision are set forth in the Postal Guide issued July, 1923, page 24, as follows:

> 145. Salary and promotions.—The salary of village carriers is fixed by congressional legislation, the entrance rate being $1,000 per annum. At the beginning of the first quarter after a year's satisfactory service, the salary is increased to $1,100 per annum, and after two years to $1,200, which is the maximum. Thirty days before the end of each quarter postmasters should submit recommendations regarding increases for village carriers who may be entitled to promotions. If, however, for any reason, an increase in salary should not be granted, a report of the facts should be transmitted to the First Assistant, Division of Post Office Service.

See also section 704 of the Postal Laws and Regulations 1924, effective July 1, 1924, which, after stating the provision of the statute hereinbefore quoted, provides, paragraph 2:

> The entrance salary shall be at the rate of $1,000 per annum, with consecutive promotions of $100 each for two years, promotion to be made at the beginning of the first quarter after one year's satisfactory service in the previous grade.

These regulations, which fix the initial salary of $1,000 per annum and authorize promotion to $1,100 only after one year's satisfactory service at $1,000 and to $1,200 only after one year's satisfactory service at $1,100, were made pursuant to and in execution of the provision in the act of June 5, 1920, *supra*, and therefore must be held to be a part of the law and of the same force and effect as the statute itself. Said regulations may be modified or amended by the Postmaster General, provided said modifications or amendments are not inconsistent with the statute, but they can not be waived in individual cases, and no modification or amendment thereof can operate retroactively. See 21 Comp. Dec. 482; 26 *id.* 99; 2 Comp. Gen. 342.

Accordingly you are advised that under the provision of the act of June 5, 1920, hereinbefore quoted, and the rules and regulations made in execution thereof, original appointments of carriers in the village delivery service are authorized only at the rate of $1,000

per annum and promotion to $1,100 and $1,200, consecutively, is authorized only after one year's satisfactory service in the preceding grade. Promotions under these regulations are not automatic—see decision of September 16, 1924, A–3948, 4 Comp. Gen. 299, and can not be made effective retroactively, 3 Comp. Gen. 559.

(A–4942)

BURIAL EXPENSES—RECLAMATION SERVICE EMPLOYEE

As the Employees' Compensation Act of September 7, 1916, 39 Stat. 745, provides for the payment from public funds of not to exceed $100 for the expenses of burial of certain employees dying as the result of injuries incurred in their employment, there is no authority of law for the payment of an amount in excess of $100 to cover the burial expenses of a field employee of the Reclamation Service killed by accident due to his employment.

Comptroller General McCarl to the Secretary of the Interior, October 7, 1924:

I have your letter of August 30, 1924, requesting decision whether payment of a voucher in favor of W. T. Tucker is authorized to be made from the reclamation fund.

It appears that Jerry Sullivan, an employee of the field force of the Bureau of Reclamation, was killed by accident due to his employment. The voucher in question is for $231.70 as covering the funeral expenses of Sullivan. It is certified that Sullivan's relatives were without funds to defray the funeral expenses, that the county officials refused to bury the remains and that burial by the Government was necessary as a sanitary measure.

The act of September 7, 1916, 39 Stat. 742, provides compensation and other benefits for employees of the United States suffering injuries while in the performance of their duties. Section 11 of the act, page 745, provides:

> That if death results from the injury within six years the United States shall pay to the personal representative of the deceased employee burial expenses not to exceed $100, in the discretion of the commission * * *

Section 40 of the act, page 750, provides:

> That wherever used in this Act–
>
> * * * * * * *
>
> The term "employee" includes all civil employees of the United States * * *

The act makes an appropriation of $500,000 to be set aside as a separate fund in the Treasury to be known as the Employees' Compensation Fund. The Congress has from time to time appropriated other sums to be added to the fund thus created. This fund, including all additions made thereto, was expressly authorized to be permanently appropriated for the payments provided for in the act, including burial expenses.

The rule is well settled that when an appropriation is made for a specific purpose, it is exclusive for that purpose. See 1 Comp. Gen. 372.

The act of May 30, 1908, 35 Stat. 556, provided relief for personal injuries for certain classes of employees of the United States, including those in hazardous employment under the Isthmian Canal Commission. It was held by the Comptroller of the Treasury, 15 Comp. Dec. 115, that the provisions of the act of May 30, 1908, were exclusive and that the commission had no power either by past or present regulations to grant relief other than or different from that provided by the statute in the case of injuries to employees of the class to which the statute applied.

On the facts shown it would appear there was no authority to incur burial expenses in this case in excess of the $100 provided by law for that purpose and you are advised that payment of the voucher under consideration is not authorized.

(A–5132)

BRIDGE TOLLS

Charges in the nature of tolls for the use of a State-owned bridge are not State taxes which the Federal Government is exempt from the payment of, but are charges for the use of State property and are payable from Federal funds.

Comptroller General McCarl to E. F. Batchelor, disbursing clerk, office of the Superintendent State, War, and Navy Department Buildings, October 8, 1924:

I have your letter of September 10, 1924, submitting, with request for decision whether payment thereon is authorized, a voucher in favor of the State Roads Commission of Maryland, aggregating $8.75, covering toll charges for the use of the Perryville-Havre de Grace Bridge by five Government-owned motor trucks en route from Perryville to Washington, D. C. You suggest that the payment of tolls is analogous to the imposition of a State tax upon Federal-owned property.

The tolls in question are imposed pursuant to the Maryland law of April 13, 1922, chapter 494, which provided for the acquisition of the Perryville-Havre de Grace Bridge by the State, the issuance of bonds in payment therefor, and in section 9 provided for toll charges as follows:

And be it further enacted: That for the purpose of raising sufficient funds to pay the interest on the said bonds or certificates of indebtedness, and to assist in retiring the principal of said loan, the State of Maryland pledges the full faith and credit and for these and the further purpose of maintaining said bridge and appurtenances thereto, the State Roads Commission shall upon its acquisition charge such tolls to the users of said bridge for vehicular

traffic to be fixed by the State Roads Commission of Maryland but not to exceed the limits herein mentioned * * * Commercial motor vehicles and trucks, not more than one ton carrying capacity, loaded or empty, with driver, 75¢; * * * more than one ton and not more than two tons * * * $1; * * * more than two tons and not over three tons * * * $1.50; * * * more than three tons and not over four tons * * * $2; * * * more than four tons and not over five tons * * * $2.50.

In the case of *Sands* v. *Manistee River Improvement Company*, 123 U. S. 288, 294, it is stated:

There is no analogy between the imposition of taxes and the levying of tolls for improvement of highways; and any attempt to justify or condemn proceedings in the one case, by reference to those in the other, must be misleading. Taxes are levied for the support of government, and their amount is regulated by its necessities. Tolls are the compensation for the use of another's property, or improvements made by him; and their amount is determined by the cost of the property or of the improvements, and considerations of the return which such values or expenditures should yield * * *.

See also *Huse* v. *Glover*, 119 U. S. 543, and authorities cited in 24 Comp. Dec. 45, in which the distinction between State tolls and taxes is discussed at length.

In decision of February 3, 1921, the former Comptroller of the Treasury authorized the payment of tolls for the use of a State-owned ferry in New York State. 96 MS. Comp. Dec. 312. It is apparent from the authorities cited that the payment of toll charges for the use of a State-owned bridge is not the payment of a State tax from which the Federal Government is exempt.

The voucher is returned herewith.

(A–5284)

VOLUNTARY SERVICES

Where electrical equipment (gear and pinion) was shipped to the company from which it was originally purchased for the purpose of examination and submission of an estimate as to the cost of putting it into operative condition and upon receipt of the estimate such work was not ordered or done the company is not entitled to compensation for any work performed incident to the inspection necessary to enable it to submit its bid for reconditioning said equipment.

Decision by Comptroller General McCarl, October 8, 1924:

Westinghouse Electric and Manufacturing Co. requested, September 19, 1924, review of settlement No. 018184, dated April 2, 1924, wherein was disallowed its claim for $106.03 representing pay for services in connection with inspection of gear and pinion for the U. S. S. *Tennessee* in 1922.

The claim is stated in claimant's letter of November 30, 1923, as follows:

When the Department (in the fall of 1922) ordered shipment to U. S. S. *Tennessee* of gear and pinion originally built for U. S. S. *Washington*, it was arranged that the displaced gears and pinions from *Tennessee* should be sent

to our works at South Philadelphia, inspected, and report given as to what might be necessary to place the material in good operating condition.

This report was made but at the time the department did not desire to carry out the work recommended.

We have now received from our South Philadelphia Works charges for the inspection, etc., of this material, and should appreciate the department's advice if we should be correct in submitting invoice for this expense.

Cleaning gears and pinions for inspection	$40.48
Pressing out shaft and coupling	6.41
Reassembling	3.60
Slushing and boxing	55.54
Total	106.03

The claim was disallowed for reasons stated as follows:

The services for which pay is now claimed were rendered by claimant company as a necessary incident to submitting a bid for reconditioning the gear and pinion and no provision was made for any pay for such service.

The fact that the Navy Department did not order the work done is not a justification for billing the expense incurred in preparing a proposal.

In the request for review claimant states:

* * * The charge was for services rendered in inspecting the condition of certain material owned by the department and returned to us for that purpose, as well as advising the cost of putting the material into operative condition.

The expense involved must be considered entirely in connection with preparing the material for inspection and reboxing; and not as a charge for preparing a bid.

The information obtained from the inspection was such that the actual making up of estimates for a bid could be carried out and no charges made for that purpose but until the material had been inspected the department did not known in what condition it was and were unable to determine its disposition. The initiative was taken by the department, who requested that we should carry out this inspection and advise them as to the cost of putting the material into suitable condition. We consequently contend that the charge made is one for service rendered which we should reasonably and justly expect the department to pay, no charge being included in the amount of $106.03 for the expense involved in making up the proposal.

There does not appear to have been any agreement whereby the Government was to pay for service of any kind in this case. The gear and pinion, forwarded to the claimant company for examination and submission of estimate as to the cost of putting it into operative condition, was equipment which had originally been purchased from the company; and the service performed by the claimant appears to have been only such as was incident to the inspection necessary to enable it to submit its bid for reconditioning the gear and pinion.

The fact that the Navy Department did not have the reconditioning work done after receiving an estimate of the cost thereof, could not operate to impose upon the Government any legal obligation to pay for any work incident to inspecting the equipment, preparing it for inspection, reassembling, or any other work claimed to have been performed in connection therewith.

Upon review the disallowance is sustained.

(A-3180)

INTERNAL REVENUE LIQUOR STAMPS—REFUNDS

The charge by the Government for the furnishing of bottled-in-bond case stamps is not a tax nor a stamp denoting the payment of a tax, and the refund to distillers or owners of distilled spirits of such a charge for the furnishing of bottled-in-bond stamps that were not used is unauthorized.

Decision by Comptroller General McCarl, October 9, 1924:

There has been considered the claim of the D. L. Moore Distillery Co. for a refund in the amount of $2,455.50, alleged to have been paid for the furnishing by the Government of 24,555 bottled-in-bond case stamps.

It is assumed that the stamps were obtained upon the order of the claimant under the provisions of articles 24 to 28, inclusive, of the United States Internal Revenue Regulations No. 23, revised December 21, 1912, issued in pursuance of the act of March 3, 1897, 29 Stat. 626.

These regulations provide for the filing with the collector, by a distiller or owner of distilled spirits, of an order for the special printing of case stamps when it is desired to bottle spirits in bond. There are printed to accompany each case stamp sufficient strip stamps for use on bottles in each case, such strip stamps to contain the following data, as required by law, the same to be furnished by the distiller or owner, viz, "the proof of the spirits, the registered distillery number, the State and district in which the distillery is located, the real name of the actual bona fide distiller, the year and distilling season, whether spring or fall, of original inspection or entry into bond, and the date of bottling."

The case stamps and accompanying strip stamps are prepared, in accordance with the order, by the Bureau of Engraving and Printing, and issued to the distiller or owner after payment for same has been made to the collector at the rate of 10 cents for each case stamp.

The charge for the stamps is nothing more than a charge to cover the expense of printing and distributing stamps, which are in the nature of a Government guaranty as to the quantity, age, proof, etc., of the spirits. It is a charge for a service rendered and is not refundable, since the unused case stamps, having been specially prepared, may not be used by any other distiller or owner and are not redeemable in the absence of a specific provision of law therefor.

The charge may not be regarded as a tax and is therefore not within the provisions of sections 3689, Revised Statutes, and 3220, Revised Statutes, as amended, which authorize refund of taxes illegally collected, nor within the provisions of the act of May 12, 1900, 31 Stat. 177, which authorizes the redemption of or an allowance for stamps denoting the payment of taxes.

I find no authority of law for the refund requested. The claim is therefore disallowed.

(A–5042)

TRAVELING EXPENSES—AUTOMOBILE HIRE FROM WIFE OF EMPLOYEE

Reimbursement from public funds for the hire of an automobile by one employee from another employee, or from any member of the family of himself or another employee, is not authorized.

Comptroller General McCarl to the Secretary of the Treasury, October 9, 1924:

I have your request of September 8, 1924, for review of settlement C–10871–T of May 26, 1924, disallowing in the accounts of J. L. Summers $14.50, being amount paid by H. S. Whitney, assistant national bank examiner, as reimbursement of amounts alleged to have been paid as automobile hire to L. E. Kelly, who is the wife of Burdette Kelly, a national bank examiner who accompanied the assistant on the various trips in question. In support of the request for review there is submitted a statement from the Acting Comptroller of the Currency as follows:

* * * the assistant examiner paid the amount in good faith, obtaining a receipt therefor, and the administrative office allowed the amount, believing that it was just and due the assistant. Furthermore, the owner of the automobile was not a relative to the assistant examiner, and Assistant Whitney in no way received benefit therefrom. It was necessary in this instance to use an automobile, and had both the examiner and assistant hired the conveyance from a private person the same amounts would have been paid. It therefore follows that there was no loss to the Government due to the fact that the automobile used was the property of the wife of the examiner. A decision by the Comptroller General is desired in this case, because there are many field employees who are owners of the conveyance which they use in their official work. Quite often the examiner finds it to the best interests of the service to carry an assistant with him, and this office approves the action, inasmuch as time is saved, the method of transfer is more convenient, and the examiner who owns the machine, in justice to him, is remunerated to some extent for the losses that he incurs in using his conveyance. It is a well-established fact that the allowances for gasoline and oil which the Government makes the owner of an automobile reimburse him only to a small extent of the actual expenses incurred, which embraces the use of his tires and the depreciation and wear and tear of his automobile. If the Comptroller General sees fit to allow this amount and definitely sets a precedent upon which the examiner or an assistant who owns a machine may charge a reasonable amount, not in excess of railroad fare, which charges are to be rigidly scrutinized by the Chief Examiner and the Administrative Office, such decision will be in the interest of the field service of this office.

It is not shown that the wife had a separate estate or that the automobile used for the official travel was purchased from or maintained by her own separate funds.

Paragraph 9 of the Travel Regulations of the Treasury Department is as follows:

(9) Own conveyance.—Charges for use of own conveyance will not be allowed as travel expense in the accounts of any officer or employee. Charges

for such necessary incidental expenses incurred in connection with use of own conveyance as are readily ascertainable—as for gasoline, oil, or horse feed used on trip in the vicinity in which stationed—will be allowed, but only to the extent of the actual cost thereof. A commuted rate charge will not be allowed in any case.

The hire of an automobile by an employee from himself is contrary to the regulations; and any arrangement purporting to be a hiring from a wife, especially if the wife has not a separate estate recognized by law, is tantamount to a hiring from the husband. Therefore, the hiring in this case must be regarded as a hiring by one employee from another, and it has been held that such hirings are unauthorized. See decision of April 8, 1924, A–176.

Furthermore, and aside from any inhibition in administrative regulations, the hiring of an automobile from any member of the family of an employee, or from another employee under circumstances that might tend to indicate the existence of a reciprocal arrangement or that any employee might receive any personal benefit, directly or indirectly, from such hiring, is unauthorized as in contravention of the provisions of section 1765, Revised Statutes.

Any former decision of this office in conflict with the rule herein announced will not be followed hereafter.

Upon review the disallowance is sustained.

(A–5217)

AVAILABILITY OF INDIAN SERVICE APPROPRIATIONS FOR THE PURCHASE OF LAND

In the purchase of land under the annual appropriations for the Indian Service the appropriation current at the time of execution of a valid deed of conveyance is the appropriation properly chargeable rather than the appropriation current at the date of completion of examination of title or other formalities required under the law as a prerequisite to payment of the purchase price.

The appropriation annually of $4,000 of the Indian Service for the purchase of land for the use of Indians does not authorize the purchase at one time or within any one fiscal year of a tract of land at a purchase price in excess of $4,000.

Comptroller General McCarl to the Secretary of the Interior, October 10, 1924:

I have your letter of September 15, 1924, requesting decision of questions presented by the Commissioner of Indian Affairs as follows:

This office is in possession of a deed from N. F. Wallace and Omega Wallace, his wife, of Leake County, Mississippi, conveying to the United States for a consideration of $700 a 20-acre tract of land in Mississippi on which a day school is to be constructed.

Section 9 of the act of Congress of May 25, 1918 (40 Stat. L. 561–573), made appropriation for the establishing and maintaining of day schools for Choctaw Indians in Mississippi and the purchase of land to be sold to Indians under rules and regulations of this department. Each appropriation act since 1918 has contained an appropriation for these purposes.

The above deed was executed on May 25, 1923, and, together with the abstract of title, was forwarded to the Attorney General on July 6, 1923, for an opinion as to whether or not the deed if accepted would vest the United States with a valid title to the property. The Attorney General returned the deed and abstract on July 13, 1923, with certain suggestions relating to the cession of jurisdiction by the State of Mississippi, in accordance with section 4788, Hemingway's Annotated Code of Mississippi, and stated that when the recommendations had been complied with the United States would be vested with valid title. The requirements of the Attorney General were complied with, and on November 26, 1923, the papers were referred to the Solicitor for the Interior Department for his opinion as to the validity of the title. His opinion was expressed on December 13, 1923. By the time the case was returned from the solicitor the appropriation for the payment for the lands, "Education of Choctaws in Mississippi, 1923," was exhausted and no funds were available from the 1923 appropriation to meet the obligation.

This office has another deed from N F. Wallace and Omega Wallace, his wife, of Leake County, Mississippi, conveying 180 acres of land to be sold to Indians. The various appropriation acts since 1918 have each appropriated $4,000 for the purchase of land for this purpose. The deed for the 180 acres was dated May 30, 1923, and the Solicitor for the Interior Department expressed an opinion as to the validity of the title on February 1, 1924. In the opinion certain recommendations were made which necessitated a reference of the deed and the abstract to the agency. The suggestions and recommendations have been met, but as the purchase price of the land is $5,300, the appropriation of $4,000 in the fund "Land and improvements for Choctaws in Mississippi, 1923," has been exceeded.

On November 17, 1916, the honorable comptroller decided that payment for land in California purchased on May 22, 1916, should be paid for from the 1916 appropriation. However, in that case no subsequent appropriation had been made for the purpose of purchasing lands for Indian schools and agency buildings.

The decision of the honorable comptroller is desired as to whether the consideration named in the deed first above mentioned can be paid from the fund "Education of Choctaws in Mississippi, 1924," also as to whether the consideration of $5,300 named in the second deed can be paid partly from "Land and improvements for Choctaws in Mississippi, 1923," and partly from "Land and improvements for Choctaws in Mississippi, 1924."

The facts of the case referred to in the submission, decision of the Comptroller of the Treasury of November 17, 1916, 79 MS. Comp. Dec. 477, appear to be that under date of October 27, 1913, the superintendent of the Fort Bidwell Indian School transmitted to the Indian Office a deed purporting to run from one Henry Diggins, sole heir of Jim Diggins, a deceased Pit River allottee, covering five acres of land therein described, such land being needed for the use of the Fort Bidwell School; that the deed, which was not considered in proper form, was returned for proper execution, the matter of the purchase being held in abeyance until receipt of another deed from Diggins, the same being acknowledged before a notary on May 2, 1916; that the deed so received was thereafter submitted to the Attorney General for examination as to its sufficiency as required by section 355, Revised Statutes, and returned after the close of the fiscal year 1916, being pronounced satisfactory; and that upon its receipt it was recorded in the records of the Indian Office and in the land records of Modoc County, California.

On that state of facts it was said:

It thus appears that the question submitted hinges on whether the transaction above described could be considered as concluded before June 30, 1916.

If so, the appropriations then in force were charged with the purchase price of the land; if not, there was no authority of law for any contract or purchase subsequently made.

I think the facts above set forth warrant the conclusion that the transaction was, for all practical purposes, closed when Diggins had executed the deed that was later found to meet all technical requirements of law. The deed was accepted on its receipt, subject only to its being found later by the Attorney General to be a valid transfer of title, and the transaction having been thus closed during the fiscal year 1916, the appropriations in force for that year became charged with the obligation thus assumed.

The purchase price of the land may, if otherwise proper, accordingly be paid from the appropriation "Indian school and agency buildings, 1916."

The appropriation for "Education of Choctaws in Mississippi, 1923," act of May 24, 1922, 42 Stat. 570, was for $22,500, and the same appropriation for the fiscal year 1924, act of January 24, 1923, 42 Stat. 1191, was for $21,500, the language of each appropriation, being identical, providing as follows:

* * * for their education by establishing, equipping, and maintaining day schools, including the purchase of land and the construction of necessary buildings and their equipment, * * *.

The appropriations for "Lands and improvements for Choctaws in Mississippi," for the fiscal years 1923, act of May 24, 1922, 42 Stat. 570, and 1924, act of January 24, 1923, 42 Stat. 1191, were identical both as to language and amount, providing as follows:

* * * for the purchase of lands, including improvements thereon, not exceeding eighty acres for any one family, for the use and occupancy of said Indians, to be expended under conditions to be prescribed by the Secretary of the Interior, for its repayment to the United States under such rules and regulations as he may direct, $4,000; * * *.

The several matters for decision will be considered in the order of their submission.

It is understood from the matters submitted that the transaction involving the 20-acre tract of land was closed, in so far as N. F. Wallace and Omega Wallace, his wife, were concerned, when their deed of May 25, 1923, was executed, and the things that thereafter remained to be done to vest a valid title in the United States were for accomplishment by other than the grantors. If that be a fact, the appropriation obligated by the purchase was the one current on the date the deed was executed, to wit, the appropriation for "Education of Choctaws in Mississippi, 1923," 42 Stat. 570, and no other existing appropriation may be used for that purpose. If the balance of that appropriation is insufficient to pay the obligation, the matter is in the status of a deficiency.

Answering specifically the question submitted as to the 20-acre tract, you are advised that the consideration named in the deed of May 23, 1923, is not authorized to be paid under the appropriation for "Education of Choctaws in Mississippi, 1924," 42 Stat. 1191.

Section 3732, Revised Statutes, provides:

No contract or purchase on behalf of the United States shall be made, unless the same is authorized by law or is under an appropriation adequate to its ful-

fillment, except in the War and Navy Departments, for clothing, subsistence, forage, fuel, quarters, or transportation, which, however, shall not exceed the necessities of the current year.

Section 3679, Revised Statutes, as amended by the act of February 27, 1906, 34 Stat. 49, provides:

> No Executive Department or other Government establishment of the United States shall expend, in any one fiscal year, any sum in excess of appropriations made by Congress for that fiscal year, or involve the Government in any contract or other obligation for the future payment of money in excess of such appropriations unless such contract or obligation is authorized by law. * * * Any person violating any provision of this section shall be summarily removed from office and may also be punished by a fine of not less than one hundred dollars or by imprisonment for not less than one month.

It is understood from the matters submitted that the transaction involving the 180 acres of land was closed in so far as N. F. Wallace and Omega Wallace, his wife, were concerned when their deed of May 30, 1923, was executed. If that be a fact, the appropriation obligated by the purchase was the one current on the date the deed was executed, to wit, the appropriation for "Lands and improvements for Choctaws in Mississippi, 1923," 42 Stat. 570. However, the appropriation for "Lands and improvements for Choctaws in Mississippi, 1923," could not be obligated in excess of the amount thereof, and I know of no law applicable to the Interior Department authorizing contracts to be made for the future payment of money in excess of available appropriations.

In 3 Comp. Gen. 973, which is equally applicable here, it was said, with reference to the provisions of sections 3679 and 3732, Revised Statutes, that—

> A contract entered into during the fiscal year 1924 calling for expenditure of $14,337 would be in direct contravention of these provisions of law as being a contract in excess of any available fiscal year appropriation. Such a contract would not be authorized under the appropriation for the fiscal year 1924 because said appropriation is inadequate. * * * There is no authority for the execution of one contract, as suggested, obligating parts of appropriations for two different fiscal years for the construction costs of one building at an Indian school. * * *

Answering specifically the question submitted as to the 180-acre tract you are advised that the consideration of $5,300 named in the deed of May 30, 1923, is not authorized to be paid partly from the 1923 and partly from the 1924 appropriations for "Lands and improvements for Choctaws in Mississippi."

(A-5423)

CLASSIFICATION OF CIVILIAN EMPLOYEES—DISTRICT OF COLUMBIA—BASIS FOR COMPUTING SALARY PAYMENTS

The salary payments of former per diem employees of the District of Columbia who have been allocated by the Personnel Classification Board, under authority of the Classification Act of 1923, to positions carrying per annum rates of salary, may not be converted into semimonthly per diem payments

on the basis of 313 days per year, but the computation of the semimonthly payments of such employees is to be made as for other per annum employees in accordance with the provisions of the act of April 28, 1904, 33 Stat. 513.

Decision by Comptroller General McCarl, October 13, 1924:

In connection with the audit of pay rolls for the period July 1 to 15, 1924, in the accounts of J. R. Lusby, disbursing officer for the District of Columbia, there is for consideration the correctness of the method adopted by the disbursing officer for computing semimonthly payments of salaries of employees who were paid on the per diem basis prior to July 1, 1924, but who have been allocated by the Personnel Classification Board, under authority of the Classification Act of 1923, to positions carrying per annum rates of salary payments.

The method adopted by the disbursing officer is in accordance with an order issued by the Board of Commissioners of the District of Columbia dated July 25, 1924, made applicable to so-called per diem employees holding office by virtue of Commissioners' appointments. This order directed payments semimonthly on the first and sixteenth of each month, based on 313 days per year, limited by the annual rates fixed for the positions by the Personnel Classification Board. The rule for computation was stated as follows:

Multiply the annual compensation by the number of days of service and fractions thereof, if any, exclusive of Sundays, and then divide such amount by 313, which will give the compensation, excluding the retirement deduction, if any, for the period covered by the pay rolls. From this, the retirement deduction, if any, is to be made under the provisions of the Retirement Act of May 22, 1920, and the remainder will be the net amount due the employee.

Pay rolls for per diem employees shall contain a statement as follows:

"Classification salaries, per diem employees, 313 day men."

This is practically the procedure proposed by the Secretary of the Treasury and submitted to this office for consideration as the basis for salary payments for former per diem employees of the Bureau of Engraving and Printing, but in decision of June 16, 1924, 3 Comp. Gen. 964, it was held as follows (quoting from the syllabus):

The classification act of March 4, 1923, 42 Stat. 1488, provides only for per annum and per hour rates of pay and, in the absence of an express provision of law therefor, the Secretary of the Treasury is not authorized to convert the per annum and per hour rates of pay for employees of the Bureau of Engraving and Printing coming within the terms of the act, into per diem rates.

No provision appears in the annual appropriation act for the government of the District of Columbia, dated June 7, 1924, 43 Stat. 539, or in any other statute, authorizing the Commissioners of the District of Columbia to convert the basis of payment for employees of the District of Columbia coming within the terms of the Classification Act of 1923 from per annum rates to per diem rates. Without some statutory provision the rule promulgated by the Commissioners was not authorized. The compensation of employees who

have been allocated to positions carrying a per annum rate of pay must be computed in accordance with the act of April 28, 1904, 33 Stat. 513, as follows:

That the annual compensation of officers, agents, and employees of the United States for services rendered subsequent to June thirtieth, nineteen hundred and four, shall be divided into twelve equal installments, one of which shall be the pay for each calendar month; and in making payments for a fractional part of a month, one-thirtieth of one of such installments, or of a monthly compensation, shall be the rate to be paid for each day. For the purpose of computing such compensation each and every month shall be held to consist of thirty days, without regard to the actual number of days in any month, thus excluding the thirty-first day of any month from the computation, and treating February as if it actually had thirty days. (See 10 Comp. Dec. 772)

Proper adjustments in the pay of employees affected hereby should be made on the first pay roll subsequent to receipt of this decision.

(A–4888)

FOREIGN SERVICE OFFICERS—TRANSIT-TIME PAY

A Foreign Service officer who reached the age of 65 years prior to July 1, 1924, the effective date of the act of May 24, 1924, 43 Stat. 144, which provided for the retirement of Foreign Service officers, and who was not retained on active duty by the President, was automatically retired July 1, 1924, and on and subsequent to that date is only entitled to his retired pay, with no right to transit-time pay under the provisions of section 1740, Revised Statutes, during the time spent in traveling to his home.

Decision by Comptroller General McCarl, October 14, 1924:

There is for consideration of this office the matter of the pay to which Mason Mitchell, consul of class 5, is entitled for the period from July 6 to August 2, 1924, while in transit from Malta to Washington, D. C., the said consul having reached the age of 65 prior to July 1, 1924, and section 17(d) of the act of May 24, 1924, 43 Stat. 144, in "effect on July 1, 1924," providing:

When any Foreign Service officer has reached the age of sixty-five years and rendered at least fifteen years of service, he shall be retired: *Provided,* That the President may in his discretion retain any such officer on active duty for such period not exceeding five years as he may deem for the interest of the United States.

Paragraph 477 of the "Consular Regulations" provides:

Time in transit.—The Secretary of State is authorized to establish, determine, and make public the maximum amount of time actually necessary to make the transit between each consular post and the city of Washington, and vice versa, and from time to time revise his decision in this respect; and the allowance for time actually and necessarily occupied by each consular officer who may be entitled to such allowance shall in no case exceed that for the time thus established and determined, with the addition of the time usually occupied by the shortest and most direct mode of conveyance from Washington to the place of residence in the United States of such officer.—*18 Stat. L. 70, Sec. 4.*

With the exception of cases in which specific orders to the contrary are issued in writing by the Department of State, the transit period within the

meaning of the statute will be construed to be the time actually and necessarily occupied in making direct transit between the officer's place of residence and his post of duty, or vice versa.—*E. O. Sept. 11, 1923.*

Paragraph 492 of the "Consular Regulations" provides that consuls general, consuls, etc., are entitled to compensation at the rate of their respective salaries, as follows:

(1) Beginning not prior to the date of the oath of office, for time occupied in receiving instructions in the United States, or, by special direction of the Department of State, at consulates general or consulates other than those to which they shall have been appointed, not exceeding in all thirty days.—*R. S. Sec. 1740.*

(2) For the time actually and necessarily occupied in transit, by the most direct route, between the places of their residence and their posts, and vice versa. (Paragraph 477.) This applies to transit from the United States, to transit between posts when a transfer takes place, and to transit to the United States at the termination of service, unless the officer dies, or is recalled for malfeasance, or resigns in anticipation of such recall. The time during which a consul may be unavoidably detained at his post while waiting for a conveyance to the United States, or to another post after delivering up the office, may be included in his transit period provided he takes the first available means of transportation. * * *

Section 1740, Revised Statutes, provides:

No ambassador, envoy extraordinary, minister plenipotentiary, minister resident, commissioner, charge d'affaires, secretary of legation, assistant secretary of legation, interpreter to any legation or consulate, or consul-general, consul, or commercial agent, mentioned in Schedules B and C, shall be entitled to compensation for his services, except from the time when he reaches his post and enters upon his official duties to the time when he ceases to hold such office, and for such time as is actually and necessarily occupied in receiving his instructions, not to exceed thirty days, and in making the direct transit between the place of his residence, when appointed, and his post of duty, at the commencement and termination of the period of his official service, for which he shall in all cases be allowed and paid, except as hereinafter mentioned. And no person shall be deemed to hold any such office after his successor is appointed and actually enters upon the duties of his office at his post of duty, nor after his official residence at such post has terminated if not so relieved. But no such allowance or payment shall be made to any consul-general, consul, or commercial agent, not embraced in Schedules B and C, or to any vice-consul, vice-commercial agent, deputy consul, or consular agent, for the time so occupied in receiving instructions, or in such transit as aforesaid; nor shall any such officer as is referred to in this section be allowed compensation for the time so occupied in such transit, at the termination of the period of his official service, if he has resigned or been recalled therefrom for any malfeasance in his office.

It does not appear that Consul Mitchell was retained by proper authority on active duty after June 30, 1924; therefore, he was automatically retired July 1, 1924, the effective date of the retirement act, he having previously reached the age of 65 years. The question is, therefore, whether he is entitled on and after July 1, 1924, to retired pay only, under the act of May 24, 1924, *supra*, or whether he is entitled to transit time pay under section 1740, Revised Statutes, for the period subsequent to July 1, 1924, after automatic retirement, while in transit to his home.

The uniform construction of retirement acts, notably for the Army, the Navy, and the civilian branch of the Government, has been that

upon reaching the prescribed age retirement automatically becomes effective and active duty pay ceases, unless under authority of controlling statutes, the individual is retained on active duty. The same is true here. As the Executive authority did not retain Consul Mitchell on the active list the going into effect of the retirement act operated to discontinue his active duty pay, and to entitle him only to pay based on his retired status. Transit time pay is nothing more than active duty pay continued after a consular officer has vacated his office during sufficient time for him to reach his home. Section 1740, Revised Statutes, was, of course, enacted before any provision was made for retirement with pay and can not give a retired officer any right to his full active duty pay while in a retired status.

Accordingly, it must be held that Consul Mitchell is entitled on and after July 1, 1924, only to his pay as a retired consular officer under the act of May 24, 1924, *supra*, and not to transit time pay for any period.

(A–4932)

PATENTS—ROYALTIES

Where an employee of a steamship company transporting troops of the United States was consulted as to and rendered assistance in evolving distinctive shipping tickets for the segregation of the baggage of troops, which tickets as finally adopted contained more points of dissimilarity than similarity with those devised by him, the United States is not liable for the payment to him either on the basis of services rendered, or for so much of his idea as was finally used, there having been no contract for his services, nor evidence of the fair value of the benefits conferred thereby, and the idea having been in the public domain.

Decision by Comptroller General McCarl, October 14, 1924:

Herluf F. J. Ravn requested August 19, 1924, review of settlement No. 039764, dated August 6, 1924, disallowing his claim for $5,000 alleged to be due for devising a group system under which troop baggage, etc., was moved overseas. The claim was disallowed on the ground that there was no legal obligation on the United States to pay either for the services in evolving the group system of shipping tickets or for the idea which was the basis of such system.

During the early days of the World War and in troop movements overseas, considerable difficulty was experienced by debarkation quartermasters in segregating the baggage and other impedimenta of the various organizations and forwarding same to the proper destination. Complaints of such difficulty were made to embarkation quartermasters at Hoboken, N. J., with the result that they set about devising some scheme to eliminate the difficulty and one which would not disclose to the enemy the composition, origin, and destination of the troops in event such scheme fell into the hands of the enemy through the sinking of the troop ships or otherwise. These

quartermasters consulted with officials of the Cunard Steamship Co. and the International Mercantile Marine Co., both of which companies transported many of the troops. Claimant was superintendent of baggage of the first-named company and his superior officers were approached and gave their consent to the quartermasters consulting with him in the matter. They did consult with him, with the result that he submitted a scheme based on group tags with various colored markings. The quartermaster in charge reports that:

4. The writer has no desire to disparage the assistance rendered by Mr. Ravn in the final adoption of the group tags, for he did take a great deal of interest in it and was willing at any time to give his advice and assistance, based on his many years' experience with the Cunard Company, but the system finally adopted was not the one suggested by Mr. Ravn, but a composite of the many suggestions made by all of those who were called on, adapted by the experience of the three officers above referred to, based on their knowledge of transportation and Army conditions.

5. Mr. Ravn's plan provided for five (5) different designs, these to be increased to twenty-five (25) by the designs being printed in different colors. As finally adopted, twenty-five (25) different designs were used and all of them printed in the same color, and it may be stated, in this connection, that this figure of twenty-five (25) distinct tags was fixed on by the undersigned in the beginning as the probable maximum number of organizations requiring separate tagging that would be placed on any one transport at one time. Many of the other suggestions made by Mr. Ravn were not considered feasible and were not adopted. I attach photostatic copies of the group tags as finally adopted and placed in effect at Hoboken.

Claimant has submitted copies of the original tags devised by him and a comparison of them with the tags finally adopted and used in overseas troop movements is sufficient to disclose that they are by no means identical. In fact, their points of dissimilarity are more numerous than their points of similarity.

The liability of the United States in the matter, if any, must be because of the use of some of the ideas developed by claimant or because of his services in evolving the idea.

There are three ways by which the United States may become liable for private property: (1) When the property is taken without consent of the owner for public use the Constitution imposes liability on the United States to pay just compensation for the property taken; (2) when the property is secured under a contract the United States is liable for the price stipulated if the contract in form and substance has been authorized by law and there is an appropriation adequate to its fulfillment; and (3) when the property is taken under an agreement, not in the form prescribed but where the acquisition has been authorized by law, the United States is liable on a *quantum meruit* or *valebat*.

Here no property was taken or secured under any of these conditions. Section 3744, Revised Statutes. In fact, claimant had not patented the tags (section 4899, Revised Statutes; 4 Comp. Gen. 224), nor had they been deposited for registration as trademarks or for

copyrights. Whatever originality there may have been in the tags finally adopted and whatever part of originality embodied therein may have been secured from claimant, the matter was in the public domain and there is no legal basis whatever for the claimed royalty of $5,000, or any other sum by reason of the use of the shipping tags. See sections 9522 and 9523, Compiled Statutes, 35 Stat. 1077; *White-Smith Music Pub. Co.* v. *Apollo Co.*, 209 U. S. 1; *Holmes* v. *Hurst*, 174 U. S. 82.

There was no contract, either expressed or implied, to pay claimant for his time and there is no evidence before this office for arriving at the fair value of the benefits conferred by his services, nor appropriation, even if a contract to pay therefor could be implied. This view of the matter renders it unnecessary to decide whether so much of claimant's ideas of distinctive shipping tags as was embodied in the tag finally adopted or his assistance in evolving such tickets was not furnished or rendered as a part of the service of the Cunard Steamship Co., for which the United States has fully paid as a part of the cost of transportation of the troops, their baggage and other impedimenta.

Upon review the settlement must be, and is, sustained.

(A–5300)

FOREIGN SERVICE OFFICERS—TRAVELING EXPENSES UPON RETIREMENT

Upon retirement an officer of the Foreign Service is entitled to reimbursement of actual expenses of transportation and subsistence between his last post of duty and his place of residence when appointed. Where the travel is to a place other than the place of residence at the time of entering the service reimbursement for the expenses thereof would be authorized in an amount not exceeding what it would have cost if the travel had been to such place of former residence.

Comptroller General McCarl to the Secretary of State, October 14, 1924:

I have your letter of September 17, 1924, requesting decision whether consular officers upon retirement are entitled to traveling expenses to the place of residence at time of appointment or whether they have the right of election as to their residence in the United States at the time of retirement.

You cite the account of B. S. Rairden, American consul, retired, covering traveling expenses from his former post of duty at Curacao, Dutch West Indies, to Los Angeles, Calif., which he now claims for the first time as his home. His original appointment, as well as his last assignment commission as consul at Curacao, dated August 10, 1920, reads "Bradstreet S. Rairden, of Maine."

Statutory authority for payment of expenses of transportation and subsistence of diplomatic and consular officers does not appear in the Revised Statutes nor in any general provision of law, but is provided as an item in each annual appropriation act for the Diplomatic and Consular Service. For the present fiscal year the act of May 28, 1924, 43 Stat. 209, provides as follows:

To pay the itemized and verified statements of the actual and necessary expenses of transportation and subsistence, under such regulations as the Secretary of State may prescribe, of diplomatic and consular officers and clerks in embassies, legations, and consulates, including officers of the United States Court for China, and their families and effects in going to and returning from their posts, or of such officers and clerks when traveling under orders of the Secretary of State, but not including any expense incurred in connection with leaves of absence, $275,000: *Provided*, That no part of said sum shall be paid for transportation on foreign vessels without a certificate from the Secretary of State that there are no American vessels on which such officers and clerks may be transported.

That portion of the appropriation act which controls the places between which the expenses of transportation and subsistence are payable is "in going to and returning from their posts." This definitely fixes but one terminus, viz, the post of duty. The use of the word "returning" would seem to indicate that the other terminus was the place from which the officer started. Under section 1740, Revised Statutes, and the annual appropriation acts in pursuance thereof transit pay upon termination of the period of official service is expressly provided for to "the place of his residence when appointed." Because this is the only statutory recognition that has ever been given to any residence of a consular officer, and in view of the wording of the annual appropriation acts providing for payment of traveling expenses, I am of opinion that the places between which actual expenses of transportation and subsistence may be paid by the Government in the case of a diplomatic or consular officer entitled to such expenses upon retirement from active service, are the last post of duty and the place of his residence when appointed.

If the actual travel is to a place other than place of residence at time of entering the service reimbursement for expenses thereof would be authorized in an amount not to exceed what it would have cost if the travel had been to place of such former residence.

The question submitted is answered accordingly.

(A–4174)

PAY AND ALLOWANCES—RETIRED NAVAL OFFICERS ON ACTIVE DUTY

An officer of the Navy who was ordered upon being placed on the retired list on a certain date to continue upon active duty, subject to his consent, until the arrival of the vessel to which ordered at a designated port, when he would regard himself detached and proceed to his home, is entitled to active duty pay and allowances from said retirement date until arrival at home.

Decision by Comptroller General McCarl, October 15, 1924:

There is before this office the claim of Lieut. Oscar Borgeson, U. S. Navy, retired, for $93.33 rental allowance paid him for the period, September 2 to 29, 1922, which was checked against his account for the second quarter, 1924, Navy Disbursing Office, New York.

Under date of August 18, 1922, orders were addressed to claimant in part as follows:

1. You will regard yourself detached from duty on board the receiving ship at San Francisco, and from such other duty as may have been assigned you, at such time as will enable you to report on 2 September, 1922, to the commandant of the Twelfth Naval District and the commanding officer of the U. S. S. *Argonne* for duty on board that vessel.
2. Upon being placed on the retired list of officers of the U. S. Navy on 15 September, 1922, you will continue on active duty, subject to your consent until the arrival of the U. S. S. *Argonne* at New York, N. Y.
3. Upon the arrival of the U. S. S. *Argonne* at New York, N. Y., you will regard yourself detached from duty on board that vessel; will proceed to your home and upon arrival regard yourself relieved of all active duty in the Navy.
4. Immediately upon your arrival home you will report your local address in full and the date of your arrival to the Bureau of Navigation. See Article 135, Navy Regulations, 1920.

Indorsements on these orders show reporting on the U. S. S. *Argonne*, September 2, 1922, and arrived home September 30, 1922.

Claimant was ordered to the U. S. S. *Argonne* "for duty on board that vessel." Evidence has been produced that he performed duty thereon from September 2 to 29, 1922. The rental allowance was claimed because of a wife. In accordance with decisions of this office, 33 MS. Comp. Gen. 589, May 17, 1924; 36 *id.* 976, August 26, 1924; 34 *id.* 455, June 11, 1924; 37 *id*, 412, September 11, 1924, refund should be made of $93.33 in question.

By settlement No. 11933–N, dated March 4, 1924, claimant was found to be indebted to the United States in the sum of $68.95, viz, difference between active duty pay received and retired pay for the period September 16 to 29, 1922, $43.75; and subsistence allowance paid for said period, $25.20. In accordance with decisions of this office, 34 MS. Comp. Gen. 456, June 11, 1924, and 37 MS. Comp. Gen. 412, September 11, 1924, claimant was entitled to the active duty pay and subsistence allowance paid him. Settlement No. 11933–N, dated March 4, 1924, is to this extent reversed.

(A-5031)

BURIAL EXPENSES—VETERANS' BUREAU TRAINEES

Under section 3 of the act of March 4, 1923, 42 Stat. 1523, the actual and necessary cost of preparation of the body of a deceased trainee of the Veterans' Bureau for transportation to the place of burial may be allowed, notwithstanding the widow of the deceased trainee had previously been reimbursed for the actual cost of burial expenses of not in excess of $100 after arrival of the body.

Decision by Comptroller General McCarl, October 16, 1924:

Settlement 037630, dated June 6, 1924, disallowed the claim of Stinchfield & Fehrman Co., Valparaiso, Ind., for $100, for services rendered and supplies furnished in preparing for shipment the body of Carl Reichert, a trainee of the United States Veterans' Bureau at Valparaiso, Ind., who died presumably on April 24, 1923, his body not being found until April 26, 1923. Under direction of a medical officer of the Veterans' Bureau, the claimant prepared the body for shipment to relatives in Cincinnati, Ohio. When the body arrived in Cincinnati it was found that, owing to the time that lapsed between death and the finding of the body and the delay in shipment by the express company, the body was in such a state as to require further preparation for burial. The necessary services were performed by undertakers in Cincinnati, who were paid by trainee's widow, and she in turn was reimbursed to the amount of $100 by a disbursing clerk of the Veterans' Bureau, there being no showing that any burial expenses had been incurred prior to the date of those rendered in Cincinnati on the order of the widow. The claim was disallowed on the ground that the widow having been paid the full amount authorized by law for burial expenses, no further payment could be made on that account.

Section 3 of the act of March 4, 1923, 42 Stat., 1523, provides:

* * * Where a veteran of any war dies after discharge or resignation from the service and does not leave sufficient assets to meet the expense of his burial and the transportation of his body, and such expenses are not otherwise provided for, the United States Veterans' Bureau shall pay the following sums: For a flag to drape the casket, and after burial to be given to the next of kin of the deceased, a sum not exceeding $5; also for burial expenses, a sum not exceeding $100, to such person or persons as may be fixed by regulations: *Provided*, That subject to regulations, where death occurs while such person is receiving governmental medical, surgical or hospital treatment or vocational training, the United States Veterans' Bureau shall pay, in addition to burial expenses, the actual and necessary cost of the transportation of the body of such person (including preparation of the body) to the place of burial within the continental limits of the United States.

The regulation applicable is section 8103, as set forth in supplement No. 3 of the Regulations of the United States Veterans' Bureau as follows:

Where a veteran dies under circumstances which render the United States Veterans' Bureau administratively responsible for the disposition of the body, a sum not exceeding $100 will be allowed for actual burial expenses, and in addition not to exceed $5 for furnishing a flag to drape the casket; also the actual and necessary cost of preparing and transporting the body of the deceased to the place of burial within the continental limits of the United States * * *.

The claim is for the actual and necessary cost for preparing the body of the deceased for transportation to the place of burial, and the deceased was receiving vocational training, which brought him within the class for which the statute provides an allowance for

preparing and transporting the body to the place of burial in addition to the expense of burial. Therefore, the claim is proper for allowance. The payment to the widow was for burial expenses incurred after arrival of the body at Cincinnati and was within the statutory limitations with reference to such payments.

Upon review $100 is certified due claimant.

(A-5424)

PURCHASES—PERIODICALS—NEWSPAPERS

The New York Journal of Commerce and Commercial Bulletin, being a daily publication which on its title-page defines itself as a "newspaper," and one which though mainly devoted to commercial interests disseminates general information of such class as news along with general news, is a newspaper as distinguished from a periodical, and the expense of a subscription thereto for the Bureau of Foreign and Domestic Commerce, Department of Commerce, is payable from the proper allotment from the contingent expense fund of that department for newspapers of not exceeding $2,500.

Comptroller General McCarl to the Secretary of Commerce, October 16, 1924:

I have your letter dated September 23, 1924, the substance of which is a request to be advised whether or not the New York Journal of Commerce and Commercial Bulletin may be classed as a periodical, and thus permit of charging the cost of a subscription as such, for use of the Bureau of Foreign and Domestic Commerce, to the contingent expense fund of that department providing for the purchase of periodicals, instead of to the limited allotment for newspapers.

You state that the Journal is a technical publication designated for a particular class of people and is not read by the public generally, that it presents summaries of reports by Dun, Bradstreet, Moody, the exchanges, and the most reputable houses in many lines of business, and that it is the department's belief this publication may properly be classed as a periodical rather than a newspaper, citing 16 Comp. Dec. 25 and 3 Comp. Gen. 977.

Inspection of the publication in question discloses that it is self-defined on the title page as a "newspaper" and the subscription terms on the editorial page show it to be a daily publication. Furthermore, while the mission of this publication is devoted mainly to commercial interests, yet it accumulates general information of this class, which is then disseminated as news. In addition, there is included news of the day in brief form, as well as paragraphs of other news matter, including editorials upon current topics.

The information contained can not be said to comprise only technical detail of interest only to a special class, because its subject matter is varied and concerns too large and indiscriminate a propor-

tion of the population. After a careful examination of the publication in question, I am constrained to hold that it must be classed as a newspaper, rather than a periodical, and that the expense of a subscription thereto for the purpose indicated is chargeable to the proper allotment from the contingent expense fund of not exceeding $2,500 for newspapers.

(A-5516)

RETIREMENT—FOREIGN SERVICE OFFICERS

The act of May 24, 1924, 43 Stat. 140, having provided that the period of service of Foreign Service officers retired under the provisions of said act shall be computed from the date of original oath of office, there is no authority for using a prior date in such computation even though the officer may have entered upon his duties at a date prior to that of taking the oath of office.

Comptroller General McCarl to the Secretary of State, October 16, 1924:

I have your letter of September 30, 1924, requesting decision as to the date from which length of service should be computed for the purpose of paying retirement annuity to American Consul Bradstreet S. Rairden under the provisions of the act of May 24, 1924, 43 Stat. 140.

It appears that the officer in question was appointed consul August 18, 1892, and entered upon his duties as a consular officer on November 1, 1892, but did not take the oath of office until May 1, 1893.

Paragraph (p) of section 18 of the act of May 24, 1924, 43 Stat. 145, provides:

> For the purposes of this act the period of service shall be computed from the date of original oath of office as secretary in the Diplomatic Service, consul general, consul * * * .

The language of the act is clear and the meaning is unmistakable. The period of service is to be computed from the date of the original oath of office in any of the various positions named. Reference is made in the submission to 4 Comp. Dec. 496, and the case of *United States* v. *Eaton*, 169 U. S. 331. Said decisions involved the construction of a statute which required that an officer should take an oath of office before entering upon the duties thereof, and the decisions held that the statute was directory and if the required oath is taken the officer would be entitled to compensation from the date of entering upon duty.

In the present case the law has fixed a definite date as the starting point for computation of an officer's period of service and there is nothing ambiguous or doubtful in the language used. It is not unreasonable to presume that there were in contemplation when the provision in question was enacted situations similar to the one presented in your letter and that it was to avoid uncertainty as to the beginning

of service in such cases that the law specifically stated that the period of service shall be computed from the date of original oath of office. But be that as it may, the plain terms of the statute leave no room for construction or interpretation. You are advised therefore that the period between November 1, 1892, and May 1, 1893, may not properly be included in determining the length of service of Consul Rairden for the purposes of the act of May 24, 1924.

(A-1422)

PERSONAL SERVICES—ATTORNEYS

As section 189, Revised Statutes, prohibits the employment of attorneys or counsel at the expense of the United States, payment for professional services rendered in furnishing legal opinions as to the validity of titles to lands is not authorized.

A claim for clerical service in searching public records and preparing therefrom abstracts of title to lands in the Raritan Arsenal Reservation may not be allowed where due to inaccuracies the abstracts were practically worthless and it was necessary that the records be reexamined and new abstracts prepared.

The action of the Appraisal Section of the War Claims Board of the War Department in adjudicating a claim for personal services rendered the United States imposes no liability on the United States and is not binding upon the General Accounting Office.

Decision by Comptroller General McCarl, October 17, 1924:

There is before this office for consideration claim of C. W. Weygand for $1,473.78 alleged to be due him for services rendered the War Department in 1918 in searching public records and preparing therefrom abstracts of title to lands included in the Raritan Arsenal Reservation, for preparing and delivering legal opinions on said titles, and for other services of a professional nature.

The facts giving rise to the claim may be summarized as follows:

The Government having requisitioned certain lands for the Raritan Arsenal in New Jersey, the Fidelity Trust Co. of Newark was employed to make abstracts of title to said land. After this company had completed approximately one-half of the work the claimant was employed to complete it, an informal agreement being made with him by Lieut. J. H. M. Andrews, by which he was to be paid the sum of $6,600 for the completion of the work involved. At the time this agreement was made it was contemplated that a formal contract would be executed, and such a contract was prepared and forwarded to the claimant for signature. He declined to sign the contract, and upon the refusal of the Government to execute an alternative contract prepared by him he abandoned the work, which was completed for the Government by other agencies.

Mr. Weygand subsequently filed with the War Department a claim for $3,192.39 for the services performed by him prior to his aban-

donment of the work, which was considered by the Appraisal Section of the War Claims Board acting under the authority conferred by General Orders No. 30, W. D., 1918, as amended by General Orders No. 41, W. D., 1919, and General Orders No. 40, 1920, and the sum of $1,473.78 awarded him as a full and complete settlement of his claim against the United States for professional services rendered in searching public records and preparing therefrom abstract of title to land included in the Raritan Arsenal Reservation, for preparing and delivering legal opinions on said titles, and for any and all other services of a professional nature rendered to the United States in connection with the work above outlined.

The claimant at first refused to accept the amount awarded but upon his decision later to accept it the matter was referred to this office for settlement.

The Appraisal Section of the War Claims Board under the law and General Orders creating it was without authority to consider and adjust claims for personal services and its findings and decision imposed no liability on the United States and are not binding upon this office which under the law is charged with the settlement of claims for or against the United States.

Since the agreement between Lieutenant Andrews and the claimant was not executed in accordance with section 3744, Revised Statutes, the Government, if liable at all, is only liable on a *quantum meruit* for the value of the services received.

Under the provisions of section 189, Revised Statutes, the employment of attorneys or counsel at the expense of the United States is prohibited and no allowance can be made for the preparation of legal opinions or professional services rendered. This leaves only for determination the value of the clerical work in the preparation of the abstracts of title. This value is not the cost to the claimant but their worth to the Government. The evidence on file shows that the abstracts prepared and delivered to the Government were so inaccurate as to be practically worthless and that it was necessary to have the records reexamined and new abstracts prepared. This is sufficient to dispose of the matter, but it may also be stated that against any such claim as the party may assert against the United States, it would be proper for the United States to show the increased cost, loss, and damage to it by claimant's abandonment of the work. Such abandonment made under the circumstances stated is not to the credit of claimant and negatives any legal claim against the United States.

The claim is disallowed.

(A-5009)

NAVY PAY—OFFICERS OF THE STAFF CORPS

The service which a lieutenant of the Staff Corps of the Navy of less than 17 years' service may count for fourth-period pay purposes is confined to active commissioned service, and is therefore exclusive of commissioned service in the Naval Militia or National Naval Volunteers while in an inactive status.

Comptroller General McCarl to Lieut. George M. Snead, United States Navy, October 18, 1924:

There has been received from the Secretary of the Navy your request of July 24, 1924, for decision whether Lieut. B. F. Huske (Ch. C.), United States Navy, is entitled to base pay of the fourth-pay period from June 5, 1924, as a lieutenant of the Staff Corps of the Navy having commissioned service equal to that of a lieutenant commander of the line of the Navy drawing the pay of the fourth period. The provision of the act of June 10, 1922, 42 Stat. 625, upon which the claim depends, is contained in section 1, and so far as here material provides that:

> The pay of the fourth period shall be paid * * * lieutenant commanders of the Navy * * * who have completed fourteen years' service, * * * lieutenant of the Navy * * * who have completed seventeen years' service * * * and to lieutenants of the Staff Corps of the Navy, * * * whose total commissioned service equals that of lieutenant commanders of the line of the Navy drawing the pay of this period.

The lieutenant commander of the line whose commissioned service is used for comparison by Lieutenant Huske is Lieut. Commander C. B. C. Carey, U. S. Navy, whose continuous service in the Navy dates from his appointment as midshipman May 9, 1910, commissioned an ensign June 6, 1914, and commissioned a lieutenant commander from June 5, 1924, having, therefore, over 14 years of service authorized to be counted under eleventh paragraph of section 1 of the act of June 10, 1922, and exactly 10 years' commissioned service on June 5, 1924, when promoted to the grade of lieutenant commander. Lieutenant Huske's services are reported by the Bureau of Navigation as follows:

Chaplain, Naval Militia, North Carolina.
April 30, 1913, to January 19, 1917. Inactive.
Chaplain, National Naval Volunteers.
January 20, 1917, to April 6, 1917. Inactive.
Chaplain, National Naval Volunteers.
April 7, 1917, to June 30, 1918. Active service.
Chaplain, Naval Reserve Force.
July 1, 1918, to July 20, 1921. Active service.
Chaplain with rank of lieutenant, U. S. Navy.
July 21, 1921, to the date of submission of claim.

As the total active commissioned service of Lieutenant Huske from April 7, 1917, to June 5, 1924, is but 6 years, 1 month, 29 days, the question presented for decision is whether commissioned service

in the Naval Militia and National Naval Volunteers while in an inactive status, that is, not in Federal service, is authorized to be counted for the purposes of fourth period pay.

The act of June 10, 1922, was an act to provide pay for the regular establishments therein enumerated. Section 1 fixes the pay of officers of the Regular Navy, Regular Army, etc. By the eleventh paragraph, it is provided that for officers appointed on and after July 1, 1922, no service shall be counted except active commissioned service under a Federal appointment and commissioned service in the National Guard when called out by order of the President. For officers in the service on June 30, 1922, service theretofore counted for longevity increase of pay was authorized to be included and also as to other service, 75 per centum "of all other periods of time during which they have held commissions as officers * * * the Naval Militia, or the National Naval Volunteers since June 3, 1916," was directed to be included in the computation. This latter service was not theretofore authorized to be counted for pay purposes in the regular establishments, and but limited credit, that is 75 per cent, is now authorized to be included.

The provision contained in the paragraph fixing the conditions of pay of the fourth period here considered is limited to "commissioned" service and is not affected by any of the provisions contained in the eleventh paragraph of section 1, which describes the service generally to be counted for determining the pay period of an officer and his longevity pay. The provisions for fourth-period pay relate to officers of the regular establishment and the commissioned service therein contemplated is active commissioned service and none other.

It is only under recent statutes, beginning with the act of June 3, 1916, 39 Stat. 166, that other than service actually rendered to the Federal Government was authorized to be counted for any purpose and such statutes have specifically provided for counting periods when no service was actually rendered but when the officer or man was available for or subject to be required to render services. The eleventh paragraph of section 1 of the act of June 10, 1922, is an example of such a provision.

The laws have specifically provided for this exceptional credit and when the law makes no such provision, the enacted provisions must be understood as contemplating actual service rendered the Federal Government. You are not authorized to credit Lieutenant Huske with any portion of his Naval Militia or National Naval Volunteer service while on an inactive status. See in this connection decision of September 3, 1924, 4 Comp. Gen. 249, case of Lieutenant Austin.

(A-3403)

SEAMEN, DESTITUTE AMERICAN—TRANSPORTATION

The sworn statement by an officer of a shipping company that a destitute American seaman went ashore from a ship of said company in a foreign country and failed to return before the ship sailed, unsupported by evidence that the seaman was reported as a deserter to an American consular officer within 48 hours and a certificate of desertion by the consular officer in accordance with Consular Regulations, is not sufficient to establish desertion or that the company has been otherwise relieved of liability to return the seaman to the United States.

Decision by Comptroller General McCarl, October 20, 1924:

The Standard Transportation Co. has requested review of settlement 01559, dated May 12, 1924, disallowing its claim for $138.35 for transportation of destitute seaman, A. J. Pallisard, from Hankow, China, to San Francisco, Calif., by the steamship *China Arrow* during the period October 20 to November 15, 1923.

The claim was disallowed for the reason that the seaman last served on the steamship *Yankee Arrow*, a vessel belonging to the same shipping company, claimant herein, which owned the vessel on which the transportation was furnished, and no evidence had been submitted showing affirmatively that claimant company had been relieved from all duty, responsibility, and liability with respect to the seaman so transported. 4 Comp. Gen. 118; decision of October 7, 1924, A-3621.

A sworn statement by an officer of claimant company has since been furnished showing that the seaman went ashore October 14, 1923, from the steamship *Yankee Arrow* and failed to return before sailing October 16, 1923. An entry was made in the log book of the vessel certifying to the desertion of the seaman, but the United States consul was not notified of the desertion by the captain of the vessel at the time, stated as due to the lack of opportunity prior to sailing time. Later, apparently, the consul was notified of the alleged desertion by an officer of the shipping company.

It has been held that desertion of a seaman actually proven relieves the shipping company of liability to return him to the United States if found destitute abroad. 3 Comp. Gen. 936.

Desertion is defined under section 294, Consular Regulations, as follows:

> Desertion is defined to be the quitting of the ship and her service by one of the ship's company without leave and against the obligation of the party and with an intent not again to return to the ship's duty. Neglect or refusal to rejoin the ship after an absence with leave when ordered to return is desertion; but it is not desertion when a mariner, through excess of indulgence, overstays his time of leave, and when he has not refused or neglected to comply with an order to return, nor when the seaman leaves the ship on account of cruel or oppressive treatment, or for want of sufficient provisions in port when they can be procured by the master, or when the voyage is altered in the articles without consent.—*18 Fed. Rep., 605; 39 Id., 624.* Where a seaman signs articles for a voyage, agreeing to go to the port where the vessel is lying to join her, and fails to do so, he is a deserter.—*53 Fed. Rep., 551.*

Sections 300 and 301 of the Consular Regulations provide as follows:

300. Desertions to be noted on crew list.—It is the duty of a master, when a desertion occurs, to note the fact on the list of the crew (Form No. 33), and to have the desertion officially authenticated at the port or place of the consular office where it takes place, if it is possible; if not, at the consular office at the port first visited by the vessel after the desertion, if it shall have occurred in a foreign country. If the vessel is at a port where there is a consular officer, it is the duty of the master to report to the latter the desertion of a seaman within 48 hours thereafter. This provision is to be construed in connection with the provision that the bond given by the master for the return of the seaman shall not be forfeited on account of his absconding, of which satisfactory proof is to be exhibited to the collector. (Paragraph 205.)

301. Desertions connived at by masters.—Consular officers are enjoined to take every proper measure to discourage and defeat any proceedings on the part of masters under which seamen are permitted or forced to desert, and subsequently come upon the consulate for relief. And with this view they are forbidden to certify the desertion list of any master until it is satisfactorily shown that the desertion was not consented to or abetted by the master or his officers, or was not made justifiable by the conduct on their part toward the seamen. No seaman can be said to abscond who openly goes off with the consent of the master or under circumstances showing the desire or intention to get rid of him. (*24 C. Cls. R., 160.*) When, therefore, the consular officer is satisfied that the seaman did not abscond or that he could have been reclaimed, if the master chose to make an effort for that purpose, he is instructed to decline making any certificate which would facilitate the master in evading the obligation to return his crew.—*E. O. Oct. 21, 1915; E. O. Sept. 5, 1922.*

Accordingly, the two primary requirements to prove desertion are lacking in this case, viz, notice to the consular officer within 48 hours thereafter, and a certificate of the consular officer made at the time showing the actual desertion of the seaman as defined by the Consular Regulations. It must be held, therefore, that the evidence adduced does not sufficiently establish the desertion, or that the shipping company has been otherwise relieved of liability to return the seaman to the United States.

Accordingly, upon review the settlement is sustained.

(A–5305)

RENTAL AND SUBSISTENCE ALLOWANCE—DEPENDENT MOTHER OF ARMY OFFICER

The dependency of a wife is primarily a liability of her husband, and where an affidavit by the mother of an officer of the Army shows that her husband was unemployed but fails to show the cause of his unemployment or his financial condition or income or ability to earn an income during the period of her alleged dependency, it has not been established that she for said period was in fact dependent upon her officer son for her chief support for the purpose of the payment to the officer of rental and subsistence allowances by reason of a dependent mother.

Decision by Comptroller General McCarl, October 20, 1924:

There is for consideration a request for review of settlement No. M–7359–W, dated June 5, 1924, accounts of Capt. Frank J. Keelty, Finance Department, wherein was disallowed credit for $37.20 sub-

sistence allowances and $40 rental allowances paid to First Lieut. James C. White by reason of a dependent mother for the period July 1 to August 31, 1922.

Credit was disallowed on the ground that the mother was not in fact dependent upon her officer son for her chief support within the meaning of the act of June 10, 1922, 42 Stat. 628.

From affidavits executed by the mother on file in this office it appears that during the period in question she was 47 years old and in good health; that her husband was approximately 51 years old; that she had an adult son, Edward H. White, who at that time was a cadet in the United States Military Academy (he is now a second lieutenant in the Air Service of the Army); that she had a minor son in school; that her mother was living with and was dependent upon her; that she owned no property except about $1,500 worth of personal property and $200 in bank; that her husband was unemployed, and that during the six months prior to the affidavit (November 10, 1922, to May 10, 1923) his income was less than $200; that she was housekeeping in a flat and received $40 a month from the subletting of rooms; that her officer son contributed $100 a month to her support; and that her living expenses were $120 a month.

The mother's affidavits fail to show whether the husband's unemployment was due to his health, inability to find work, or to a condition of financial independence. They also fail to show his financial condition.

The mother swears that the contributions of $100 a month "were necessary for my maintenance" and "applied solely to my support" and that her average monthly living expenses were $120. The officer's son stated in a letter dated August 5, 1924, to the Finance Officer, Sixth Corps Area, as follows:

> * * * My mother's income of $40.00 per month was derived by subletting the best rooms of her apartment for which she paid a monthly rental of seventy-five dollars. Out of the one hundred dollars per month which I contributed to her support, it was necessary for her to meet the balance of her rent (thirty-five dollars), provide for a helpless husband, an aged mother, a thirteen-year-old son in school, and herself.

It therefore appears that the $120 which the mother swears to be her average monthly living expenses was in fact the living expenses of the entire household of four persons, and that the contributions which the mother swears were "applied solely to my support" and "were necessary for my maintenance" were in fact used for the support and maintenance of the four persons.

In view of the absence of any showing in the affidavits as to the property and assets of the husband and as to his income and ability to earn an income during the period in question it can not be held that the mother was in fact dependent upon her officer son for her

chief support; the legal liability of her husband for the support of his wife can not be overcome by mere suggestion.

Accordingly the disallowance is sustained.

(A-5519)

TUITION OF ARMY OFFICERS

Under section 127a of the National Defense Act, as amended by the act of June 4, 1920, 41 Stat. 786, the payment is authorized of tuition of Army officers taking correspondence courses at colleges or universities while remaining at their respective posts of duty, provided the total number of officers detailed as students, etc., does not exceed the statutory limitation, and that no other expense than the cost of tuition shall be chargeable to public funds.

Comptroller General McCarl to the Secretary of War, October 21, 1924:

I have your letter of September 29, 1924, requesting to be advised as to whether the funds applicable for the payment of tuition of an officer at a school under the National Defense Act as amended, may also be applied to the payment for a correspondence course at a college or university, the officer, however, remaining on duty at his post.

Section 127a of the National Defense Act, as amended by the act of June 4, 1920, 41 Stat. 786, provides:

> The Secretary of War is hereby authorized, in his discretion, to detail not to exceed 2 per centum of the commissioned officers of the Regular Army in any fiscal year as students at such technical, professional, and other educational institutions, or as students, observers, or investigators at such industrial plants, hospitals and other places, as shall be best suited to enable such officers to acquire a knowledge of or experience in the specialties in which it is deemed necessary that such officers perfect themselves. The number of officers so detailed shall, as far as practicable, be distributed proportionately among the various branches: *Provided*, That no expense shall be incurred by the United States in addition to the pay and allowances of the officers so detailed, except for the cost of tuition at such technical, professional, and other educational institutions.

While the wording of the law seems to contemplate the physical presence of the officer at the college or university, as well as at industrial plants, hospitals, etc., the purpose is to educate the officer for the performance of his duties by special instruction. The law requires no such strict construction that its principal purpose is sacrificed if the physical presence of the officer at the college or university is impracticable.

The authority of the law is to detail the officers to institutions of learning, etc., without other expense to the United States than the cost of tuition at such place—meaning substantially the officers shall not receive living expenses at such places in addition to their officers' allowances. If the same tuition in question can be accomplished by a course in correspondence form, instead of class tuition, I am constrained to think it is not to be objected to, the total number of officers so detailed being kept within the limits fixed by law.

(A-5282)

DEPARTMENTS, EXECUTIVE, SERVICES BETWEEN—PHOTOSTAT COPIES OF RECORDS

Expenses incurred by the Treasury Department in making photostat copies of certain records of the Veterans' Bureau, made necessary in connection with the investigation by the Secret Service Division of alleged forged indorsements on checks issued by the Veterans' Bureau, are not chargeable to the Veterans' Bureau appropriations.

The interests of the United States are such as not to warrant the indiscriminate issuance of photostat copies of canceled checks, and such copies may be furnished only on a satisfactory showing of the purpose and necessity thereof.

Comptroller General McCarl to the Director United States Veterans' Bureau, October 22, 1924:

I have your letter of September 18, 1924, reading:

There are transmitted herewith for your consideration, in connection with making direct settlement through the General Accounting Office, five vouchers ($4.74, $3.46, $3.24, $11.99, and $42.89) presented to this bureau by the chief clerk of the Treasury Department. Correspondence, attached, had with the chief clerk of the Treasury Department developed the fact that the vouchers cover supplies used for making photostatic copies, under orders from your office, of checks issued by this bureau.

The vouchers have not been certified in the Veterans' Bureau for the reason that this bureau has no knowledge of the actual services rendered by the Treasury Department. However, no objection will be interposed to your utilizing an appropriation under my administrative control for the settlement of these accounts.

I would appreciate your giving consideration at this time to this whole question of photostatic copies of cancelled checks to the end that copies of checks issued by disbursing agents of the Veterans' Bureau may be furnished in the regular course of business upon requisitions placed by officials of this bureau. Under the present arrangement bureau beneficiaries must be referred to your office for information as to endorsements appearing on checks issued in their favor. When the bureau has attempted to refer such inquiries to you, the disabled ex-service men have repeatedly expressed the opinion that the action of the bureau was merely an attempt to evade responsibility. This has placed the bureau in rather an embarrassing position, besides furnishing a cause for resentment and irritation on the part of the sick and disabled with whom the bureau is constantly dealing.

The vouchers submitted for direct settlement are stated as for "Sensitized paper used in making photostatic copies during the month of" February and January, 1924; December, November and October, 1923. It is not shown what papers or documents were photostated nor for what purpose nor at whose request; but it might be inferred from correspondence accompanying your submission that the papers photostated were checks, affidavits, etc., in the possession of the Treasury Department, and that the copies were considered necessary in connection with investigations by the Secret Service Division of the Treasury of alleged forged indorsements and in making reclamations from banks paying and collecting on improper indorsements. The statement in the submission that the copies were made under orders from this office does not appear to be correct.

The bills for the paper used in making the copies are understood to have been rendered against the Veterans' Bureau merely because the checks necessitating the investigations and reclamations were

issued by that bureau. As the need for the copies appears to have arisen in connection with the regular activities of the Secret Service Division and the Treasurer's office, it would appear that the expense of making the copies is an expense of the Treasury Department and not of the Veterans' Bureau. The fact that the copying may have been necessitated by the improper issuing and addressing of checks by the Veterans' Bureau does not warrant the charging of Veterans' Bureau appropriations with the expense thereof.

On the facts submitted, the request for a transfer settlement crediting the appropriation indicated by the chief clerk of the Treasury Department and charging an appropriation of the Veterans' Bureau must be and is denied.

With reference to the third paragraph of your letter, *supra*, paragraph 3 of "General Regulations No. 24, 1923," issued by this office under date of April 11, 1923, provides:

> Copies of records, accounts, vouchers, documents, or other papers on file in the General Accounting Office will be furnished only upon the submission of a written statement, addressed to the Comptroller General, satisfactorily showing the purpose and necessity thereof; and where such copies are desired by or on behalf of parties to a suit, whether in a court of the United States or any other court, such copies shall be furnished to the court only upon a rule on the Comptroller General requesting such copies. Exceptions hereto may be made only on the written order of the Comptroller General.

Your difficulties are appreciated but experience has demonstrated that the public interest requires unusual care in the matter of furnishing copies of paid checks, and in order to minimize the improper or unnecessary issuance of such copies I feel I must adhere to the requirements of General Regulations No. 24, 1923, issued by this office April 11, 1923.

(A-5561)

CLASSIFICATION OF CIVILIAN EMPLOYEES—INITIAL SALARY RATE UNDER REALLOCATION MADE SUBSEQUENT TO JULY 1, 1924

The initial rate of compensation of employees under reallocation of a position held June 30, 1924, made subsequent to July 1, 1924, must be based on the rate received on June 30, 1924, in accordance with the rules of section 6 of the Classification Act of March 4, 1923, 42 Stat. 1490, and may be paid from the beginning of the pay period current upon the date of receipt by the administrative office of the reallocation, although the result will be a further exceeding of the already excessive salary average in the grade to which the position has been reallocated.

Comptroller General McCarl to the Chairman, Federal Trade Commission, October 22, 1924:

I am in receipt of your letter of October 2, 1924, requesting decision of the following questions:

1. The commission having approved the appeal of Mr. J. W. Karsner, chief, Docket Section of the Federal Trade Commission, for a correction of the orig-

inally erroneous allocation of his position to Grade CAF 7, at $2,900, by its allocation to Grade CAF 8, at $2,900, can the Personnel Classification Board grant this relief?

2. If the job is allocated to Grade CAF 8 at the present time, being a correction of an originally erroneous allocation, does this not effect a proper original allocation, and do not the mandatory provisions of paragraph 4, section 6, of the Classification Act of 1923, require that such allocation should be at the salary of $2,900, and absolutely prohibit a reduction?

You state that Mr. Karsner was receiving on June 30, 1924, compensation at the rate of $2,880 per annum, on the basis of which the initial rate of compensation of his position July 1, 1924, under an allocation to grade 7 of the Clerical, Administrative, and Fiscal Service, in accordance with the rules of section 6 of the Classification Act of 1923, was $2,900 per annum. It appears that the salary average of the total number of persons now in grade 8 of the Clerical, Administrative, and Fiscal Service in the Federal Trade Commission exceeds the rate average for that grade. You state that because of this condition in the average of grade 8, the employee was advised by the Personnel Classification Board that his position may not be reallocated to that grade, from grade 7, without a loss of $200 in the rate of compensation. It is stated that this ruling is based on the decision of this office dated July 19, 1924, 4 Comp. Gen. 79, requiring changes in compensation in a grade in which the salary average is excessive, to be made at the minimum salary rate of the grade, and decision of September 8, 1924, 4 Comp. Gen. 280, fixing an effective date for payment of compensation under allocations or reallocations made subsequent to July 1, 1924. If the employee was so advised by the Personnel Classification Board, it is apparent that there has been a misunderstanding as to the meaning and intent of the cited decisions of this office and the application thereof to the restrictions contained in the "average" provision appearing in the appropriation acts for 1925.

The second exception to the "average" provision appearing in the act of June 7, 1924, Public 214, appropriating for the independent offices of the Government, including the Federal Trade Commission, is as follows:

* * * *Provided*, That this restriction shall not apply * * * (2) to require the reduction in salary of any person whose compensation is fixed as of July 1, 1924, in accordance with the rules of section 6 of such act, * * *.

Under the rules of section 6 of the Classification Act, the initial compensation of employees holding positions allocated under the act was based on the rate received June 30, 1924. This is the only basis on which the initial rate of compensation of an employee who held a position June 30, 1924, and continued to hold the position subsequent to July 1, 1924, may lawfully be fixed whether under an original allocation or a reallocation. Accordingly, neither the de-

cision of July 19, 1924, nor any other decision of this office considered or decided any question involving the effect of a change in the initial salary rate of an employee by reason of the reallocation of his position subsequent to July 1, 1924, on the average of the grade to which the position was reallocated. The decision of July 19, 1924, *supra*, and subsequent decisions based thereon, relate to changes in compensation of employees made by the administrative office. The decision of September 8, 1924, cited by you, in so far as here applicable held as follows:

* * * Hereafter allocations may be given effect to only for the pay period current upon the date of receipt by the administrative office of the allocation, whether it be an original allocation, or an allocation resulting from an appeal.

This referred to the effective date of any increase or decrease in the salary of an employee resulting from an allocation or reallocation. It was the adoption of a practical accounting procedure due to the possibility of confusion arising from so many changes in allocation of positions based on large numbers of appeals by employees, and did not and could not alter the basis for fixing the initial salary rate under a reallocation of a position held June 30, 1924, subsequent to July 1, 1924, nor affect in any way the relation of such initial compensation rate to the "average" provision appearing in the appropriation act.

Initial rates of compensation under such reallocations made subsequent to July 1, 1924, in accordance with section 6 of the Classification Act, are as much within the quoted exception to the "average" provision as were those originally made effective July 1, 1924. Accordingly, the initial rate of compensation of employees under reallocation of positions held June 30, 1924, and continued to be held subsequent to July 1, 1924, is based on the rate received June 30, 1924, and may be paid from the beginning of the pay period current upon the date of receipt by the administrative office of the reallocation. The matter may be summarized by saying that where appointment, transfer, reinstatement, promotion, or demotion of an employee is made to a grade in which there is an excess of the average, the employee can only go into that grade at the minimum salary of such grade. But where classification of the position is being made as on appeal from that which has been made the classification thereupon is to be understood as now correctly determining the grade and the employee goes into that grade on the same basis with respect to excess of the average as the other employees who were placed therein by classification and not by appointment, transfer, reinstatement, promotion, or demotion.

If and when the Personnel Classification Board reallocates the position held by Mr. Karsner from grade 7 to grade 8 of the Clerical,

Administrative, and Fiscal Service, he may be paid initially at the rate of $2,900 per annum, effective with the pay period current as stated in decision of September 8, 1924.

(A-2485)

POSTAL FINES AND DEDUCTIONS UNDER SECTION 3962, REVISED STATUTES—APPLICATION TO OF JOINT PROCEDURE AUTHORIZED BY SECTION 409, REVISED STATUTES, AS AMENDED

The fines or deductions imposed or made by the Postmaster General pursuant to section 3962, Revised Statutes, are subject to the general procedure authorized by section 409, Revised Statutes, as amended by section 304 of the Budget and Accounting Act of June 10, 1921, 42 Stat. 24, and therefore may or may not be remitted, etc., through joint action by the Postmaster General and the Comptroller General; when so remitted, etc., such action is effective for accounting purposes, and in the absence of such joint procedure fines and deductions imposed or made within the scope of and as contemplated by section 3962, Revised Statutes, remain unchanged for accounting purposes.

Comptroller General McCarl to the Postmaster General, October 23, 1924:

I have your letter of July 29, 1924, requesting a reconsideration of a decision of July 16, 1924, which held that when a deduction has been made from the compensation of a Star Route Mail contractor in accordance with orders of the Postmaster General, the terms of the contract, and existing laws, and it has been certified to this office as a charge against the contractor and entered as such by this office, the charge may not be removed without the concurrence of this office.

For preceding communications relative to matter see letters of your office of April 6, 1923, and June 23, 1924, and decisions of this office of December 20, 1922, 16 MS. Comp. Gen. 928, and January 30, 1923, 1 D. M. MS. Comp. Gen. 501; 2 Comp. Gen. 727; 3 *id.* 474; decision of June 9, 1924, 34 MS. Comp. Gen. 301; and letter of this office of June 19, 1924.

The submission outlines conditions under which it is stated the decision of July 16, 1924, would handicap and retard operations, and urges reconsideration of that portion of the decision which applies to the remission of—

* * * fines imposed entirely as a disciplinary measure and not for violation of law, and deductions made for minor failures to perform full service under contract for the transportation of the mails, when such fines or deductions are imposed under the provisions of R. S. 3962.

In explanation of the request it is stated—

As we understand it, there is a sharp distinction between fines, penalties, and forfeitures as referred to in R. S. 409 and fines or deductions imposed at the discretion of the Postmaster General under R. S. 3962.

The fines we have in mind are really deductions being imposed for minor failures to perform service according to contract, such as nonobservance of official schedule, permitting mail to become wet, etc., where it is not practicable to make a deduction on a pro rata basis.

This is brought out in the decision of the Attorney General of December 31, 1885, as cited in our letter of June 23, 1924, in which he states that these deductions are not in the technical sense a penalty or forfeiture, but it is the withholding of money not earned.

There seems to be no question as to the procedure under R. S. 409 in case of a failing bidder or failing contractor where the proposal bond is liable to forfeiture or damages are to be collected, as it is not understood nor contended that the Postmaster General has any discretion as to the collection of the penalty bond or the damages except upon recommendation from your office. On the other hand, it seems unreasonable to suppose that under the law conferring upon the Postmaster General the right to impose fines for minor violations of contracts or to make deductions for minor failures to perform complete service at his discretion, he does not have the right to modify or remit such fine or deduction at his discretion and without the formality of procuring a recommendation from your office as contemplated in section 409, Revised Statutes. * * *

The question appears to be whether certain fines and deductions imposed or made by the Postmaster General, under authority of section 3962, Revised Statutes, come within the purview of section 409, Revised Statutes, for remission, modification, compromise, or removal purposes.

Section 409, Revised Statutes, provides:

In all cases of fine, penalty, forfeiture, or disability, or alleged liability for any sum of money by way of damages, or otherwise, under any provision of law in relation to the officers, employees, operations, or business of the postal service, the Postmaster-General may prescribe such general rules and modes of proceeding as shall appear to be expedient, for the government of the Sixth Auditor, in ascertaining the fact in each case in which the Auditor shall certify to him that the interests of the Department probably require the exercise of his power over fines, penalties, forfeitures, and liabilities; and upon the fact being ascertained, the Auditor may, with the written consent of the Postmaster-General, mitigate or remit such fine, penalty, or forfeiture, remove such disability, or compromise, release, or discharge such claims for such sum of money and damages, and on such terms as the Auditor shall deem just and expedient.

It has been held that since the enactment of the Budget and Accounting Act of June 10, 1921, the terms "Sixth Auditor" and "Auditor" appearing in that portion of section 409, above the semicolon, should be read Comptroller, Bureau of Accounts, Post Office Department, and that the word "Auditor" appearing below the semicolon should be read Comptroller General of the United States, the act of June 10, 1921, having transferred the administrative duties of the former Auditor for the Post Office Department (Sixth Auditor) to the Comptroller, Bureau of Accounts, Post Office Department, and the remaining duties of said Auditor to the Comptroller General. Section 304, Budget and Accounting Act of June 10, 1921, 42 Stat. 24; decision January 30, 1923; 1 MS. Comp. Gen. 501; 2 Comp. Gen. 727; 3 *id.* 474.

The scope of section 409, Revised Statutes, extends to—

* * * all cases of fine, penalty, forfeiture, or disability, or alleged liability for any sum of money by way of damages or otherwise, under any provision of law in relation to the officers, employees, operations, or business of the postal service * * *.

Section 3962, Revised Statutes, provides:

> The Postmaster-General may make deductions from the pay of contractors for failures to perform service according to contract, and impose fines upon them for other delinquencies. He may deduct the price of the trip in all cases where the trip is not performed; and not exceeding three times the price if the failure be occasioned by the fault of the contractor or carrier.

By decisions of courts rendered since the opinion of the Attorney General of December 21, 1885, 18 Op. Atty. Gen. 313, 315, referred to in the submission, it has been held that fines and deductions authorized to be imposed or made by the Postmaster General by authority of section 3962, Revised Statutes, are a liquidation of recoverable damages under the contract and not a penalty. See *Parker* v. *United States*, 26 Ct. Cls. 344, 357, 358, 359; *United States* v. *Atlantic Coast Line R. R. Co.*, 206 Fed. Rep. 190, 195–8; *id.*, 215 Fed. Rep. 56; *Union Pacific R. R. Co.* v. *United States*, 219 Fed. Rep. 427; *United States* v. *United Fruit Co.*, 292 Fed. Rep. 308.

The scope of the authority in section 409 for joint action under it by the Postmaster General and Comptroller General extends to all cases within the scope of said statute, be they fine, penalty, forfeiture, disability, or alleged liability for any sum of money by way of damages or otherwise, the only differentiation being as to the form of its exercise in the various classes.

It is not seen how this office may give effect to said statutes and hold otherwise than that the provisions of section 409, covering as they do "all cases of fine, penalty, forfeiture, or disability, or alleged liability for any sum of money by way of damages or otherwise," "under any provision of law," and in relation to "operations or business of the postal service," apply to the "fines" and "deductions" authorized to be imposed or made by section 3962, Revised Statutes.

Accordingly, the decision of July 16, 1924, to the effect that fines or deductions imposed or made as authorized by section 3962, Revised Statutes, are within the scope and operation of the concluding part of section 409, Revised Statutes, must be adhered to. This view is not in conflict with the legal discretion that may be exercised by the Postmaster General in the imposing of fines or making of deductions under section 3962, Revised Statutes. The action of the Postmaster General in imposing a fine or making a deduction within the scope of section 3962 will be accepted generally as final for accounting purposes.

Section 3962 is a statute vesting discretion in the Postmaster General to impose fines and make deductions from amounts otherwise due mail contractors under their contracts; while section 409 is an accompanying procedure statute applying in common to section 3962 and other laws under which the Postmaster General may impose

fines, etc. See act of June 8, 1872, sections 266 and 316, 17 Stat. 316, 325. The procedure statute, as amended by the Budget and Accounting Act, prescribes joint action by the Postmaster General and the Comptroller General to remit, modify, compromise, etc., any fine, liability, etc., which the Postmaster General under the authority of "any provision of law"—as section 3962—has imposed or made.

For the purpose of participation therein on the part of the Comptroller General, joint procedure under section 409 may be initiated through information brought to his attention by the Postmaster General by a party whom the Postmaster General has fined, etc., or otherwise, and may or may not be employed in a given case. If employed it will be given effect for accounting purposes in accordance with the result, but if not employed any fine or deduction imposed or made by the Postmaster General within the scope of and as contemplated by section 3962, or other authority, remains unchanged for accounting purposes.

While there seems to exist an impression that the action of the Comptroller General in joining with the Postmaster General for the purposes of remission, etc., is a review of the discretionary power of the Postmaster General to impose the fine, etc., in the first instance under section 3962, it should be emphasized that it is not such a review, but is simply that joint procedure expressly provided by law with reference to the remission, compromise, etc., of fines, etc., theretofore imposed through discretionary action of the Postmaster General, such joint power vested separately in the Postmaster General and Comptroller General being in entire harmony. In making a deduction or imposing a fine under section 3962 the responsibility is that of the Postmaster General, and there is no wish or purpose in this office to diminish his discretion or to act otherwise than in a spirit of helpfulness and cooperation. Should it at any time be discovered by the Postmaster General that an error had been made or an injustice inflicted in making a deduction or imposing a fine, the facts that would move him to such conclusion would doubtless be equally convincing to this office and there should be little difficulty or delay in effecting an adjustment.

(A–5652)

CLASSIFICATION OF CIVILIAN EMPLOYEES—PROMOTION UPON REALLOCATION TO LOWER GRADE

Under a reallocation of the same position made subsequent to July 1, 1924, it is the rate of pay received on June 30, 1924, and not the rate of pay received initially, or by promotion, under an original allocation of the position effective July 1, 1924, which controls the initial salary rate properly payable.

An employee receiving $2,740 per annum on June 30, 1924, whose position was originally allocated July 1, 1924, in grade 10 of the clerical, administrative, and fiscal service with minimum salary rate of $3,300 per annum, but subsequently reallocated to grade 8 of the same service with maximum salary rate of $3,300 per annum, is entitled from the effective date of the reallocation to $2,800 per annum, but may be promoted by administrative action simultaneously with the effective date of the reallocation from $2,800, the initial salary rate properly payable under the reallocation in grade 8, to $3,300, the maximum salary rate of that grade, if the proper average is maintained in the grade and the promotion is justified by a comparison of the efficiency of the promoted employee with other employees in the grade.

Comptroller General McCarl to the Secretary of Agriculture, October 23, 1924:

I have your letter of October 7, 1924, as follows:

An employee in one of the branches of this department who on June 30, 1924, was receiving a salary of $2,740 was allocated by the Personnel Classification Board to grade CAF–10, and accordingly on July 1 his compensation was increased to $3,300, the minimum rate of that grade. Subsequently the board reviewed the allocation and on August 20 authorized a change in classification from grade CAF–10 to grade CAF–8.

Your decision is requested as to whether this employee may be continued at the salary rate of $3,300 after his transfer to grade CAF–8, the average of this to be not exceeded; and if not, the appropriate rate at which he may be legally paid.

The rate of $3,300 per annum is a salary rate common to grades 8, 9, and 10 of the clerical, administrative, and fiscal service; that is, the maximum of grade 8, the average or middle of grade 9, and the minimum of grade 10. The rates of grade 8 are $2,700, $2,800, $2,900, $3,000, $3,100, $3,200, and $3,300 per annum. If the position reallocated August 20, 1924, was the same held by the employee June 30, 1924, the initial salary rate under the reallocation to grade 8 should have been fixed, in accordance with rule 4 of section 6 of the Classification Act of 1923, on the basis of the rate received June 30, 1924, at $2,800 per annum. That is to say, it is the rate received June 30, 1924, and not the rate received initially, or by promotion, under the original allocation effective July 1, 1924, which controls the initial salary rate properly payable under a reallocation of the same position subsequent to July 1, 1924.

If the proper average of grade 8 was not exceeded thereby, it was within the authority of the administrative office to promote the employee simultaneously with the effective date of the reallocation, or at any time thereafter, from $2,800 to $3,300, the maximum salary rate of grade 8, provided a comparison of the efficiency of the promoted employee with others in the grade, in accordance with the rules and regulations promulgated by the personal classification board or the Civil Service Commission, justifies the promotion. See 4 Comp. Gen. 77.

(A-5686)

LEASES—SUPPLEMENTAL AGREEMENT FOR INCREASED RENT

Where under the terms of a lease agreement the lessor was obligated to furnish the necessary heat, light, water, and toilet facilities and to keep the premises in good repair to the satisfaction of the lessee (the Government), a supplemental agreement entered into for the payment of increased rent upon condition that the lessor install additional necessary lights and a radiator and to repaper the room leased, and renovate the portion of the building used by the Government in common with other tenants, is without consideration, and the payment of the increased rent is unauthorized during the period covered by the original lease.

Decision by Comptroller General McCarl, October 23, 1924:

Review has been requested of settlement No. M-8335-W, dated June 12, 1924, wherein credit was disallowed in the accounts of Capt. Thomas S. Pugh, F. D., U. S. Army, for the sum of $30.83 paid by him to the Yesler Estate (Inc.), for increased rental of the second floor of the building located at the southwest corner of First Avenue South and Yesler Way, Seattle, Wash., for the period from November 24, 1923, to December 31, 1923, under supplemental agreement dated November 24, 1923.

On June 14, 1923, a lease was entered into between the Yesler Estate (Inc.), and P. Hanses, captain; Q. M. C., U. S. Army, for and on behalf of the United States, whereby the former leased to the latter for use as a recruiting office for the term beginning July 1, 1923, and ending June 30, 1924, the

Entire second floor of building consisting of one room 50 by 20 ft. (1,000 sq. ft.), located at S. W. corner of 1st Ave. S. and Yesler Way, Seattle, Wash. (95 Yesler Way), except right of common user of stairs and hallways reserved for benefit of other tenants of the building,

at the rate of $75 per month.

Paragraph 3 of the lease provided:

That the stipulated rent includes the furnishing by the lessor of the necessary heat, light, water, and toilet facilities. The furnishing of heat includes the furnishing of stoves or other facilities for heating, and the furnishing of light includes the furnishing of lamps or other facilities for lighting. * * *

While paragraph 4 provided:

That the lessor will keep the above-described premises in good repair to the satisfaction of the lessee during the occupancy of same under this lease.

On November 24, 1923, a supplemental agreement was executed whereby the rent of the premises was increased $25 per month upon condition that—

The contractor is to paper the main room (20 by 50 ft.) renovate generally the halls and washroom, paint the stairs, put in additional necessary lights and an additional radiator.

The evidence shows that the work stipulated was performed but the date on which it was completed does not appear. This work,

however, in so far as it affected the room occupied by the Government was provided for in the original lease as the repapering of the room can only be construed as repairs while the lessor was already obligated to furnish the necessary heat and light. The renovation of the halls, stairs, and toilet, which were in common use by all tenants of the building, was not for the exclusive benefit of the Government but improvements in which all tenants shared. It is therefore concluded that the supplemental agreement providing for increased rent was without consideration and the payment of such increased rent unauthorized.

Upon review the disallowance is sustained.

(A-2712)

JURISDICTION OF THE GENERAL ACCOUNTING OFFICE—DAMAGES, CONTRACTS

Under section 305 of the act of June 10, 1921, 42 Stat. 24, the General Accounting Office has jurisdiction to settle all claims against the United States, whether liquidated or unliquidated, save those expressly excepted by statute.

Where, under a contract providing for the taking down and reerection of certain steel hangars on a Government reservation, the contractor submitted its invoice to the disbursing officer for a certain sum in "final payment," certified the invoice and voucher as "correct," and received the final payment from the disbursing officer, the transaction is closed in so far as the right of the contractor to make further claims under the contract is concerned.

Where a contract provided for the payment by the contractor of liquidated damages for delays but made no provision for the payment by the United States of damages for delays, and an extension was granted to the contractor for time of alleged delay by the United States without the deduction of liquidated damages therefor, the payment by the United States of damages for said delay is unauthorized.

Decision by Comptroller General McCarl, October 24, 1924:

In connection with the settlement of the claim of The Donnell-Zane Co., Inc., for $4,985.05 as damages alleged to have resulted from the delay of the United States in furnishing material for the erection of hangars at Mitchell Field, Long Island, N. Y., under contract dated May 4, 1922, there is for consideration: (1) Whether the General Accounting Office has jurisdiction to settle a claim against the United States for unliquidated damages; and (2) if so, whether upon the facts appearing the United States is legally chargeable with damages here for failure to furnish material on time. These questions will be considered in the order stated.

From a period anterior to the establishment of the Government itself and since the ordinance of September 26, 1778, of the Continental Congress, the accounting officers have been authorized to adjust and settle public claims and accounts. Since the act of March

3, 1817, 3 Stat. 366, which was carried into the Revised Statutes as section 236 and reenacted as section 305 of the Budget and Accounting Act of June 10, 1921, 42 Stat. 24, it has been provided that the accounting officers shall settle and adjust—

> All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, * * *.

A more comprehensive provision of law in the matter of jurisdiction of claims or accounts in which the United States is concerned could hardly be drafted. It is an elementary rule of statutory construction that in determining the legislative intent of a statute, the words of the statute are to be considered in their natural and ordinary signification. When so considered, there would appear to be no room for doubt that the Congress, in enacting section 305 of the act of June 10, 1921, intended to confer on the General Accounting Office jurisdiction to settle and adjust all claims and demands, whether liquidated or unliquidated, of the United States or against it, except where it has been specifically provided otherwise by statute with reference to a particular claim or class of claims.

A claim has been judicially defined as the assertion of liability to the party making it to pay a sum of money. *Cornell* v. *Travelers Insurance Co.*, 175 N. Y., 239. It includes and embraces every species of legal demand. *Telegraph Co.* v. *Cobbs*, 47 Ark., 344; *Knutson* v. *Krook*, 111 Minn., 352; *Veeder* v. *Veeder*, 1 Den. (N. Y.), 257. The word "demand" includes everything which may be recovered by suit. *Kelly* v. *Madison*, 43 Wis., 638; *Rosser* v. *Brown*, 66 Ala., 89; *Hallen* v. *Davis*, 59 Iowa, 444; *Mayberry* v. *McClury*, 51 Mo., 256; The word "settle" means to ascertain and pay while "adjust" means to determine the amount due, *Lynch* v. *Nugent*, 80 Iowa, 422; *Townes* v. *Birchett*, 12 Leigh (Va.), 173; *State* v. *Moore*, 24 L. R. A., 774, and cases there collated.

It would appear to be clear that section 305 of the Budget and Accounting Act makes no distinction between liquidated and unliquidated claims, and as to section 236, Revised Statutes, that has been the view of former Comptrollers of the Treasury. Judge Downey, then Comptroller of the Treasury and now an associate justice of the United States Court of Claims, after collecting and referring to decisions of his predecessors and to certain decisions of the courts and opinions of the Attorney General, said in 21 Comp. Dec. 134, at page 138, that—

> * * * The accounting officers have jurisdiction to settle, except where otherwise provided by statute, any and all claims against the Government, of whatever kind or description that may be presented to them for settlement, and they have the power to allow any legal claim that is supported by evidence

fully showing the liability of the Government for the amount claimed or allowed. Some claims, such as claims for liquidated damages resulting from breach of contract, are of a nature that may and generally do make it impracticable for the accounting officers to determine with accuracy their true merit. Such claims often and generally do call for the taking of testimony, the cross-examination of witnesses, the weighing of conflicting evidence, etc., before any determination as to their justness can be reached. And because of this—i. e., because the accounting officers have not the necessary machinery for determining the merits of such claims, and not because of any lack of jurisdiction—it has been a rule, adopted by successive comptrollers, not to allow them. The real and true reason for such disallowance should be stated, however, and not the fictitious reason generally assigned.

Then again, there is a class of claims which involve no element of damages for breach of contract, but are claims simply for value, arising upon contract express or implied. The claim here considered is an example of this class. The accounting officers can and should settle such claims, and should allow them whenever the reasonableness thereof and the obligation of the Government to pay are clearly established. Wherever, however, such claims resolve themselves into disputed questions of fact—i. e., where the parties differ as to the value of the thing in question and the accounting officers are unable to determine with any substantial degree of accuracy the correctness of the claim presented or the true amount due—the claim should be disallowed, leaving it to the parties to assert their rights in a court of law. (19 Comp. Dec. 409.)

The jurisdiction of the accounting officers is emphasized by the statutory requirement that judgments of the courts, with a few specific exceptions, are to be reported to the Congress for appropriations. The appropriations originally available for the particular subject matter are not ordinarily chargeable with such judgments. Claims settled and adjusted by the General Accounting Office are payable from the original appropriations and are certified to Congress for appropriation only when the original appropriation has ceased to be available. The difference in the result in the two forums—the courts and the General Accounting Office—here clearly appears. A favorable determination by the General Accounting Office upon a claim makes it immediately payable from such moneys as may remain unexpended in the obligated appropriation and there appears no intendment in the statutory jurisdiction conferred to settle and adjust all claims whatever, that a claimant shall be denied relief as to legal obligations against the United States and sent to the courts simply because the claim may be technically classified as liquidated or unliquidated.

There being jurisdiction in the General Accounting Office to settle claims for unliquidated damages by reason of a breach of a contract, there is here for decision whether the instant claim, or any part thereof, is a legal charge against the United States.

The contract of May 4, 1922, between the United States and the Donnell-Zane Co. (Inc.), required the contractor to take down and reerect certain steel hangars at Mitchel Field, Long Island, N. Y. The United States agreed to furnish certain material and to pay $22,619 for the work. The contract was modified by a supplemental agreement dated February 7, 1923, to provide for certain additional

work at a cost of $664, making a total of $23,283 for the complete job. The contract date for completion was fixed at August 11, 1922. Time was made the essence of the contract and for any delay in completion of the work beyond the agreed date damages were liquidated in advance at $10 for each calendar day of delay, with the stipulation that—

> Interruption of work resulting from failure of the Government to render decisions, or caused by tornadoes, floods, lightning, or other such acts of God, shall be considered unavoidable and beyond the control of the contractor. Such delays will not be subject to payment of damages. Where, however, delay in execution of work is due to nondelivery, or the rejection of materials, changes in market conditions, failure to submit drawings for correction and approval, such delays shall not be considered unavoidable. Preliminary claim for extension of time, including statement of cause or causes upon which the claim is predicated, must be filed by the contractor with the constructing officer within ten (10) days after the occurrence of such causes of alleged delay; failure to do so will preclude such cause from being considered in case a formal claim for extension is later presented. * * *

The work was delayed until on or about February 19, 1923, by reason of the failure of the United States to furnish certain material. When the work was completed, and on February 19, 1923, the contractor submitted the following:

APPLICATION FOR FINAL PAYMENT

To contract for dismantling and reerecting steel hangars at Mitchel Field, L. I., N. Y., as per contract dated May 4th, 1922	$22,619.00
To supplemental agreement dated February 7th, 1923, for taking down and erecting steel hangars at Mitchel Field, L. I., N. Y.	664.00
	23,283.00
Less previous payment	20,340.64
Balance due	2,942.36

We hereby certify the above to be correct and just and that payment therefor has not been received.

DONNELL-ZANE COMPANY, INC.,
Per H. J. ZANE, Jr., *Treas.*

and on April 19, 1923, Capt. M. T. Legg, Finance Department, paid the contractor the $2,942.36 claimed as "balance due."

Thereafter, and on June 28, 1923, the contractor addressed a letter to the Quartermaster General of the Army, under whose jurisdiction the work was performed, alleging that the failure of the United States to furnish material as requested had caused it to expend $4,985.05 more than would have been expended had the work been completed on August 11, 1922, and not delayed until on or about February 19, 1923. The claim was investigated by an Army officer and the Quartermaster General forwarded the claim to the General Accounting Office with the statement "that as near as can be determined the contractor incurred additional expenses, aggregating $3,059.25, due to delays by the Government in failing to furnish ma-

terial on time". There are at least two reasons why the United States is not legally chargeable with damages in the instant case.

As to the first reason: The contractor was given an extension of time for the delay from August 11, 1922, to February 19, 1923, and no liquidated damages were deducted from payments by reason of such delays. The contract did not stipulate for damages for delays caused by the United States; and if time was a material element due the contractor, it signally failed to have mention thereof made in the contract. It must be assumed that in determining its price for the work claimant gave consideration to the consequence of possible delays caused by the Government and contracted accordingly. By stipulating in the contract the rights reserved to the parties such rights are exclusive. In accordance with the maxim that *expressio unis est exclusio alterius* it must therefore be concluded that the United States is not liable for damages due to delay in delivery of material. See decisions dated March 31, 1923, and July 31, 1924, on claims of the Edgemor Iron Co., and Lange & Bergstrom, respectively.

An agreement that the United States will not be subject to payment of damages by reason of certain delays is binding on the contractor. See *Robinson* v. *United States*, 261 U. S. 486.

As to the second reason: The contractor submitted its invoices for $2,942.36 " for final payment," and certified the account " to be correct and just." The contractor also certified a voucher stated for $2,942.36 as " 8th & Final payment on account " of the contract and supplement as " correct," and a disbursing officer paid said voucher. In considering a case where there was protest against the amount paid on the voucher but where the amount was accepted and an additional amount claimed, as here, the Court of Claims in decision dated January 14, 1924, in *Northern Pacific Railway Company* v. *United States*, said:

> * * * We are unwilling to concede that the large number of disbursing officers or paymasters charged with the ministerial duty of disbursing Government funds, whose limited authority is well known, may by the receipt of such statements [protests] as accompanied the vouchers in this case pay parts of the bills and leave the balance for settlement in the courts, thus setting at naught the carefully framed system of Government accounting. * * * We repeat, therefore, that the only proper rule is one that will recognize the disbursing officers' limited authority and that will require a creditor of the Government who is unwilling to accept the payment by the disbursing officer as conclusive to follow the course provided by the statute [act July 31, 1894, 28 Stat., 207, as amended by the act of June 10, 1921, 42 Stat., 24] or bring suit in a court of competent jurisdiction. * * * Its action in stating its bill on the form used and then accepting payment from the disbursing officer is inconsistent with the claim now asserted. Not having pursued such a course as could consistently, with the accounting system have provided a remedy, it must be held that by accepting payment in the circumstances stated it waived any legal effect which could otherwise be accorded the so-called protest. (See *Savage case*, 92 U. S., 382; *Sweeney case*, 14 Wall. 75.)

A fortiori the transaction was closed in so far as the right of the contractor to assert additional claims is concerned when it stated

its claim for "final payment" on completion of the contract and made no protest.

The claim must be, and is, disallowed.

(A-3079)

JURISDICTION OF THE COMPTROLLER GENERAL—RELIEF OF ACCOUNTABLE OFFICERS

The Comptroller General is without general authority of law for the allowance of credit to accountable officers on account of the loss of vouchers or supporting papers necessary for the credit, and, in the absence of special legislative relief, credit may not be allowed to the Treasurer of the United States in his Public Debt Account for payments made in redeeming Liberty loan bond coupons where the canceled coupons have been lost.

Comptroller General McCarl to the Secretary of the Treasury, October 24, 1924:

There has been received your letter of May 26, 1924, as follows:

On September 9, 1921, the Register of the Treasury reported to the Treasurer of the United States that fifty-four coupons at $10.63 each were found missing during an audit of coupons paid for the month of June, 1921, in the shipment of canceled coupons from the Federal Reserve Bank of Chicago of June 2, 1921.. Every effort has been made by the Treasurer of the United States and the Register of the Treasury to clear up this shortage without any apparent success. The records of the Division of Securities, Office of the Treasurer, indicate that the coupons were received from Chicago, examined, and included in the June, 1921, work transmitted to the Office of the Register for audit. The records of that office, however, do not show such receipt. The attached file, including affidavits made by employees in the Division of Securities, Office of the Treasurer, and in the Office of the Register, is therefore submitted with a request for a review of the case to determine whether the suspension of credit of $574.02 in the Treasurer's account may not be legally raised.

Suspension was made by this office in the settlement of the public debt account of Frank White, Treasurer of the United States, as follows:

Principal and Interest, on the Public Debt.

Settlement No. 2375, June 1 to June 30, 1921.

Second Liberty loan converted at 4¼%. Coupons short in this account in amount of $574.02, not received by the Register of the Treasury from the Secretary of the Treasury. Suspended---------- $574.02

The canceled coupons constitute the only proper evidence in support of the alleged payments by the Treasurer of the United States and are absolutely essential before credit for such payments may be allowed by this office in the Public Debt Account of the Treasurer in the absence of specific statutory authority for allowing credit on other evidence.

The Comptroller General has no general authority of law to relieve accountable officers of the Government in the case of lost vouchers or supporting papers to payments made by them, nor does there exist any special authority of law applicable to the accounts of the Treasurer of the United States.

Accordingly you are advised that credit for the item in question can not be allowed upon the evidence submitted. The matter would appear to be proper for presentation by the Treasurer to the Court of Claims under the provisions of sections 145 and 147 of the Judicial Code of March 3, 1911, 36 Stat. 1137, or to Congress for specific relief by means of special legislation.

(A–3015)

TRAVELING EXPENSES—TIPS

Fees to station porters for the carrying of heavy hand baggage do not constitute a "gratuity" or "tip" within the meaning of the antitipping laws of Georgia or Tennessee, and an employee of the United States Tariff Commission is entitled to reimbursement for fees paid to station porters in Georgia and Tennessee while in a travel status.

Decision by Comptroller General McCarl, October 25, 1924:

J. F. Bethune, secretary and special disbursing agent, United States Tariff Commission, requested March 4 and April 26, 1924, review of so much of settlements Nos. C–4284–Ms of December 15, 1923, and C–7606–Ms of March 4, 1924, as disallow in his accounts payments aggregating $1.70 representing fees paid to station porters in Georgia and Tennessee, which States have antitipping laws. In support of his request for review he submits the proposition that fees to station porters are not tips within the ordinary meaning of that term as used in the antitipping laws, and states in that connection:

> The so-called tips in question were paid to station porters at Johnson City, Tenn., for carrying hand baggage. My information is that these porters are employed by the Southern Railway to perform certain duties for which they receive very small salaries; that they are not required to carry hand baggage for passengers, but are permitted to do so for those passengers who desire their services.

Section 1 of the Georgia law, act of August 19, 1918, provides:

> *Be it enacted by the General Assembly of the State of Georgia and it is hereby enacted by the same*, That from and after the passage of this act it shall be unlawful for any employee or servant of any hotel, common carrier, or sleeping car company, restaurant, barber shop, or other public place, or of any person, firm, or corporation to solicit or receive any gratuities or "tips" for the purpose, or with the intent of influencing the action of said employee in relation to the employer's business, from the guests or patrons of such hotel, restaurant, barber shop, or other public place, or of such person, firm, or corporation.

Section 2 of the Georgia law makes it unlawful for the employer to "knowingly permit" the receipt of tips; section 3 prohibits the giving of tips and section 4 requires the posting of "No tipping" notices.

The sections of the Tennessee Code, 1917 edition, on the subject of tipping are as follows:

6888a–31. It shall be unlawful in this State for any hotel, restaurant, cafe, barber shop, dining car, railroad company, or sleeping car company to willfully allow any person in its employ to receive any gratuity, commonly known as a "tip," from any patron or passenger, and it shall be unlawful for any patron of any hotel, restaurant, cafe, barber shop, dining car, or any passenger on any railroad train or sleeping car to give any employee any such gratuity, and it shall be unlawful for any employee of any hotel, restaurant, cafe, barber shop, dining car, railroad company or sleeping car company to receive any gratuity or tip. (1915, ch. 185, sec. 1.)

6888a–32. By "gratuity" or "tip" as used in this act is meant any extra compensation of any kind which any hotel, restaurant, cafe, barber shop, dining car, railroad company, or sleeping car company, or the manager, officer, or agent thereof in charge of the same allows to be given an employee or which any person gives to any employee, or which is received by any employee and is not a part of the regular charge of the hotel, restaurant, cafe, barber shop, dining car, railroad company, or sleeping car company for the thing bought or service rendered, or a part of the services which by contract it is under duty to render. * * * (1915, ch. 185, sec. 2.)

6888a–33. Each hotel shall post notices of this act in the office and in each room, and each restaurant, café, and barber shop shall post at least two notices of this act in two conspicuous places in the same, and each dining car, railroad, or sleeping car company doing business within this State shall post two notices of this act in conspicuous places in each sleeping car, and each café, hotel, or dining car operator shall have printed in a conspicuous place on their menu cards or bills of fare a synopsis of the provisions of this act. (1915, ch. 185, sec. 3.)

The Georgia law prohibits gratuities or tips given or received for the purpose of "influencing the action of said employee in relation to the employer's business." As the fee to a station porter is not given in advance but after the service has been rendered, the payment thereof could not be said to have influenced the porter in connection with his employer's business; i. e., fees paid to station porters in Georgia after the rendering of service and in payment for carrying hand baggage to and from trains do not come within the prohibition of the Georgia antitipping law. (The Georgia law was repealed Aug. 18, 1924.)

The Tennessee law does not specifically refer to station porters, except in so far as they may be considered employees of a railroad, and the law specifically defines gratuities or tips as "extra compensation not a part of the regular charge * * * for service rendered or a part of the services which by contract it is under duty to render." The section requiring the posting of notices does not require such notices to be posted in railroad stations, thus indicating that it did not contemplate prohibiting fees to station porters.

Furthermore, it is a matter of general knowledge that station porters are not required to carry hand baggage to and from trains for all passengers, or at least do not do so, except in anticipation of the payment of a fee for the service so rendered. Services of station porters are not recognized as a part of the service to which the purchase of a railroad ticket entitles the passenger. A reasonable fee to a station porter for carrying hand baggage does not therefore constitute a "gratuity" or "tip" within the meaning of the antitipping

laws of Georgia or Tennessee when incurred by reason of heavy hand baggage; the payment thereof in accordance with existing regulations constitutes a necessary expense of transportation.

Upon review the settlements are reversed as to the items in question and a difference of $1.70 is certified for credit in Mr. Bethune's accounts.

(A–5586)

TAX—STATE—AUTOMOBILE LICENSE PLATES

The requirement of a State that a Federal motor vehicle operated within the State shall have a license tag for which the Government would be required to pay a fee amounts to a tax on an instrumentality of the United States, and reimbursement for an amount paid to a State for material used in manufacturing and cost of issuing a license plate for a Government truck is unauthorized.

Comptroller General McCarl to E. Protin, special disbursing agent, Lighthouse Service, October 25, 1924:

Reference is made to your letter of September 20, 1924, submitting with request for decision whether payment thereon is authorized, a voucher in favor of J. B. Miller, keeper Mobile Lighthouse Depot, Mobile, Ala., in the sum of 50 cents for reimbursement of amount paid by him to the State of Alabama for material used in manufacture and cost of issuing a license plate for a Nash truck, the property of the United States Lighthouse Service.

The general proposition that a State has no authority to tax the property of the United States is supported by numerous decisions of the courts and of this office. See *McCullough* v. *Maryland*, 4 Wheat. 316; *Johnson* v. *Maryland*, 254 U. S. 51; 9 Comp. Dec. 181; 15 *id.* 231; 23 *id.* 386; 3 Comp. Gen. 663.

It is contended that the sum of 50 cents covers cost of labor and material in the manufacture and issuance of the license plate and that no part of said amount is to cover the license fee. However, any requirement of a State that a Federal motor vehicle operated within the State shall have a license tag amounts to a tax on an instrumentality of the United States. See 1 Comp. Gen. 150.

The question presented is answered in the negative, and the voucher is returned herewith.

(A–5263)

TAXICAB HIRE

Rainy weather, heavy hand baggage, employee's residence four blocks from street-car line, and early morning appointment, do not justify the use of a taxicab by an employee of the Department of Commerce within the meaning of the travel regulations of said department, where it is shown that street-car service was available.

Reimbursement to an employee of the Department of Commerce is authorized for taxicab hire, where it is shown that the distance to destination and return was 1½ miles each way and that street-car service was not available.

Decision by Comptroller General McCarl, October 28, 1924:

Thomas L. Gaukel, an employee of the Department of Commerce, with headquarters in St. Louis, Mo., has requested review of settlement No. 037340, dated July 15, 1924, wherein was disallowed his claim for $7.40, representing payments for taxi hire while traveling on official business in accordance with travel order No. 5361, dated March 1, 1924.

The items are listed in the claimant's traveling expense voucher as follows:

1924		
1. April 22.	Baggage transfer and taxicab, residence to station	$1.00
2. April 23.	Taxicab to Chamber of Commerce building, Evansville	.50
3. April 24.	Taxicab to Chamber of Commerce building, Louisville	.50
4. April 25.	Taxicab to Chamber of Commerce building, Nashville	.40
5. April 26.	Taxicab to hotel, Memphis	.50
6. April 28.	Taxicab fare, round trip, to Memphis Fur. Co. (not reached by street car)	2.00
7. April 29.	Taxicab fare, round trip, to plant of Van Vleet Mansfield Drug Co. to keep appointment (necessary owing heavy rain)	2.00
8. April 30.	Taxicab station to residence, St. Louis	1.00
	Total	7.90

Travel Regulations, Department of Commerce, paragraph 31, provide as follows:

> Whenever official travel requires the use of street cars, omnibus, transfer coach, hack, or taxicab, reasonable charges for their use will be allowed. Charges for conveyances of this class other than street cars must be accompanied by a statement showing the necessity for use.

In regard to items 1 and 8 the claimant states that his residence is located four blocks from the street-car line and approximately 6 miles from the railroad station, and that two pieces of heavy baggage were necessary to be taken on the trip. The baggage, it appears, consisted of official reference books, Government publications, and private property. These circumstances are not deemed sufficient to establish that the use of a taxicab was necessary either upon departure to the station or when the employee returned home. While it would have perhaps been somewhat inconvenient to walk four blocks to the street-car line, mere inconvenience does not warrant the use of a more expensive vehicle in place of a street car.

The explanation with reference to items 2, 3, 4, and 5 is that the taxicab was used because of heavy baggage and early morning appointments. No showing is made that street cars were not available and the facts presented do not show necessity for the use of the taxicabs.

Item 6, round-trip from office of the United States Shipping Board to the plant of the Memphis Furniture Co. 1½ miles each way, which plant can not be reached by street car, is deemed a necessary expenditure and under the circumstances this item is allowed.

The fact that it would have been necessary to walk four blocks to a street car during a heavy rainfall does not warrant the use of a taxicab for the purpose stated in item 7.

The total of the items 1 to 8, inclusive, is $7.90. In the settlement this amount was erroneously computed as $7.40. It is now found that item 6 was a necessary expense and it is therefore allowed.

Accordingly upon review there is certified due the claimant $2.

(A-5365)

PURCHASES—BOOK TYPEWRITERS—OFFICE OF RECORDER OF DEEDS

The authority granted the recorder of deeds of the District of Columbia by the act of March 4, 1923, 42 Stat. 1531, "to acquire by purchase five additional Elliott-Fisher book typewriters, and to pay for said machines out of the fees and emoluments of his office, not exceeding $1,790," is not an appropriation or its equivalent, but an authority to use an existing appropriation or its equivalent for a specific purpose, and such book typewriters may accordingly now be purchased and paid for, not exceeding $1,790, from the fees and emoluments of his office.

Comptroller General McCarl to the Recorder of Deeds, District of Columbia, October 28, 1924:

I have your letter of September 22, 1924, requesting decision, as follows:

The Congress provided in the act of March 4, 1923, 42 Stats., 1531, that the recorder of deeds of the District of Columbia might purchase out of the fees and emoluments of his office five (5) Elliott-Fisher book typewriters for use in the recorder's office, at a sum not exceeding $1,790.00.

These machines have not yet been purchased, as until now, when the recorder of deeds has secured the additional floors in this building, there was no room for them. I presume that I have authority to now purchase these machines, but most respectfully request your opinion in the matter before beginning negotiations with the Elliott-Fisher Company.

The salaries and incidental expenses of the office of the recorder of deeds are payable from the revenues of such office, section 553 of the Code of Law for the District of Columbia, 31 Stat. 1276, providing:

SALARY SURPLUS TO BE PAID INTO THE TREASURY.—The recorder of deeds of the District of Columbia shall not retain of the fees and emoluments of his office for his personal compensation over and above his necessary clerk hire and the incidental expenses of his office, certified to by the supreme court of the District of Columbia, or by one of its justices appointed by it for that purpose, and to be audited and allowed by the proper accounting officer of the Treasury, a sum exceeding four thousand dollars a year or exceeding that rate for any time less than a year; and the surplus of such fees and emoluments shall be paid into the Treasury to the credit of the District of Columbia: *Provided*, That the number of clerks and others employed in the office

of the recorder of deeds shall not be increased, except that additional copyists may be employed for temporary service as the necessities of the office may require, nor shall the salary or compensation of clerks and others be increased beyond the salaries or compensation paid during the fiscal year eighteen hundred and ninety-one; and the salary of the deputy recorder of deeds shall be two thousand five hundred dollars per annum, to be paid out of the fees and emoluments of said office of recorder of deeds.

The authority to purchase the book typewriters contained in the act of March 4, 1923, entitled "An act making appropriations to supply deficiencies in certain appropriations for the fiscal year ending June 30, 1923, and prior fiscal years, to provide supplemental appropriations for the fiscal year ending June 30, 1924, and for other purposes," 42 Stat. 1527–1531, provided:

The recorder of deeds for the District of Columbia is hereby authorized to acquire by purchase five additional Elliot-Fisher book typewriters, and to pay for said machines out of the fees and emoluments of his office, not exceeding $1,790.

It is not stated what is the exact question which creates the doubt as to the authority to now make the purchase of the machines in question, but it is presumed to be whether the authorization is the equivalent of an appropriation, and, if so, whether such appropriation is annual in character within the intent and meaning of section 7 of the act of August 24, 1912, 37 Stat. 487, so as not to be available for obligation beyond the close of the fiscal year 1924.

The general authority of the recorder of deeds to use the fees and emoluments of his office for the payment of the salaries and incidental expenses thereof is for some purposes considered the equivalent of an appropriation. 6 Comp. Dec. 668. However, the authority to purchase the book typewriters, granted apparently because the expense of such purchase might not otherwise be classed as an incidental expense and because of the purported necessity for the particular make of machine thus precluding advertising for bids as otherwise required by section 3709, Revised Statutes, is not an appropriation, or its equivalent, but simply an authority to use an existing appropriation, or its equivalent, for a specific purpose.

You are advised that you are now authorized to purchase the book typewriters in question and to pay for same, not exceeding $1,790, from the fees and emoluments of your office.

(A–3754)

GRATUITIES, SIX MONTHS' DEATH—NAVY ENLISTED MEN

The six months' death gratuity authorized by the act of June 4, 1920, 41 Stat. 824, may be paid to the widow of a deceased enlisted man of the Navy who had died from disease not the result of his own misconduct while serving a general court-martial sentence of 12 months' confinement at the termination of which he was to have been dishonorably discharged, notwithstanding he at the time of death was forfeiting his pay with the exception of $3 per month for prison expenses.

Decision by Comptroller General McCarl, October 30, 1924:

There is for consideration the claim of Anna Thatcher for a sum equal to six months' pay at the rate received by her husband, Cyril Joseph Thatcher, apprentice seaman, U. S. Navy, who died February 13, 1924, while in confinement at the U. S. Naval Prison, Portsmouth, N. H., under sentence of general court-martial.

It appears that Thatcher, while serving as commissary steward under his enlistment in the regular Navy of August 24, 1923, for four years, was tried by general court-martial at New London, Conn., and was found guilty of "Attempting a fraud in violation of article 14 of the Articles for the Government of the Navy" and was sentenced to be reduced from the rating of commissary steward, U. S. Navy, to the rating of apprentice seaman, to be confined for a period of twelve months, then to be dishonorably discharged from the United States naval service, and to suffer all the other accessories of said sentence, as prescribed by section 833, Naval Courts and Boards. The proceedings, findings, and sentence in this case were approved January 5, 1924, and the Naval Prison, Portsmouth, N. H., was designated as the place of confinement. He died February 13, 1924, while in confinement.

The act of June 4, 1920, 41 Stat., 824, provides:

> That hereafter, immediately upon official notification of the death from wounds or disease, not the result of his or her own misconduct, of any officer, enlisted man, or nurse on the active list of the Regular Navy or Regular Marine Corps, or on the retired list when on active duty, the Paymaster General of the Navy shall cause to be paid to the widow, and if there be no widow to the child or children, and if there be no widow or child, to any other dependent relative of such officer, enlisted man, or nurse previously designated by him or her, an amount equal to six months' pay at the rate received by such officer, enlisted man, or nurse at the date of his or her death. * * *

Under the sentence of the general court-martial Thatcher was not to be dishonorably discharged from the Naval Service until he had completed the period of confinement imposed. At the time of his death he was being carried on the active list of the Regular Navy as an apprentice seaman and entitled to receive pay at the rate of $25.20 per month.

The Navy Department has reported that Thatcher's death was due to disease not the result of his own misconduct and the fact that at the time of his death he was forfeiting the pay received by him, with the exception of $3 per month for prison expenses, as it accrued, did not deprive the widow of her right under the act of June 4, 1920, to receive an amount equal to six months' pay at the rate to which the seaman was entitled by reason of his grade and length of service at the time of his death. Payment of the claim is accordingly authorized in the amount of $151.20.

(A–5621)

PURCHASES—EVIDENCE OF DELIVERY

Evidence that meat sold to the Government was delivered to and receipted for by an enlisted man of the Army duly authorized to receive and receipt therefor entitles the vendor to payment in the absence of evidence to the effect that the meat was subsequently rejected and returned or destroyed.

Decision by Comptroller General McCarl, October 30, 1924:

Wilson-Martin Co. applied September 17, 1924, for review of settlement 041574, August 12, 1924, disallowing its claim for $141.96 for 507 pounds of lamb alleged to have been delivered April 4, 1922, to Camp Dix, N. J. The disallowance was based upon the lack of evidence of receipt at the camp. In support of its claim the company submitted a photostatic copy of an American Railway Express Co. delivery receipt signed "Q. M. C. Det. Mike Hapstak" and dated April 4, 1922, covering 507 pounds of meat.

The records of meat receipts at Camp Dix fail to show the receipt of this particular shipment, and Mike Hapstak states that he has no "remembrance" of having signed for such shipment, but a comparison of his signature to the statement with that signed to the receipt discloses the two to be identical.

A board was convened to determine the question of the receipt of the meat in question and recommended that the claim be allowed. There is no doubt that Mike Hapstak actually receipted for the meat in question, but there is a total lack of evidence of what became of the meat after he receipted therefor. However, having been delivered by, or in behalf of, the company to an employee of the United States authorized to receive same and receipt therefor, and in the absence of any evidence that the meat was rejected and returned to the company, or destroyed, it must be presumed, so far as the rights of the vendor are concerned, that the Government had the benefit of the meat in question. The vendor is accordingly entitled to payment therefor.

Upon review, $141.96 is certified due the claimant.

(A–6022)

ESTATES OF DECEDENTS—ARMY ENLISTED MEN

An amount in excess of $500 due the estate of a deceased enlisted man of the Army may not be paid to an ancillary administrator appointed in the State where the enlisted man was stationed when he died, even though he may have left a debt for a lesser amount due a resident of such jurisdiction,

when it appears that the domicile of the deceased was in another jurisdiction in which resides a sister, but settlement will be deferred awaiting the appointment of a principal or domiciliary administrator in the jurisdiction of the domicile of the deceased.

Decision by Comptroller General McCarl, October 30, 1924:

There is before this office for consideration the claim of William M. Ellison, an attorney at law, of Washington, D. C., and West Falls Church, Va., as administrator of the estate of George Columbus, late a sergeant, Headquarters Company, Thirteenth Engineers, who died August 12, 1923, at Fort Humphreys, Va. It appears that the soldier left surviving him at least one sister living in Quebec, Province of Quebec, Canada, and that the amount due the estate exceeds $500. Letters of administration were granted to claimant herein by the Circuit Court of Fairfax County, Va., "on all and singular the estate of George Columbus, who was late of this county," and the administrator states in his application for the arrears of pay, etc., that "Letters of administration were taken out in the interest of May McGlue for a debt of ($106.75) one hundred six and 75/100 dollars."

The military history of the soldier is as follows:

Enrolled June 13, 1898, at Buffalo, N. Y.; mustered into service same date a private, Co. I, 65th N. Y. Inf.; mustered out a private November 19, 1898, at Buffalo, N. Y., with company. Enlisted April 5, 1899; discharged April 4, 1902. Reenlisted May 9, 1902; discharged May 8, 1905. Reenlisted May 26, 1905; discharged May 25, 1908. Reenlisted May 26, 1908; discharged July 17, 1911. Again enlisted May 17, 1912; discharged May 16, 1915. Reenlisted May 17, 1915; discharged May 22, 1919. Reenlisted May 23, 1919. Home address, Washington Barracks, Washington, D. C. Discharged May 31, 1922. Reenlisted June 1, 1922. Home address, 34 Roylan St., Quebec, Canada. Died August 12, 1923, at Fort Humphreys, Va., a sergeant, Headquarters Company, 13th Engineers. Death occurred in line of duty. Emergency address, Ella Columbus (sister), 34 Roylan St., Quebec, Canada.

It thus appears that except for the periods November 20, 1898, to April 4, 1899, and July 18, 1911, to May 16, 1912, the soldier was continuously in the service from June 13, 1898, to the date of his death. He entered the service at Buffalo, N. Y., and although giving his home address in 1919 as Washington Barracks (an Army post), he gave as his home address on his last discharge Quebec, Canada, and the address of the relative to be notified in case of necessity as that of a sister living in Quebec. That the soldier ever claimed Fort Humphreys or any other place in Virginia as his home or domicile is not suggested. Soldiers, it has been said, have a quasi incapacity to acquire a new domicile. In 19 Corpus Juris, 418, the following statement of the law has been formulated on the cases there collected:

The domicile of a soldier or sailor in the military or naval service of his country generally remains unchanged, domicile being neither gained or lost by

being temporarily stationed in the line of duty at a particular place, even for a period of years. A new domicile may, however, be acquired if both the fact and the intent concur. * * *

However, except for the suggestion contained in the letters of administration that the soldier "was late of" Fairfax County, Va., there is no allegation that he was domiciled there. Wherever the soldier's domicile was, it seems certain it was not Fairfax County, Va. The administrator, and claimant herein, at best is, therefore, an ancillary administrator, whose powers extend only to the assets within the jurisdiction of his appointment. It has been said:

An ancillary administration is proper whenever a person dies leaving in a State or country other than that of his last domicile property to be administered, or which is in danger of being wasted or lost, or debts owing to him which must be collected by suit, or where there are provisions of his will to be carried out with respect to property in such jurisdiction. * * * The chief object, however, of an ancillary administration is to collect and preserve local assets for the benefit of local creditors. 18 Cyc. 1223.

Moneys due from the United States have no situs. *Vaughn* v. *Northrup*, 15 Peters, 1; *Wyman* v. *Halstead*, 109 U. S. 654; *United States* v. *Borcherling*, 185 U. S. 223; 25 Comp. Dec. 656.

In *Wyman* v. *Halstead*, *supra*, it was said:

* * * But the United States, in their sovereign capacity, having no domicil in any one part of the Union rather than in any other, do not, by establishing at the National Capital a treasury for the transaction of the principal business of the financial department of the Government and making their money obligations payable there, confine their presence or their powers to this spot. The United States having, in the phrase of Mr. Justice Story, "an ubiquity throughout the Union" may in their discretion, exercised through the appropriate officers, pay a debt due to the estate of a deceased person either to the administrator appointed in the State of his domicil or to an ancillary administrator duly appointed in the District of Columbia, and the exercise of their discretion in this regard can not be controlled by writ of mandamus.

It appears that the soldier was not domiciled in the jurisdiction in which the letters of administration were issued and that a principal or domiciliary administration must be had in any event. Payment of the amount due the estate of the soldier from the United States must await the appointment of such principal or domiciliary administrator.

It is proper to remark that the 112th Article of War, 41 Stat. 809, makes provision for the payment of local creditors of a soldier dying in the service by authorizing the summary court upon the direction of the commanding officer, "to pay the undisputed local creditors of decedent in so far as any money belonging to the deceased which may come into said summary court's possession under this article will permit, * * *."

The claim of the ancillary administrator will accordingly be disallowed as not proper for payment under his appointment. See also 20 Comp. Dec. 740; 23 *id.* 95.

(A-5579)

PURCHASES—AUTOMOBILES

As the provision in the District of Columbia appropriation act of February 28, 1923, 42 Stat. 1333, for the fiscal year 1924 limited the cost of any automobile acquired under any provision of that act to not to exceed $650 except as specifically authorized in that act at a greater amount, the purchase of an automobile for an amount in excess of $650 and payment therefor from the appropriation in the act headed "Washington Aqueduct" without such a specific authorization was unauthorized.

Decision by Comptroller General McCarl, October 31, 1924:

There is for consideration the question as to the legality of a payment made by Lieut. John R. Hardin, Engineer Corps, U. S. Army, as per voucher No. 66 of his accounts for the month of August, 1923, in the amount of $1,749.50, for one Reo automobile, under the appropriation "Washington Aqueduct, D. C., 1924."

The District of Columbia appropriation act of February 28, 1923, 42 Stat. 1333, under the heading "Contingent and miscellaneous expenses," D. C., provides:

> * * * That no automobile shall be acquired under any provision of this Act, by purchase or exchange, at a cost, including the value of a vehicle exchanged, exceeding $650, except as may be herein specifically authorized * * *.

Under the heading, "Washington Aqueduct," the same act, 42 Stat. 1368, provides for the "purchase of one passenger automobile" and that—

> Nothing herein shall be construed as affecting the superintendence and control of the Secretary of War over the Washington Aqueduct, its rights, appurtenances, and fixtures connected with the same and over appropriations and expenditures therefor as now provided by law.

The expenditure was made, it appears, on the assumption that since the automobile was being purchased for use in connection with the Washington Aqueduct project and not for use under the direction or control of the District of Columbia, the Secretary of War was not limited to the amount of $650 in making the purchase.

The Washington Aqueduct project is not under the direction of the Commissioners of the District of Columbia, but without regard to the purpose, the appropriation for the project has been included by the Congress in the District of Columbia appropriation act. It is therefore subject to all the limitations applying generally to said act unless by other provision it is specifically excepted therefrom.

The act limits to $650 the expenditure for an automobile under any of its provisions, except as otherwise specifically authorized, and makes no specific provision for an expenditure in excess of that amount for the automobile in question. The limiting provision is clear, unambiguous, and all-inclusive. It applies to every purchase of an automobile made from appropriations contained in the act except purchases specifically authorized therein at a greater cost.

I find no such specific authority in that provision of the act which reserves to the Secretary of War the independent superintendence and control of the Washington Aqueduct, etc., nor does it seem that it could have been the intent of the Congress to have this provision serve as such specific authority when it is observed that under another heading in the act, 42 Stat. 1338, specific provision was made for "the purchase of one special motor vehicle at a cost not to exceed $2,000."

I am constrained to hold, therefore, that the expenditure is illegal, and accordingly the account will be reopened and the disbursing officer charged with the amount of $1,749.50.

(A–5612)

TRAVELING EXPENSES—ATTENDANCE AT MEETINGS OR CONVENTIONS

As the act of June 26, 1912, 37 Stat. 184, prohibits the payment from public funds of expenses of attendance of an officer or employee of the United States at any meeting or convention, in the absence of a specific appropriation for such purpose or an express provision therefor in some general appropriation, payment of the transportation expenses of engineers of the Bureau of Mines incurred at convention rates in attending meetings or conventions without such an appropriation or provision is unauthorized. (Modified by 4 Comp. Gen. 630.)

Decision by Comptroller General McCarl, November 1, 1924:

This office has for consideration the question as to the allowance of three bills presented by the Baltimore & Ohio Railroad Co., Nos. 70744 for $146.16, 70742 for $158.57, and 70745 for $150.06, approved administratively, for payment from various appropriations for the Bureau of Mines. These claims include the following transportation requests:

I–215287, May 12, 1924, bill 70744, transportation of J. E. Cranshaw, explosive engineer, Pittsburgh, Pa., to Cincinnati, Ohio, and return, charge $16.79.
I–215117, May 23, 1924, bill 70742, O. P. Hood, chief mechanical engineer, Washington, D. C., to Cleveland, Ohio, charge $15.63.
I–215118, May 29, 1924, bill 70745, is for the return of Mr. Hood and the charge made is $7.82.

It appears that the travel of Mr. Cranshaw was for the purpose of attending the Convention of National Coal Association and American Mining Congress held in Cincinnati May 12–17, 1924, while Mr. Hood's travel was for the purpose of attending the Joint Meeting of the American Society of Mechanical Engineers, American Society of Refrigerating Engineers, and American Society for Testing Materials, held in Cleveland May 26–30, 1924.

The act of June 26, 1912, 37 Stat. 184, provides:

SEC. 8. No money appropriated by this or any other Act shall be expended for membership fees or dues of any officer or employee of the United States or of the District of Columbia in any society or association or for expenses of attendance of any person at any meeting or convention of members of any society or association, unless such fees, dues, or expenses are authorized to be paid by specific appropriations for such purposes or are provided for in express terms in some general appropriation.

The Director of the Bureau of Mines reported to this office under date of October 2, 1924, as follows:

It is not believed that this travel expense violates the provisions of section 28 of the act of June 26, 1912 (37 Stat. 184), and the following information is submitted with the request that claims be paid and charged against the appropriation "Investigating mine accidents, 1924," and "Fuel testing, Bureau of Mines, 1924."

Mr. J. E. Cranshaw is an explosive engineer of the Bureau of Mines, stationed at Pittsburgh, Pa. He was ordered to be in Cincinnati, Ohio, on May 13, 1924, to confer with certain powder manufacturers, coal operators, mining engineers, and others interested in the use of explosive powder, on the subject of obtaining better methods of blasting. The conference met on May 13th and 14th. At the conclusion of the conference Mr. Cranshaw returned to the Pittsburgh station.

Mr. O. P. Hood is chief mechanical engineer of the Bureau of Mines. He was ordered to Cleveland to confer with representatives of certain public service utilities on matters relating to a greater efficiency in the use of fuel and with a representative of the University of Michigan on the subject of fuel conservation. Because all of the parties with whom he was to confer were in Cleveland during the meeting of the associations referred to in your letter, a great deal of time and expense in travel was saved by having Mr. Hood confer with them in Cleveland at that time rather than individually and at other points throughout the country.

It would seem that the above comes under the duties imposed upon the Bureau of Mines by the act approved February 25, 1913 (37 Stat. 681), and your approval of the expenditures in question is accordingly requested.

As the railroad company's claim is for fares at convention rates instead of full fare, it is reasonable to assume that the Government's engineering officers presented certificates showing that they were bona fide members of the respective organizations holding the conventions or that the travel was for the express purpose of attending the meeting or convention, thus putting the carrier on notice that the expenses involved were of the class for which the statute precludes the use of any appropriation not specifically made available therefor.

The appropriations "Investigating mine accidents, 1924," and "Testing fuel, Bureau of Mines, 1924," 42 Stat. 1209, provide for carrying on the work of the Bureau of Mines as provided in the act of February 25, 1913, 37 Stat. 681, and for the actual necessary traveling expenses of employees engaged thereon while absent from their respective stations on official business, but do not provide in specific terms for attendance at meetings or conventions. Accordingly the claims must be and are disallowed.

(A–4758)

(A–5136)

ACCOUNTING—SET-OFFS—WORLD WAR ADJUSTED COMPENSATION ACT

The relation of principal and agent existing between the United States and its accountable officers and agents is such as to authorize, whenever practicable, the principles of subrogation as against recipients of erroneous payments by such officers or agents, if the amount of the indebtedness was originally chargeable to the public account of the recipient of the erroneous payment. The matter is one of cooperation between principal and agent and carries with it no legal liability of the principal to the agent.

Adjusted service credits due veterans or amounts payable to their dependents or beneficiaries under the World War adjusted compensation act of May 19, 1924, 43 Stat. 121, are subject to set-off of amounts owing to the United States by the veterans, their dependents, or beneficiaries, except where barred by statute or preferred lien of third parties.

Where a veteran would, except for his indebtedness, be entitled to adjusted service credit in excess of $50, the amount of his indebtedness should be deducted therefrom and an adjusted service certificate issued on account of the balance to his credit if in excess of $50; but if such balance is for $50 or less, payment thereof may be accomplished as though the total credit was for only $50 or less, same having been reduced because of advances to the veteran. Similar action should be taken in cases where the veteran is entitled to adjusted service pay in the sum of $50, or less.

Where overpayments were made to "veteran" officers and enlisted men of the Regular Army and of the National Guard from Federal funds, because of nondeduction of allotments and amounts due post exchanges, company funds, and other governmental agencies, chargeable to the pay and allowances of the officers and enlisted men, which can not be collected by reason of their separation from the service, or refusal or inability to make refund. deduction thereof should be made from the veteran's adjusted compensation regardless of whether the responsible officer has been charged with the overpayments for failure to make proper deductions thereof from current pay and allowances. The same action should be taken even though the responsible officer has repaid into the Treasury an amount so overpaid, provided it be shown that the amount of the repayment was not otherwise collected from the veteran, but no liability arises against the United States for failure of its officers and employees to so protect an accountable officer charged with an overpayment.

Comptroller General McCarl to the Director, United States Veterans' Bureau, November 3, 1924:

I have your letters of August 14 and September 8, 1924, requesting decision of several questions as to whether the adjusted service credits due veterans under the World War adjusted compensation act of May 19, 1924, 43 Stat. 121, may be used to offset indebtednesses of veterans or their dependents due the United States or its agencies, or facilities, under the circumstances stated, reference being had to decision of June 27, 1924, 3 Comp. Gen. 1006, wherein it was held that amounts payable to veterans are subject to set-off on account of indebtednesses of veterans to the United States.

The general rule as between debtor and creditor is that where the debtor has overpaid an earlier account of the creditor, or a credit otherwise exists in favor of the instant debtor, such overpayment or credit is deemed in law to be an advance on any future account, and the debtor may insist upon credit therefor when adjusting subsequent demands of his creditor. In considering the matters here in question the United States may be denominated the debtor and the beneficiary of the adjusted compensation the creditor. In theory immediately upon the enactment of the act of May 19, 1924, *supra*, certain credits accrued to the veterans entitled thereunder, less the amounts advanced on account thereof by the debtor by reason of prior overpayments, etc. The result is that the World War adjusted compensation act authorized the crediting to the veterans only those amounts due over and above advances made.

The foregoing is fundamental, notwithstanding what appear to be conflicting details found in the act of May 19, 1924, preponderance of authority being in support thereof aside from the rules of construction requiring the doing of that which is possible and practicable.

In those cases where a veteran would, except for his indebtedness, be entitled to adjusted service credit in excess of $50, the amount of his indebtedness should be deducted therefrom and an adjusted service certificate issued on account of the balance to his credit if in excess of $50; but if such balance is for $50 or less, payment thereof may be accomplished as though the total credit was for only $50 or less, same having been reduced because of advances to the veteran. Similar action should be taken in cases where the veteran is entitled to adjusted service pay in the sum of $50 or less as to which no question is raised.

As to those cases in which overpayments were made to "veteran" officers and enlisted men of the Regular Army and of the National Guard from Federal funds because of nondeduction of allotments and amounts due post exchanges, company funds, and other governmental agencies, chargeable to the pay and allowances of the officers and enlisted men, which can not be collected by reason of their separation from the service, refusal or inability to make refund, deduction thereof should be made from the veterans' adjusted compensation regardless of whether the responsible officer has been charged with the overpayments for failure to make proper deductions thereof from current pay and allowances. The same action should be taken even though the responsible officer has repaid into the Treasury an amount so overpaid, provided it be shown that the amount of the repayment was not otherwise collected from the veteran, but no liability arises against the United States for failure of its officers and employees to so protect an accountable officer charged with an overpayment.

The relation of principal and agent existing between the United States and its accountable officers and agents is such as to authorize, whenever practicable, the principles of subrogation as against recipients of erroneous payments by such officers or agents, if the amount of the indebtedness was originally chargeable to the public account of the recipient of the erroneous payment. The matter is one of cooperation between principal and agent and carries with it no legal liability of the principal to the agent.

You ask also whether you may deduct from amounts payable to dependents the amounts owing to the United States by the veteran upon whose military or naval service such dependents base their claims. The same question might arise as to beneficiaries and will

be considered accordingly, both as to amounts due the United States from veterans as well as from dependents and beneficiaries, particularly as to overpayments of allotments, etc., to the latter as allottees, etc., except where barred by statute or the preferred lien of third persons.

Section 601 of the act of May 19, 1924, *supra*, provides that if a veteran has died before making application or has died after making application but before he has received payment under Title IV, then the amount of "his" adjusted service credit shall be paid to "his" dependents. Section 603 provides that no such payments shall be made to the heirs or legal representatives of any dependents. Under section 501 the amount of the face value of the adjusted service certificate shall be payable to the "veteran" or, upon his death, prior to the expiration of the 20-year period, to the named beneficiary," in being, or to the "estate of the veteran." The purpose of the act is "To provide adjusted compensation for veterans," and "Title III. General provisions," carries the subtitle "Benefits granted veterans," providing that "Each veteran shall be entitled—

"* * * To receive" service pay or a certificate.

No such declarations or provisions appear as to dependents or beneficiaries. On the contrary, it clearly appears that only limited classes may benefit upon death of the veteran on account of "his" service credit. The service credit passes to others only upon certain contingencies and no estate is benefited or created thereby except that of the veteran. None but the veteran can assign or pass title thereto. Even though installments have been paid to a recognized dependent nothing passes to his or her estate. Neither the dependents nor beneficiaries have vested rights in unpaid compensation that do not revert to others through their relationship to the veteran.

You are therefore advised that amounts payable to dependents are subject to set-off of amounts owing to the United States by the veterans. Amounts due the United States by dependents or beneficiaries are likewise subject to set-off.

Under the procedure now in effect with reference to reporting to the bureau the indebtedness of veterans and notice to each veteran or beneficiary of the contemplated deduction on account thereof, it would seem advisable to give such veteran or beneficiary an opportunity to pay the amount of the indebtedness and receive compensation or adjusted service certificate for the full amount accruing under the act instead of having same deducted from the amount of service credit. Such a procedure will enable the debtor veterans who so desire to take advantage of the investment features provided in those cases otherwise requiring the issuance of the adjusted service certificate.

(A-5032)

SICK LEAVE—CERTIFICATES—CHRISTIAN SCIENTISTS

The certificate of an authorized and recognized Christian Science practitioner in support of an application by a consular officer or clerk for sick leave is sufficient for the requirements of section 467, Consular Regulations of 1922, if said practitioner and officer or clerk be not the same person.

Where the regulations of a department or establishment state that it is desirable that the certificate of the physician in attendance be furnished in support of an application for sick leave the application should be supported by a certificate of a licensed physician, an authorized and recognized Christian Science practitioner, or evidence of equal import acceptable to the head of the department or establishment concerned, and a certificate by a Christian Scientist in his own behalf, whether a practitioner or otherwise, is insufficient.

The granting of sick leave to an officer or employee within the limits of the laws relating thereto is discretionary with the head of the department or establishment concerned, and ordinarily the evidence required therefor may be left to administrative discretion.

Comptroller General McCarl to the Secretary of State, November 4, 1924:

I have your request of September 6, 1924, for a decision of questions presented, as follows:

The question has arisen as to whether the certificate of a Christian Science practitioner, instead of a certificate from a licensed physician, in the case of the absence of a consular officer or clerk from duty on account of illness, is acceptable and sufficient to meet the requirements of paragraph 467 of the Consular Regulations. Another question is also involved and that is whether in the case of an employee who is a believer in Christian Science and who, according to his belief, knows enough of the science to be able to cure his own physical ailments, any certificate should be required.

Paragraph 467 of the Consular Regulations, edition of 1922, provides:

Conditions under which leave is granted.—Leave of absence is granted, within statutory limitations, at the discretion of the President, acting through the Secretary of State. Leaves are of two kinds, simple leave, and leave with permission to visit the United States. The granting of simple leave of absence does not carry with it permission to return to the United States. A consular officer must receive express permission to return, in order to entitle him to the benefit of the statutory allowance of salary in transit.

Simple leave of absence with salary may be granted for not more than thirty days in any one year, except in the event of illness on the part of the officer or a member of his family, or under other exceptional circumstances, when simple leave with pay may be extended to a total of sixty days in one year, but no longer.

Leave of absence with permission to visit the United States for not to exceed sixty days in any one calendar year may be granted with salary not oftener than once in two years, except (1) in the case of consular officers in remote places, who may be granted continuous leave covering parts of two successive years, provided not to exceed sixty days is granted in either year; and (2) also in cases where the health of officers requires that they should be absent from their posts, when continuous leave not to exceed sixty days in either year may be granted covering parts of two successive years. Whenever leave of absence is claimed to be necessary on account of illness, it is desirable that a certificate of the physician in attendance be forwarded to the Secretary of State. *R. S. secs. 1740, 1742.*

The purpose of requiring a certificate of a physician as proof of the existence of an illness of sufficient seriousness to form the basis for leave of absence is to secure corroboration of the existence of such illness so that the granting of leave shall not rest alone upon the statement of the officer or employee concerned. A requirement that the illness of an officer or employee of the

United States be evidenced by a certificate of a physician does not necessarily limit certification thereto by physicians of any particular school. Recognized practitioners of whatever school may be accepted and no good reason suggests itself why a certificate by a recognized Christian Science practitioner should not be accepted.

In view of the purpose sought to be accomplished by the certificate it would not appear sufficient to accept a certificate executed by one not an authorized and recognized practitioner, nor would it be sufficient to accept the certificate of the officer or employee concerned whether or not he is an authorized and recognized practitioner. An officer or employee who is authorized to take acknowledgments or certify the correctness of transactions generally may do so only with respect to such matters as affect others. A certification or affidavit subscribed to by an officer or employee in his own behalf lacks the corroborative effect intended by the requirement thereof and generally is not acceptable. I am not aware of any reason why a statement by a believer in Christian Science, whether a practitioner or not, should be accepted in preference to similar statements of persons of a different faith.

Answering your second question specifically, you are advised that an employe who is a believer in Christian Science and who, according to his belief, knows enough of the science to be able to cure his own ailments, should be required to furnish a certificate of a licensed physician or a certificate of an authorized and recognized Christian Science practitioner or evidence of equal import acceptable to the department.

The granting of leave of absence to employees subject to the limitations prescribed by law is within the discretion of each department and establishment, and ordinarily the evidence required to warrant granting leave of absence because of illness may be left to administrative regulation.

(A–5347)

TRAVELING EXPENSES—STORAGE OF AUTOMOBILE

Where official business required travel either by train or automobile of an employee of the Bureau of Standards who was away from his headquarters on a leave of absence, and the employee elected to perform the journey by train, storage of his automobile at the point the travel status began pending his return from official business is a personal expense and not payable from public funds.

Decision by Comptroller General McCarl, November 4, 1924:

H. W. Gillett, an employee of the Bureau of Standards, applied September 6, 1924, for review of settlement 047720 of September 3, 1924, disallowing his claim for reimbursement in the amount of $2 for expenses incurred in storing his automobile while traveling on

official business. The official orders under which the travel was performed directed travel from Washington, D. C., claimant's headquarters, to Atlantic City, N. J., and intermediate points and return and authorized the travel to be performed either by train or automobile. It appears, however, that the claimant was in Philadelphia on leave upon receipt of this order and that his actual travel on official business began at that point; that he did not use his automobile for official travel but traveled by train to Atlantic City and returned to Philadelphia, storing his automobile in Philadelphia in the meantime. As no use of his automobile was made on official business, its storage was not an expense incurred on official business any more than had the expense of storage been incurred in Washington, D. C., while absent therefrom on official business. The safekeeping of private property during a period of official travel is a personal expense and not reimbursable from public funds.

Upon review the settlement is sustained.

(A-5484)

LANDING OF GOVERNMENT AIRPLANES—USE OF PRIVATE PROPERTY—DAMAGES

Neither payment for the use and occupation of private property nor for damages thereto under the provisions of the appropriation "Aviation, Navy, 1923," act of July 1, 1922, 42 Stat. 805, is authorized where a Navy airplane assigned to and operated by the Marine Corps landed in a field without damage to the property and without prior agreement with the owner or without his knowledge or assent.

Decision by Comptroller General McCarl, November 6, 1924:

Commander F. G. Pyne, United States Navy, as custodian of the retained records of Commander C. G. Mayo, United States Navy, requested September 29, 1924, review of settlement No. M-5618-N, dated April 12, 1924, wherein was disallowed in the acounts of Commander Mayo credit for $15 paid to the Sunbury Supply Co., for the use of a field in connection with the landing of a Navy airplane, assigned to and operated by the Marine Corps, on Walnut Street Field, Sunbury, Pa., April 21, 1923. No evidence has been submitted showing that the Sunbury Supply Co. owned or had any interest in the property; however, for the purpose of this decision it will be assumed that the company owned and had possession thereof.

It is reported that there were no growing crops in the field at that time and no damage was done to any part of the field or shrubbery in the vicinity. The Sunbury Supply Co., has not contended that there was any damage but bases its claim upon an implied contract to pay for the use and occupation of the property. The landing of the plane was effected without prior agreement with claimant and without its prior knowledge or assent, the landing being a trespass on the real property and a tort.

Originally, between individuals, the only remedy of one who had suffered from the wrongdoing of another was by a tort action, but there are at present a few instances in which the injured party is permitted to treat the tortious act as having created a contract between himself and the tortfeasor, and to waive the cause of action arising in tort and sue on the implied contract. The doctrine of waiving a tort and suing in assumpsit is seldom, if ever, applied where the tort in question is a naked trespass. An action for use and occupation of real property is founded on a contract express or implied, and before a recovery can be had *ex contractu* it must appear that the relation of landlord and tenant existed between the parties; under no other circumstances will the action lie. Title in the plaintiff and use and occupation by the defendant are not enough. Accordingly, if one enters as a trespasser upon another's land, an action for use and occupation can not be maintained. *Lloyd* v. *Hough*, 1 How. (U. S.) 160. The instant case was one of a mere naked trespass and the only claim of the owner, if any, is one sounding in tort for the trespass.

The appropriation "Aviation, Navy, 1923," 42 Stat. 805, provides:

* * * That the Secretary of the Navy is hereby authorized to consider, ascertain, adjust, determine, and pay out of this appropriation the amounts due on claims for damages which have occurred or may occur to private property growing out of the operations of naval aircraft, where such claim does not exceed the sum of $250: *Provided further*, That all claims adjusted under this authority during any fiscal year shall be reported in detail to the Congress by the Secretary of the Navy * * *.

The claim is not one for actual damages to private property and can not be considered as being within the appropriation act quoted.

Upon review the settlement is sustained.

(A–5966)

PURCHASES—EVIDENCE OF LOWEST BID—QUARTERMASTER'S DEPARTMENT, UNITED STATES ARMY

The act of July 5, 1884, 23 Stat. 109, relating to the purchase of supplies by the Quartermaster's Department, United States Army, and requiring that the awards be made to the lowest responsible bidder, is but declaratory of the requirements applicable to other branches of the Government involving purchases in conformity with section 3709, Revised Statutes. The requirements of decision of March 8, 1924, 3 Comp. Gen. 604, that it be so stated if the lowest bid was accepted, and explained if otherwise, which is applicable generally to all branches of the Government, is equally applicable to contracts and purchases by the Quartermaster's Department, to the extent that such purchases otherwise have not been excepted from the requirements as to advertising, etc.

Comptroller General McCarl to the Secretary of War, November 6, 1924:

I have letter of October 24, 1924, from the Acting Quartermaster General, in response to letters of October 11, 13, and 16, relative to certain contracts filed in this office, each of said contracts containing a certificate to the effect that "the award of the contract was made to the lowest responsible bidder."

In the letters of October 11, 13, and 16, you were advised that although the certificates state that the awards were made to the lowest responsible bidder, there is no showing that the lowest bids were actually accepted, attention being invited to the requirements in that respect as stated in decision of March 8, 1924, 3 Comp. Gen. 604, at page 605, as follows:

> The acceptance by an administrative officer of other than the lowest bid would ordinarily not be questioned if the reasons assigned for that action appeared satisfactory, but the action in that respect by administrative officers is not conclusive on the accounting office. It appears, therefore, that a satisfactory audit of expenditures, whether pursuant to formal or informal contracts, requires at least an affirmative showing that the lowest bid was accepted, or, if otherwise, a detailed statement of the reasons for accepting other than the lowest bid.

In response to such notices and requests for prompt compliance with the requirements as therein outlined, the Acting Quartermaster General advised that the information furnished to the effect that the awards were made to the lowest responsible bidder was all that the law required and all that had ever been required in connection with contracts of the Quartermaster's Department of the Army, citing in support thereof certain orders and regulations of the Secretary of War and a provision of the act of July 5, 1884, 23 Stat. 109, pursuant to which such orders, regulations, etc., were issued, the said act providing as follows:

> * * * *Provided*, That hereafter all purchases of regular and miscellaneous supplies for the Army furnished by the Quartermaster's Department and by the Commissary Department for immediate use, shall be made by the officers of such Department, under direction of the Secretary of War, at the places nearest the points where they are needed, the conditions of cost and quality being equal: *Provided also*, That all purchases of said supplies, except in cases of emergency, which must be at once reported to the Secretary of War for his approval, shall be made by contract after public notice of not less than ten days for small amounts for immediate use, and of not less than from thirty to sixty days whenever, in the opinion of the Secretary of War, the circumstances of the case and conditions of the service shall warrant such extension of time. The award in every case shall be made to the lowest responsible bidder for the best and most suitable article, the right being reserved to reject any and all bids. * * *

In the letter of October 24, 1924, it is stated:

> Furthermore, it is suggested that the Comptroller General's decision cited in your letters has no consistent application to this branch. That case was with regard to business under laws different from those pertaining to the Quartermaster Corps, and it is understood that at the time of the decision there was not at hand any contract, copy of proposal, or certificate as to award. It is not appreciated how the decision, under the circumstances rendered, can or should have general application, and particularly in matters where the requirements are so markedly different.
>
> It is the policy of this office to cooperate with the General Accounting Office, and in view of the explanation set forth above request is made that such exceptions as you have taken to the contracts in question, as well as any similar ones noted before consideration of this letter, be withdrawn.

The provision of law generally applicable to purchases of other branches of the Government service is section 3709, Revised Statutes, Such other branches of the Government service are not authorized to make awards to irresponsible bidders any more so than the Quarter-

master General; in other words, the provision in the act quoted, *supra*, that the award be made to the lowest responsible bidder is but declaratory of the general requirement applicable alike to all, though not expressly required of all.

The fact that a showing as to the acceptance of the lowest bid, or a statement of the reasons for accepting a higher bid, was required only in specific cases is no reason why the accounting officers could not have made that a general requirement as to all purchases. I believe that the requirements as announced in 3 Comp. Gen. 604, is a salutory one, in the interests of the United States, reasonable, and with full warrant in law; and must be adhered to.

You are advised, however, in view of the past practice, the time will be extended so that the requirements generally will be insisted upon only as to contracts executed on and after November 15, 1924, unless a particular need therefor arises in specific cases.

(A-2519)

EXCHANGE RATES—ACCOUNTS OF AMERICAN CONSULAR OFFICERS STATIONED IN CHINA

In determining the rate of exchange on Chinese silver dollars to be used by American consular officers stationed in China in the settlement of their accounts for fractional quarters, both in accounting for fees collected and in taking credit for disbursements made in paying accounts which are payable in Chinese dollars, the following procedure is authorized in accordance with the existing instructions of the State Department:

When the accounts cover the full quarter or more than two months of a quarter the average rate for such quarter should be used as the accounting rate.

When the accounts cover more than one month but not more than two months the average rate for the two months should be used as the accounting rate.

When the accounts cover not more than one month the rate for such month should be used as the accounting rate.

Comptroller General McCarl to the Secretary of State, November 8, 1924:

There has been received your letter of October 13, 1924, file FA-893.5151/263, transmitting a copy of a despatch from the American consul general at Shanghai relative to the practice to be followed in the settlement of consular accounts in China for fractional quarters.

The suggested basis for such settlements is as follows:

1. If during or at the end of the first month, at the rate for that month.
2. If during the second month, but before the end, the first month's accounts may be settled at the established rate for the first month and the second month's accounts at this month's rate.
3. But in the event that the accounts are handed over at the end of the second month, then it would appear appropriate to use the average rate of exchange for the first and second month.

The circular of instructions, dated June 7, 1924, to American consular officers in China regarding the rate of exchange on Chinese silver dollars is in part as follows:

The department will accordingly, as stated in its telegram of May 28, 1924, to the American consul general at Shanghai, telegraph on the first of each

month to the consul general at Shanghai the average rate furnished by the Federal Reserve Board for the Mexican, Hongkong, and Yuan dollars. The rate so telegraphed should be used by consular officers in the collection of fees for the month in which it is telegraphed in the same manner that the Director of the Mint rate has heretofore been used for the quarter.

In making quarterly returns of fees and in disbursements consular officers should follow the provisions of General Instruction 788 of June 28, 1921, using, however, in lieu of the average daily rates as provided therein the average of the three months of the quarter, which average rate will be furnished to the consular officers by the consul general at Shanghai at the same time that he transmits the rate for the third month of the quarter. Such average rate, in the interests of exact uniformity, will be computed by the consul general at Shanghai from the rates telegraphed to him by the department.

In accordance with these instructions, when the accounts cover the full quarter or more than two months of a quarter the average rate for such quarter should be used as an accounting rate.

Where they cover more than one month and not more than two months the average rate for the two months should be used.

Where they cover not more than one month the rate for such month should be used.

These rates should be used both in accounting for fees collected and in taking credit for disbursements made in paying accounts which are payable in Chinese dollars.

(A–5518)

SALES—SURPLUS WAR SUPPLIES—REFUNDS

Where it is shown that cloth sold at public auction was sold by lot, "as is" and "where is," without warranty or guaranty, for a lump-sum price, and delivery was made and the purchase price paid, the rule of *caveat emptor* applies and the United States is not liable for a refund of any part of the purchase price for an alleged shortage in yardage when received based upon a catalogue description of the cloth when offered for sale.

Comptroller General McCarl to Capt. H. E. Pace, Finance Department, United States Army, November 8, 1924:

There has been received your request of August 4, 1924, for decision whether you are authorized to pay voucher stated in favor of Frank Lippman in the sum of $14.03 claimed as a refund to cover an alleged shortage of 23 yards of O. D. duck, purchased at an auction sale (sales No. E–12068) held February 23, 1923.

The evidence submitted shows that Frank Lippman, at a public auction sale conducted by the quartermaster at Schenectady, N. Y., February 23, 1923, purchased for $12,200 a lot of O. D. duck cloth described in the sale catalogue as follows:

Lot No. 14–B.
73B E–13524. Duck, O. D. (color varies from khaki to O. D. dark), No. 9, 54 in. to 57½ in., unused (packing approximately 300 yards per roll), 20,000 yds.

It also appears that the purchaser sold this lot of cloth to the Anthracite Overall Manufacturing Co., of Scranton, Pa., and that no Government inspection was made after shipment from the Reserve Depot Schenectady, N. Y., and it is certified by Government

shipping clerk that the material in question was shipped in original packages with factory markings; that roll No. 70–1 was marked to contain 340 yards, and that roll No. 26 was marked to contain 345 yards.

The receiving clerk of the Anthracite Overall Manufacturing Co. in affidavit states:

* * * I found actual yardage on roll #70–1 of 327 yards instead of 340 yards invoiced and on roll #26 actual yards were 335 yards instead of 345 yards as invoiced, making a total shortage of 23 yards.

An examination of the sale catalogue, stating the conditions and terms of sale, discloses:

(*a*) That the property listed for sale was open for inspection for one week prior to the sale.

(*b*) That failure of purchaser to inspect property would not be considered grounds for claim for adjustment.

(*c*) That all property would be sold "as is" and "where is" without warranty or guaranty as to quality, character, condition, size weight, or kind, and no claim for any allowance upon any of the grounds mentioned would be considered after the property was knocked down to a bidder.

(*d*) That no representative of the Government was authorized to make any statement or representation as to quality, character, condition, size, weight, or kind of any property offered, and any statement or representation made would not be binding on the Government or be considered as grounds for any claim for adjustment.

(*e*) That the sale of each lot or part of each lot was made as a whole and shipment would not be made of fractional parts thereof.

(*f*) And that on page 5 thereof purchasers were warned for the second time that the property was sold "as is" and "where is."

The evidence shows that this entire lot of cloth was shipped direct from Government warehouse to the Anthracite Overall Manufacturing Co. and the claim for shortage is supported only by the affidavit of the receiving clerk of said company without any inspection or participation in any manner by anyone representing the Government after delivery, so even if there was a legal liability established, there would be no authority or justification for basing a refund upon the record in this case. See 4 Comp. Gen. 100.

It was said in decision of July 18, 1924, 35 MS. Comp. Gen. 750–A:

* * * and when a bid has been accepted, the material delivered, and the purchase price paid, the transaction is closed irrespective of whether the material was of the exact quality as stated in the catalogue. * * *

It was also held in 37 MS. Comp. Gen. 345, September 10, 1924, that in sales of this kind the rule of *caveat emptor* applies.

By reference to the description of lot 14–B, as contained in the catalogue, it is seen that the number of rolls of cloth was not even stated, but in parentheses are the words "packing approximately 300

yards per roll." It also appears in evidence that there were 63 rolls in the lot purchased by claimant and that only 7 of the rolls contained less than 300 yards, 2 rolls exactly 300 yards, and 54 rolls more than 300 yards, and that all the rolls of cloth were in the original package as received from factory.

Upon a careful review of all the facts and circumstances surrounding this transaction, it is clear that this was not a sale of cloth by the yard but a bulk sale, as described in the catalogue, for the lump sum of $12,200, the yardage stated as approximately 20,000 and a shortage is claimed of only 23 yards. It would seem, therefore, that the demand for a refund in the light of these facts, apart from any legal consideration, is without merit.

It appearing that this lot of cloth was sold "as is" and "where is" without guaranty or warranty of any nature, delivery made and the purchase price paid, the transaction is closed and no authority exists to refund any part of the purchase price. See 28 MS. Comp. Gen. 120, Dec. 4, 1923; 30 MS. Comp. Gen. 817, Feb. 29, 1924.

Accordingly, you are advised that payment of vouchers submitted and herewith returned is not authorized.

(A-5952)

POST EXCHANGE FUNDS—ACCOUNTABILITY

Under existing regulations officers of the Marine Corps composing a Marine Corps post exchange council are pecuniarily responsible for losses to the exchange growing out of their negligence or lack of due care and diligence in the performance of their duties, and where such responsibility is administratively fixed and the amount deducted from their pay payment of the sum deducted to the post exchange is authorized.

Decision by Comptroller General McCarl, November 8, 1924:

There has been requested review of settlement No. M-235329-N, dated October 8, 1923, disallowing the claim of the post exchange, Second Regiment, United States Marine Corps, for $855.16, the amount checked against the pay of the following officers, members of the exchange council appointed under article 1207, Marine Corps Manual:

Name of officer	Amount checked
Maj. R. E. Davis	$29.29
Capt. Martin Canavan	99.29
Capt. L. G. Wayt	99.29
Capt. R. L. Iams	528.00
Lt. W. F. McDonnell	99.29
Total	855.16

During the period from October 3 to December 6, 1922, the Second Regiment post exchange at Cape Haitien, Republic of Haiti, suffered a loss of $925.18. The brigade commander, First Brigade, United States Marine Corps, which includes the Second Regiment, ordered an investigation, and the report of the board appointed to conduct

this investigation showed that the loss was due to negligence and lack of care in the performance of their duties by the exchange officer and members of the exchange council, consisting of the officers listed above. The brigade commander ordered the pay accounts of the officers found to be responsible for the loss checked. Major R. E. Davis paid the sum of $70 in cash and the sum of $855.16 was deducted from payments made the officers.

The authority for this checkage is found in the Marine Corps Exchange Regulations, article 1207, paragraph 11, which is as follows:

> The members of an exchange council will be held pecuniarily responsible for losses to an exchange due to negligence or lack of due care and diligence in the performance of their duties. * * *

After the deductions had been made application was made to this office by the post exchange officer for payment of the amount collected from the officers and payment refused by the settlement here under review.

The fixing of the responsibility for the shortage was an administrative matter. Although the Secretary of the Navy in this connection has requested review of settlement M–67431–N, November 22, 1923, by which was disallowed the claim of Capt. R. L. Iams, United States Marine Corps, for the pay withheld, and has suggested that "the amount was illegally checked." There is no suggestion that the administrative fixing of responsibility for the shortage was not in accordance with the facts.

The collections having been made in accordance with the direction of the superiors of the officers concerned, for the express purpose of reimbursing the post exchange for the loss sustained through their acts, such withholding being in accordance with the unbroken and long-continued administrative practice, acquiesced in by the accounting officers, and held to be legal and proper by the courts, payment to said post exchange of the amount collected for its account is authorized. See 19 Comp. Dec. 496, and the authorities cited therein. It appears that by settlement No. 148437–N, dated May 6, 1924, the sum of $99.29, deducted from the pay of Capt. Martin Canavan, was refunded to him, thus leaving available for payment to the post exchange the sum of only $755.87.

Upon review the settlement is revised, and there is certified as due the claimant the sum of $755.87.

The refund of $99.29 to Capt. Martin Canavan by settlement No. 148437–N dated May 6, 1924, was improper. However, as it appears the officer was directed to make claim for the amount by his superiors, and to pay the amount when received to the post exchange, inquiry will be made to ascertain if it has been done. If not, the amount therein allowed will be disallowed and when collected will be paid to the post exchange in connection with its present claim.

(A-5758)

BURIAL EXPENSES—HEADSTONES AND MARKERS—VETERANS' BUREAU BENEFICIARIES

The cost of erecting a headstone furnished by the War Department, or the cost of purchase and erection of an ordinary marker, may be included as an item of burial expenses of beneficiaries of the United States Veterans' Bureau, within the maximum amount of $100 allowed by section 201 of the World War veterans' act of June 7, 1924, 43 Stat. 617.

Comptroller General McCarl to the Director, United States Veterans' Bureau, November 10, 1924:

I have your letter of October 13, 1924, requesting decision whether the appropriation for burial expenses of beneficiaries of the Veterans' Bureau is available for cost of erecting at the graves of beneficiaries of the bureau headstones furnished by the War Department, and for purchase of headstones or markers in cases in which they can not be furnished by the War Department, in connection with the interment of the remains of bureau beneficiaries.

Annual appropriation acts for the War Department provide an amount for the work of furnishing headstones for unmarked graves of soldiers, sailors, and marines. For the present fiscal year, see act of June 7, 1924, 43 Stat. 511. This statutory authority for furnishing headstones for unmarked graves of veterans of specified wars, now extended to veterans of all wars, has been in existence for a number of years, and it is understood that the War Department has delivered the headstones free of cost upon application but has required that the cost of erecting be borne by the applicant.

In the case of deceased pensioners it was held October 14, 1901, 8 Comp. Dec. 222, that the cost of erecting the headstones might reasonably be considered an item of burial expenses. A marker for a grave is an item usually and ordinarily included in the expenses of burial, and where a headstone is not furnished by the War Department such a marker as is ordinarily used is reasonably an item of burial expenses. But I find nothing in the law to indicate that the term "burial expenses" was intended to include the cost of purchase and erection of a tombstone not of the ordinary marker description.

Answering your question specifically, you are advised that the cost of erecting a headstone furnished by the War Department, or cost of purchase and erection of an ordinary marker to mark the grave of a beneficiary of the Veterans' Bureau, may be included as an item of burial expenses within the maximum amount of $100 allowed by section 201 of the World War veterans' act, dated June 7, 1924, 43 Stat. 617, as constituting a proper charge against the bureau appropriation for "Funeral and other incidental expenses (including transportation of remains)," subject to such regulations as you may prescribe not inconsistent with the statute.

(A-5904)

MILEAGE—CADETS OF THE UNITED STATES MILITARY ACADEMY

Where a cadet entering the United States Military Academy received, at a place other than his home, orders directing him to travel from such place to the academy, he is not entitled to the difference between the amount of mileage for the travel actually performed after receipt of the orders and that which he would have received had he made the travel from his home to the academy.

Comptroller General McCarl to Maj. Fred W. Boschen, Finance Department, United States Army, November 10, 1924:

There has been received your communication of October 3, 1924, transmitting two vouchers, one in favor of David S. Lobdell and the other in favor of Robert J. Fleming, jr., new cadets, United States Military Academy, West Point, N. Y., for mileage at 5 cents per mile for travel to enter the Military Academy, performed during June, 1924, and requesting decision whether the difference between the amount paid at 5 cents per mile from the point where the orders directing travel were actually received and the travel originated and the allowance at 5 cents per mile from their homes to the academy may be paid to the respective cadets.

The vouchers show that the home of Lobdell is at Great Bend, Barton County, Kans., and that of Fleming is at Fort Oglethorpe, Ga., while they received the orders directing travel to the Military Academy at Washington, D. C., and Exeter, N. H., respectively. The official distances involved appear to be as follows:

	Miles
Great Bend, Kans., to West Point, N. Y	1,647
Washington, D. C., to West Point, N. Y	281
Fort Oglethorpe, Ga., to West Point, N. Y	912
Exeter, N. H., to West Point, N. Y	337

Section 19 of the act of June 10, 1922, 42 Stat. 632, provides:

That cadets at the Military Academy and cadets and cadet engineers of the Coast Guard shall receive the same pay and allowances as are now or may hereafter be provided by law for midshipmen in the Navy.

The naval appropriation act of January 22, 1923, 42 Stat. 1133, provides, in so far as is here material, as follows:

* * * for mileage, at 5 cents per mile, to midshipmen entering the Naval Academy while proceeding from their homes to the Naval Academy for examination and appointment as midshipmen; * * *.

It has been held that under the above cited acts cadets who have proceeded from their homes to the Military Academy for examination and appointment are entitled to 5 cents per mile for the entire distance from their homes to the Military Academy by the shortest usually traveled route. 2 Comp. Gen. 654. There is for decision the place from which mileage should be computed when the orders directing travel to the Military Academy are received at a place other than the home of the cadet.

The purpose of the statutes is that the cadet may be transported at the expense of the Government from the place where he may be

temporarily or permanently residing at the time he is ordered to travel to the Military Academy. The allowance authorized is not an emolument or a gratuity, but is a form of reimbursement for money expended.

The travel performed by Lobdell and Fleming from Washington, D. C., and Exeter, N. H., to West Point, N. Y., respectively, is the only travel performed under the conditions indicated, and I have to advise you that there is no authority for the payment of mileage at 5 cents per mile to such cadets entering the Military Academy for constructive travel from a place other than from that where the travel originates or for travel performed prior to the actual receipt by them of orders directing the travel. The vouchers, returned herewith, are not stated for the difference between the distance from the homes of the cadets to the academy and the places where they received orders directing travel thereto, but for the distance actually traveled, which is authorized, if not already paid, except as to error in computation in Lobdell's voucher, which should be $14.05 instead of $40.05. If it was intended to submit vouchers for the difference indicated, the vouchers, if corrected, may not be paid.

(A-5886)

TRANSPORTATION OF DEPENDENTS—NAVAL OFFICERS

The right to transportation of the wife of an officer of the Navy accrues on the effective date of the order to make a permanent change of station, and marriage after that date and while en route to the new station does not entitle the officer to transportation for his wife from her former home to the new station, nor to payment for the cost of commercial transportation purchased by him for his wife.

Comptroller General McCarl to the Secretary of the Navy, November 11, 1924:

I have your request of October 20, 1924, for decision whether Ensign Peter H. H. Dunn, United States Navy, may be reimbursed for the cost of transportation of his wife from Washington, D. C., to San Francisco, Calif., under orders dated May 15, 1924, as follows:

> In accordance with the following instructions you will regard yourself detached from your present station, and from such other duty as may have been asigned; you will proceed and report for duty as indicated:
> To the commanding officer of the U. S. S. *Pennsylvania* at Seattle, Wash., reporting on 30 June, 1924.

The indorsements on these orders show that the orders were delivered and that he was detached from the Naval Academy June 4, 1924; left Annapolis June 4; arrived Washington, D. C., June 4; left Washington, D. C., June 17; arrived San Francisco June 21; left San Francisco June 27; arrived Seattle June 29; reported commandant thirteenth naval district June 30, 1924; and reported on U. S. S. *Pennsylvania* upon arrival July 1, 1924. It further appears that Ensign Dunn was married in Washington on June 5;

that he applied to the Bureau of Navigation for transportation for his wife from Washington to San Francisco; and that transportation was refused.

The right to transportation under the act of May 18, 1920, 41 Stat. 604, accrues on the effective date of the orders to make a permanent change of station, and is applicable only to officers who have a wife or dependent child or children on that date. The right to "payment in money of amounts equal to such commercial transportation costs when such travel shall have been completed," conferred by section 12 of the act of June 10, 1922, 42 Stat. 631, was granted in lieu of the transportation in kind authorized by section 12 of the act of May 18, 1920. No right to payment under the 1922 law arises unless a right to transportation in kind existed under the 1920 law. 2 Comp. Gen. 712; 32 MS. Comp. Gen. 440, April 9, 1924.

The order to make a permanent change of station in the case of Ensign Dunn was effective June 4, 1924, at Annapolis, Md., as it was from duty at that place that he was ordered to the U. S. S. *Pennsylvania.* At time of said relief from duty he had no wife. Marriage while en route to the new post of duty did not create a right to transportation for the wife from the place at which she might have been. 2 Comp. Gen. 712.

You are accordingly advised that payment of the claim in question is not authorized.

(A-5692)

POSTAL SERVICE—EFFECTIVE DATE OF PROMOTIONS

Promotions of employees in the Postal Service dependent upon administrative selection based on comparative merit, efficiency, or qualification of different employees may be made effective only from the date of approval of the selection by the appointing power or a date subsequent thereto fixed by the appointing power, which need not necessarily coincide with the beginning of any quarter.

Where a clerk of the Railway Mail Service has served satisfactorily in grade 5 for one year, or has previously been in grade 6, his selection for promotion from grade 5 to grade 6, which is a selective or competitive grade, may be made effective by the appointing power on the date of approval of selection, or a subsequent date, which need not necessarily coincide with the beginning of any quarter.

Comptroller General McCarl to the Postmaster General, November 12, 1924:

I have your letter of October 8, 1924, as follows:

In connection with your decisions of February 13, and September 16, 1924, relative to the promotion of employees in the Postal Service, will you please inform me whether discretionary or competitive promotions in the Railway Mail Service—that is, promotions dependent upon administrative selection and determination of the relative merits or qualifications of different employees—may be made effective from the date of selection by the department or must they be made from the first day of the following quarter?

To illustrate, I present the case of Railway Postal Clerk Samuel T. Hootman, Oelwein & Kansas City R. P. O. A clerk in charge vacancy of grade 6 became available on his line June 22, 1924, and he was selected by the department in competition with five other grade 5 eligibles to fill it August 5, 1924.

Would it be permissible to promote him to grade 6, effective August 5, 1924, the date of his selection or should the promotion be made effective from October 1, 1924?

As Mr. Hootman was in grade 6 prior to April 1, 1923, this might be treated as a restoration. Should that fact be taken into consideration in determining the date of his advancement to grade 6?

The department has been making all promotions and restorations in the Railway Mail Service effective from the first of quarters under the following provisions of the postal reclassification act, approved June 5, 1920:

"Road clerks shall be promoted successively to grade three for clerks, and to grade four for clerks in charge of Class A, and to grade five for clerks and to grade six for clerks in charge of Class B.

"Promotions shall be made successively at the beginning of the quarter following a year's satisfactory service in the next lower grade.

"Whenever an employee herein provided for shall have been reduced in salary for any cause, he may be restored to his former grade or advanced to an intermediate grade at the beginning of any quarter following the reduction, and a restoration to a former grade or advancement to an intermediate grade shall not be construed as a promotion within the meaning of the law prohibiting advancement of more than one grade within one year."

Answering the general question, you are advised that promotions dependent upon administrative selection based on comparative merit, efficiency, or qualification of different employees may be made effective only from the date of approval of the selection by the appointing power or any subsequent date fixed by the appointing power. 3 Comp. Gen. 517; *id.* 559; *id.* 884; decision of September 16, 1924, 4 Comp. Gen. 299. This effective date of promotion of selected employees, i. e., those not in the automatic grades, need not necessarily coincide with the beginning of any quarter.

The act of June 5, 1920, 41 Stat. 1045–1053, requires that in certain of the divisions of the Postal Service there must be one year's satisfactory service in a lower grade before an employee is entitled to promotion to a higher grade. In the Railway Mail Service, where this requirement is made, the one year's satisfactory service is as essential before promotion may be made to a selective or competitive grade as it is for promotion to an automatic grade, the difference being that the promotion to the selective or competitive grade after the year's satisfactory service depends upon the further action of the appointing power, whereas the promotion to the automatic grade depends only upon the passage of time and the character of service.

Accordingly, if Mr. Hootman had served satisfactorily in grade 5 for one year or had previously been in grade 6, his promotion from grade 5 to grade 6, a selective or competitive grade, could have been approved by the appointing power August 5, 1924, and made effective from said date or any date subsequent thereto fixed by the appointing power. If the selection has not yet been approved by the appointing power, it may not now be approved retroactively to August 5, 1924.

The fact that the advancement was a restoration to a position formerly held would be for consideration only in case the ad-

vancement would otherwise be precluded or delayed by the law prohibiting advancement of more than one grade within one year.

(A-5903)

PROHIBITION ENFORCEMENT—DESTRUCTION OF PRIVATE PROPERTY

The use of the appropriation "Enforcement of narcotic and national prohibition acts, 1925," act of April 4, 1924, 43 Stat. 71, to reimburse prohibition agents for the estimated value of articles of personal wearing apparel destroyed by explosion and fire while on a patrol boat in the discharge of their official duties is unauthorized.

Comptroller General McCarl to the Secretary of the Treasury, November 12, 1924:

There has been received your letter of October 23, 1924, submitting for decision the question as to whether Prohibition Agent J. A. Thomas may be reimbursed, from the appropriation "Enforcement of narcotic and national prohibition acts, 1925," in the sum of $24.75, the estimated value of articles of personal wearing apparel lost by fire on account of the destruction by explosion and fire of motor patrol boat *P-110* on September 1, 1924, in Bayou St. John, New Orleans, La., it appearing that at the time Prohibition Agent Thomas was aboard the boat in the course of his official duties.

The appropriation proposed to be charged is as follows:

For expenses to enforce the provisions of the National Prohibition Act and the Act entitled "An Act to provide for the registration of, with collectors of internal revenue, and to impose a special tax upon, all persons who produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away opium or cocoa leaves, their salts, derivatives, or preparations, and for other purposes," approved December 17, 1914, as amended by the Revenue Act of 1918, and the Act entitled "An Act to amend an Act entitled 'An Act to prohibit the importation and use of opium for other than medicinal purposes,' approved February 9, 1909," as amended by the Act of May 26, 1922, known as "the Narcotic Drugs Import and Export Act," including the employment of executive officers, agents, inspectors, chemists, assistant chemists, supervisors, clerks, and messengers in the field and in the Bureau of Internal Revenue in the District of Columbia, to be appointed as authorized by law; the securing of evidence of violations of the Acts, and for the purchase of such supplies, equipment, mechanical devices, laboratory supplies, books, and such other expenditures as may be necessary in the District of Columbia and the several field offices, and for rental of necessary quarters, $10,629,770: * * *. Act of April 4, 1924, 43 Stat. 71, 72.

The use of this appropriation is limited to the objects therein indicated. And as there is nothing in the language of the appropriation that can be construed as providing for reimbursement for private property lost by employees while engaged in their official duties, and no general statutory provision authorizing such reimbursement, the question submitted must be and is answered in the negative.

(A-2798)

NAVY PAY—VOID SUMMARY COURT-MARTIAL SENTENCES

A sentence by a summary court-martial which directed the forfeiture of pay of an enlisted man of the Navy for an alleged offense which was not cognizable by a naval court-martial was void, and the enlisted man is entitled to a refund of any sums deducted from his pay by reason of such void sentence.

Decision by Comptroller General McCarl, November 13, 1924:

Leo Joseph LaBelle requested review of settlement No. M-17366, dated December 12, 1923, disallowing his claim for refund of $120, checked against his account pursuant to summary court-martial sentence approved August 11, 1921. The checkage was made in August, 1921, recredited to his account in January, 1922, and again checked in October, 1922.

It appears that the specifications in the court-martial alleged that the accused:

* * * having been ordered to the Pacific Coast Torpedo Station, Keyport, Washington, for a course of instructions in the Torpedomans' School, did, on or about July 10, 1921, after having been informed by the inspector of ordnance in charge that he, the said Leo Joseph LaBelle, gunner's mate second class, U. S. Navy, had insufficient time to serve to be allowed to take the course of instructions in the Torpedomans' School, and he, the said Leo Joseph LaBelle, gunner's mate second class, U. S. Navy, was further informed that in order to take the course of instructions in the Torpedomans' School it would be necessary for him, the said Leo Joseph LaBelle, gunner's mate second class, U. S. Navy, to either extend his enlistment or sign an agreement to reenlist upon the expiration of his current enlistment, whereupon he, the said Leo Joseph LaBelle, gunner's mate second class, U. S. Navy, did agree to sign an agreement to reenlist, and that on August 10, 1921, the said Leo Joseph LaBelle, gunner's mate second class, U. S. Navy, upon which being called before the inspector of ordnance in charge to sign the above referred to agreement to reenlist, did then and there refuse to sign said agreement.

The Judge Advocate General in letter to the commanding officer, U. S. S. *Texas*, dated January 18, 1922, expressed the opinion that the facts alleged in the specifications failed to constitute an offense cognizable by naval court-martial, and also informed the commanding officer that the Secretary of the Navy directed that the proceedings, finding, and sentence in the case be set aside, and that his record be corrected accordingly.

It is apparent that the alleged offense for which he was tried and convicted amounted to a breach of contract only, and did not constitute an offense cognizable by a naval court-martial, and therefore he forfeited no pay by reason of said sentence. 2 Comp. Gen. 445.

Upon review the settlement is reversed and $120 is certified due claimant.

(A-5632)

WAR RISK INSURANCE—REINSTATEMENT OF LAPSED POLICY

Where all the conditions fixed by section 408 of the war risk insurance act authorizing reinstatement of lapsed insurance policies have been met by the insured, the erroneous rejection of the application for reinstatement by the Veterans' Bureau on the assumption that the insured was then totally and permanently disabled, whereas he was only temporarily and totally disabled, as evidenced by the rating in existence at the time of rejection, will not defeat the rights under the policy, but payment of insurance, less proper deduction of unpaid premiums and interest, is authorized as though the policy had actually been reinstated.

Comptroller General McCarl to the Director, United States Veterans' Bureau, November 13, 1924:

I have your letter of October 6, 1924, requesting decision whether you are authorized to pay insurance under the policy previously held by Harris Ralph Williams, C-505,325.

You state as follows:

The facts in the Williams case are that Williams on October 24, 1921, applied for the reinstatement of insurance in the sum of $10,000 and paid the proper amount of premiums and interest to effect the reinstatement. He also furnished proof of the service origin of his disease. On April 1, 1922, his application was rejected on the ground that he was then permanently and totally disabled. Prior to the rejection and subsequent to the date of his application Williams tendered the proper amount of premiums up to and including the month of March, 1922. Under dates of April 13 and 19, 1922, all the money tendered by him as premiums was refunded. He tendered no premiums thereafter for the reason that he was notified that his application was rejected.

Just prior to the date of his application he had been rated temporarily and totally disabled. Subsequent to rejection of his application his case was again reviewed on several occasions, and he was found not to have been permanently and totally disabled at the date of his application or at the time of the subsequent examinations and ratings. In fact, in the rating made on January 13, 1923, he was found to be temporarily and partially disabled only to the extent of 10%. On May 5, 1923, he again applied for the reinstatement of his insurance but tendered no premiums, and this was rejected on the ground that he was then permanently and totally disabled and had been since April 6, 1923.

At the time of the making of both applications for reinstatement he had furnished the bureau sufficient evidence of the service origin of his disability, and at the date of his first application he had furnished the bureau the evidence upon which it was afterwards found that he was not at that time permanently and totally disabled. In other words, the rating of permanent total disability, which deprived him of his first reinstatement, was an error. Williams died June 3, 1923.

It will be observed that the insured died prior to the passage of the World War veterans' act and that all his rights, if any, accrued under the war risk insurance act. These accrued rights, if any, are preserved by section 602 of the World War veterans' act.

This case does not fall within the fourth proviso of section 408 of the war risk insurance act, for the reason that the onset of total permanent disability as now established occurred subsequent to March 4, 1923. The only question remaining is whether under your decision in the Lonnie Graves case this insurance is payable by reason of the erroneous rejection of Williams' first application for reinstatement. In this connection your attention is invited to the fact that Williams persisted in the tendering of premiums up to the date of the rejection of his first application and that thereafter he tendered no premiums.

In the decision referred to, involving the case of Lonnie Graves, dated March 15, 1924, it was held that the finding of total and permanent disability not of service origin made by the bureau, defeating the application for reinstatement of the insurance policy

under section 408 of the war risk insurance act may be reviewed and corrected by the bureau to show the disability to have been total and permanent at a date subsequent to the application for reinstatement of the insurance, and of service origin, the effect of which was to consider the original application for reinstatement effective to validate the policy and to authorize lawful payments thereunder.

In this case your submission indicates that there was no rating in existence showing total and permanent disability at the time the first application for reinstatement was filed, October 24, 1921, or rejected April 1, 1922, but in fact the rating of temporary and total disability had just been made prior to the date of the application for reinstatement and such a rating remained in existence until April 6, 1923. Accordingly, this is not a case for decision on the basis of the holding made in the Lonnie Graves case under the fourth proviso of section 408 of the war risk insurance act, as amended March 4, 1923, 42 Stat. 1526. It is for determination under the first part of section 408, including the first two provisos thereof, originally enacted, and added to the war risk insurance act by the act of August 9, 1921, 42 Stat. 156, as follows:

SEC. 408. In the event that all provisions of the rules and regulations other than the requirements as to the physical condition of the applicant for insurance have been complied with, an application for reinstatement of lapsed or canceled yearly renewable term insurance or application for United States Government life insurance (converted insurance) hereafter made may be approved: *Provided*, That the applicant's disability is the result of an injury or disease or of an aggravation thereof suffered or contracted in the active military or naval service during the World War: *Provided further*, That the applicant during his lifetime submits proof satisfactory to the director showing the service origin of the disability or aggravation thereof and that the applicant is not totally and permanently disabled. As a condition, however, to the acceptance of an application for the reinstatement of lapsed or canceled yearly renewable term insurance or United States Government life insurance (converted insurance) the applicant shall be required to pay all the back monthly premiums which would have become payable if such insurance had not lapsed, together with interest at the rate of 5 per centum per annum compounded annually on each premium from the date said premium is due by the terms of the policy: * * *

It is understood that there is involved in this case no question of accrued and unpaid installments of disability compensation having kept alive the insurance.

All of the conditions of the quoted portion of section 408 of the war risk insurance act were met by the applicant when he filed his application for reinstatement October 24, 1921, and the conditions remained in *status quo* until his application was rejected April 1, 1922. It has since developed that the rejection of his application was an administrative error on the part of the United States Veterans' Bureau, which, if it had not occurred, would have entitled the applicant to the reinstatement of his insurance policy. In other words, the insured did all the law required to entitle him to the reinstatement of his policy, and his right to such reinstatement should not be considered as having been defeated by an error

in the administrative office for which he was not responsible and over which he had no control. This is not a case, therefore, of retroactively correcting the erroneous rating of total and permanent disability, as in the case of Lonnie Graves, but of giving the proper effect to the rating of less than total and permanent disability in existence at the time the application for reinstatement of insurance was filed and rejected on the erroneous assumption that the insured was then totally and permanently disabled.

The second application for reinstatement and the rejection thereof had no bearing on the rights of the insured under the first attempted application for reinstatement.

Accordingly, you are advised that lawful payments of insurance are authorized under the terms of the policy as having been reinstated, the amounts of unpaid premiums and interest thereon being properly for deduction.

(A-5675)

ST. ELIZABETHS HOSPITAL—TREATMENT OF INSANE PENSIONERS AT REQUEST OF THE UNITED STATES VETERANS' BUREAU

Under section 202 (10) of the World War veterans' act of June 7, 1924, 43 Stat. 620, "veterans of any war, military occupation, or military expedition since 1897, not dishonorably discharged without regard to the nature or origin of their disabilities," may be hospitalized in Government hospitals other than those directly under the control and jurisdiction of the Veterans' Bureau, including St. Elizabeths Hospital, under the Department of the Interior.

Where a veteran who is receiving a pension through the Pension Office is hospitalized in St. Elizabeths Hospital at the request of the Veterans' Bureau, the pension is chargeable with the cost of hospitalization in an amount properly fixed by regulation of the Secretary of the Interior under the act of February 2, 1909, 35 Stat. 592, and the appropriation under the Veterans' Bureau is chargeable only with the cost of hospitalization over and above the amount properly deductible from the pension.

The amount billed to the Veterans' Bureau by St. Elizabeths Hospital for the cost of hospitalizing a veteran receiving a pension through the Pension Office, in accordance with the provisions of the act of June 5, 1924, 43 Stat. 429, "in advance or at the end of each month" should represent only the cost of hospitalization less the amount which will be properly chargeable to the pension, if an advance payment, or which had been properly chargeable to the pension if at the end of the month. Adjustments on the basis of the actual cost for the hospitalization where payments are made in advance should be made monthly or quarterly as may be agreed upon between St. Elizabeths Hospital and the Veterans' Bureau.

Comptroller General McCarl to the Secretary of the Interior, November 13, 1924:

I have your letter of October 9, 1924, requesting decision of questions presented by the administrative assistant to the superintendent of St. Elizabeths Hospital involved in the case of Myer Landerman, who is being hospitalized at the request of the Director of the United States Veterans' Bureau. The submission is partly as follows:

We have received under date of September 25th an order signed by Frank T. Hines, Director, U. S. Veterans' Bureau, and countersigned by W. J. Heffner,

district medical officer, district #4; directing us to receive in Saint Elizabeths Hospital the person of Myer Landerman, under paragraph 10, section 202, W. W. V. Act 1924, as an insane patient of the U. S. Veterans' Bureau, to be cared for as prescribed by the acts of Congress approved March 3, 1875, and March 3, 1919.

Myer Landerman was a former private in Company C, 3d U. S. Infantry, and has been twice admitted to this hospital, both times on the order of the Secretary of War. He was admitted the first time August 16, 1905, and the last time on an order dated March 7, 1906, signed by the Military Secretary requesting the admission to the hospital of Myer Landerman under the authority of section 4843, Revised Statutes of the United States, and is still in the hospital.

Myer Landerman is a beneficiary of the U. S. Pension Office under pension certificate No. 1160154, receiving a pension of $30 a month. Of this pension, under the acts of February 20, 1905, and February 2, 1909, and the various regulations of the Secretary of the Interior of May 1, 1909, as amended from time to time, one-sixth of this amount is set aside for the pensioner's benefit, the balance, not exceeding $1.50 a day, to be charged for his board.

Section 202 (10) of the World War veterans' act, dated June 7, 1924, 43 Stat. 620, provides as follows:

That all hospital facilities under the control and jurisdiction of the bureau shall be available for every honorably discharged veteran of the Spanish-American War, the Philippine Insurrection, the Boxer rebellion, or the World War suffering from neuropsychiatric or tubercular ailments and diseases, paralysis agitans, encephalitis lethargica or amoebic dysentery, or the loss of sight of both eyes regardless whether such ailments or diseases are due to military service or otherwise, including traveling expenses as granted to those receiving compensation and hospitalization under this act. The director is further authorized, so far as he shall find that existing Government facilities permit, to furnish hospitalization and necessary traveling expenses to veterans of any war, military occupation, or military expedition since 1897, not dishonorably discharged without regard to the nature or origin of their disabilities: *Provided*, That preference to admission to any Government hospital for hospitalization under the provisions of this subdivision shall be given to those veterans who are financially unable to pay for hospitalization and their necessary traveling expenses.

The questions for determination are, first, whether Government hospital facilities, other than those directly under the "control and jurisdiction" of the bureau, are available for the hospitalization of veterans other than of the World War; second, if so, is the Veterans' Bureau obligated to pay the full amount of the cost of the hospitalization for such a veteran who is receiving a pension through the Pension Office, or should there be deducted from the amount chargeable to the Veterans' Bureau that portion of the pension chargeable with the care of the veteran under laws previously in force; and, third, what should be the procedure for making reimbursement to the hospital.

First. Paragraph (10) of section 202 of the World War veterans' act consists of two parts; the first sentence, comprising about the first half of the paragraph, relates to veterans of the Spanish-American War, the Philippine insurrection, the Boxer rebellion, or the World War suffering from specified diseases. This part is a reenactment of section 4 of the act of April 20, 1922, 42 Stat. 497, as amended by the act of March 4, 1923, 42 Stat. 1524. With respect to these veterans this office has held that they are "on equal footing

with World War veterans with respect to medical and hospital treatment by the bureau" and are, therefore, entitled to treatment in Government hospitals under the control of the War and Navy Departments. 3 Comp. Gen. 174. What was there said would apply equally to the mentioned classes of veterans hospitalized in St. Elizabeths Hospital, under the Department of the Interior. The last half of the paragraph is new legislation and would seem to include the veterans specifically mentioned in the first half and also all other "veterans of any war, military occupation, or military expedition since 1897, not dishonorably discharged without regard to the nature or origin of their disabilities." This hospitalization which the director of the bureau may authorize is limited by the phrase "so far as he shall find that existing Government facilities permit." The term "Government facilities" is broad enough to include Government hospitals other than those directly under the "control and jurisdiction of the bureau" such as St. Elizabeths Hospital.

Second. Section 4849, R. S., as amended by the act of February 2, 1909, 35 Stat. 592, provides, in part, as follows:

* * * During the time that any pensioner shall be an inmate of the Government Hospital for the Insane, all money due or becoming due upon his or her pension shall be paid by the pension agent to the superintendent or disbursing agent of the hospital, upon a certificate by such superintendent that the pensioner is an inmate of the hospital and is living, and such pension money shall be by said superintendent or disbursing agent disbursed and used, under regulations to be prescribed by the Secretary of the Interior, for the benefit of the pensioner, and, in case of a male pensioner, his wife, minor children, and dependent parents, or, if a female pensioner, her minor children, if any, in the order named, and to pay his or her board and maintenance in the hospital, the remainder of such pension money, if any, to be placed to the credit of the pensioner and to be paid to the pensioner or the guardian of the pensioner in the event of his or her discharge from the hospital; or, in the event of the death of said pensioner while an inmate of said hospital, shall, if a female pensioner, be paid to her minor children, and, in the case of a male pensioner, to be paid to his wife, if living; if no wife survives him, then to his minor children; and in case there is no wife or minor children, then the said unexpended balance to his or her credit shall be applied to the general uses of said hospital: * * *

The provision in the World War veterans' act for hospitalization of veterans other than of the World War shows no intention to repeal or render inoperative prior laws obligating the pensions of veterans for their medical or hospital care, and it is a fundamental rule of statutory construction that such a repeal by implication is not favored. It would seem that the appropriation for medical and hospital treatment under the United States Veterans' Bureau may be obligated for the cost of hospitalizing veterans of wars other than the World War only in an amount not previously provided by statute. Accordingly, in this case the pension continues to be chargeable with the amount properly fixed by regulations of the Secretary of the Interior under the act of February 2, 1909, and the appropriation of the Veterans' Bureau is chargeable only with the

cost of the hospitalization over and above the amount deducted from the pension.

Third. The act of June 5, 1924, 43 Stat. 429, provides:

> * * * *Provided*, That during the fiscal year 1925 the District of Columbia, or any branch of the Government requiring Saint Elizabeths Hospital to care for patients for which they are responsible, shall pay by check to the superintendent, upon his written request, either in advance or at the end of each month, all or part of the estimated or actual cost for such maintenance as the case may be, and bills rendered by the Superintendent of Saint Elizabeths Hospital in accordance herewith shall not be subject to audit or certification in advance of payment; proper adjustments on the basis of the actual cost of the care of patients paid for in advance shall be made monthly or quarterly, as may be agreed upon between the Superintendent of Saint Elizabeths Hospital and the District of Columbia government, department, or establishments concerned. All sums paid to the Superintendent of Saint Elizabeths Hospital for the care of patients that he is authorized by law to receive, shall be deposited to the credit on the books of the Treasury Department, of the appropriation made for the care and maintenance of the patients at Saint Elizabeths Hospital for the year in which the support, clothing, and treatment is provided, and be subject to requisition by the disbursing agent of Saint Elizabeths Hospital, upon the approval of the Secretary of the Interior.

While this enactment apparently contemplates cases where the entire cost of hospitalization is the obligation of one Government establishment, there appears nothing therein to indicate an intent to preclude its application to such cases as this one. Where only a portion of the cost is chargeable to the Veterans' Bureau, the amount billed to the Veterans' Bureau, "either in advance or at the end of each month," should represent only the cost of hospitalization less amount which will be properly chargeable to the pension, if an advance payment, or which has been properly chargeable to the pension if at the end of the month. The act expressly provides that "proper adjustments on the basis of the actual cost of the care of patients paid for in advance shall be made monthly or quarterly, as may be agreed upon between the superintendent of St. Elizabeths Hospital and * * * establishments concerned." In this case it is between St. Elizabeths Hospital and the United States Veterans' Bureau. The amount paid by the Veterans' Bureau is required to be deposited for credit to the appropriation of St. Elizabeths Hospital current when such services are performed or provided. 4 Comp. Gen. 48. The administrative assistant to the superintendent of St. Elizabeths Hospital suggests that the Veterans' Bureau be given credit only at the end of each fiscal year for the amount deducted from the pension. As the act of June 5, 1924, *supra*, provides only for adjustments monthly or quarterly, there would be no authority for such procedure. Furthermore, the pension is primarily liable for the hospitalization to the extent properly deductible, and the procedure suggested would deprive the Veterans' Bureau of the use of the amount proper for credit to its appropriation for the fiscal year during which such amount can be obligated for expenditure.

(A-4538)

PAYMENT BY TREASURY DEPARTMENT FOR USE OF LEASED-WIRE SYSTEM OF FEDERAL RESERVE BOARD

In the absence of a specific statutory provision therefor, there is no authority for the Treasury Department to make payments to the Federal Reserve Board for telegraphic service rendered the department over the board's leased-wire system on other than an actual cost basis for the service furnished, determined after the service has been rendered and in advance of such payments.

Comptroller General McCarl to the Secretary of the Treasury, November 14, 1924:

I have your letter of October 20, 1924, with reference to decision of September 16, 1924, relative to the arrangement between the Treasury Department and the Federal Reserve Board for settlement of bills of the said board for use of its leased wire system in the transaction of Treasury Department business, the said arrangement providing for the payment of an estimated monthly rate, segregated and charged under enumerated appropriations and funds on the basis of the estimated service performed for the objects for which such appropriations and funds were made or created, any excess charged pursuant to the estimated rate per month for one fiscal year to be adjusted by a decrease in the monthly rate for the succeeding fiscal year.

In the decision of September 16, 1924, it was said:

> The monthly payments here contemplated appear as in the nature of advances such as are prohibited by section 3648, Revised Statutes, in the absence of legislation specifically authorizing advance payments. What is contemplated being done, and without specific legislative authority, is not essentially different from what is now being done by St. Elizabeths Hospital, but by virtue of and pursuant to specific legislative authority. See act of June 5, 1924, Public No. 199, pages 43 and 44, 43 Stat. 429.
>
> Though the amount overpaid in one fiscal year, by reason of the unauthorized advances on the estimated cost basis, may be recouped by a reduction in the estimated rate in the succeeding fiscal year, the result is, as affecting the annual appropriations involved, that those of the latter fiscal year are augmented by the unauthorized charges under those of the former fiscal year. That is contrary to the provisions of section 3678, Revised Statutes, which are that "All sums appropriated for the various branches of expenditure in the public service shall be applied solely to the objects for which they are respectively made, and for no others." Such overcharges as may have been made under the appropriations for one fiscal year and which have resulted in augmenting appropriations of other fiscal years are now for consideration of this office looking to an adjustment charging the latter with the amounts of such undercharges and crediting the former with the amounts of the overcharges.
>
> It would appear practicable to formulate some plan whereby the charges for the services rendered by the Federal Reserve Board might be billed after such services are performed, monthly or at other intervals, on the basis of the actual cost of such services, determined as accurately as may be possible under the circumstances, and with that end in view a further submission is invited of the details of any plan thought to meet the requirements of law as herein outlined.

In your letter of October 20, 1924, you state:

> A new arrangement was made for the fiscal year beginning July 1, 1923, under which the sum of $4,700 per month was to be paid, chargeable to appropriations as follows:

Expenses of loans, act of September 24, 1917, as amended and extended	$4,390.00
Public debt service, 1924	139.50
Contingent expenses, public moneys, 1924	170.50
	4,700.00

It was intended that the new monthly rate would be sufficient to make up the deficiency for the nine months ended June 30, 1923. During the year ended June 30, 1924, the amount of business transacted over the leased-wire system fell off at a great rate, principally on account of there being few new issues made during that year, so that the payments amounted to $30,419.83 more than would have been paid on the basis of the actual number of words sent at the actual cost per word. This overpayment not only wiped out the underpayment under the preceding arrangement, but left a net overpayment of $9,616.32 on June 30, 1924. Taking into consideration the overpayment and the amount of business as determined by the record of the past year, the new rate of $1,700 per month was established, chargeable to appropriations as follows:

Expenses of loans, act of September 24, 1917, as amended and extended	$1,365.00
Public debt service, 1925	139.50
Contingent expenses, public moneys, 1925	170.50
Miscellaneous expenses, Federal Farm Loan Board (special fund), 1925	25.00
	1,700.00

The monthly payments chargeable to "Public debt service" and "Contingent expenses, public moneys," are the same under all three arrangements, the amount of business chargeable to each appropriation having been practically the same. The last arrangement provides for a payment of $25 from the Farm Loan Board's appropriation, as the board is now using the leased wire in the transaction of its business.

The great variation has been in the appropriation "Expenses of loans, act of September 24, 1917, as amended and extended," because there have been wide fluctuations in the amount of business chargeable to that appropriation. As that appropriation is an indefinite appropriation, not pertaining to any fiscal year, the objections raised by you that the amount overpaid in one fiscal year may not be recouped by reduction in the estimated rate in the succeeding year, because such action is contrary to the provisions of section 3678, Revised Statutes, does not appear to be in point. An adjustment of appropriations as suggested in your letter would simply result in transferring money out of the appropriation and paying it back into the same appropriation.

The form of the agreement between the department and the Federal Reserve Board seems to be the most equitable in view of all the circumstances as detailed herein. For the reasons given, an attempt to make payment on the basis of the actual number of words sent at the actual cost per word would result in much delay and a large amount of clerical work, and would be objectionable to the Federal Reserve Board. It is not desired to enter into an arrangement for paying an arbitrary amount per annum for use of the leased-wire system, but the department has attempted to make an arrangement whereby the amount of the monthly payment shall be adjusted from time to time in accordance with the variations in the business. As the adjustment is all made in the indefinite appropriation, which does not pertain to any fiscal year, it would seem that the present arrangement could be continued without doing any violence to good accounting practice.

While the arrangement as now explained may not be in contravention of the provisions of section 3678, Revised Statutes, nevertheless it appears to involve a payment in advance of or in excess of services rendered and therefore is prohibited by the provisions of section 3648, Revised Statutes.

Accordingly, notwithstanding the matters submitted, I have no alternative but to advise that any plan of making the payments

on other than the basis of the actual cost of the service furnished, determined after the service is rendered and in advance of such payments, is not authorized in the absence of specific statutory authority therefor.

(A-5972)

EXPRESS CHARGES ON ARMY RIFLES NOT SHOWN TO HAVE BEEN GOVERNMENT PROPERTY

Payment of express charges on undelivered rifles for the purpose of obtaining possession of them from an express company, when not shown to be the property of the United States or to have been shipped by authority of any of its officers, is unauthorized; but if the War Department claims they are the property of the United States, and shall administratively determine and certify that the most advantageous and economical means of obtaining possession of them is by paying the express charges, payment thereof may be made from the appropriation for contingencies of the Army, act of June 7, 1924, 43 Stat. 479, if the Secretary of War shall so authorize or approve.

Comptroller General McCarl to the Secretary of War, November 15, 1924:

I have your request of October 25, 1924, for decision whether payment may be made to the American Railway Express Co. for express charges on two rifles now in possession of the company and which it offers to surrender to the United States upon payment of the accrued charges.

It appears that the two rifles were shipped by persons unknown from St. Paul, Minn., to an address in New York City, and from Harmans, Md., to Baltimore, Md., and that the express company has been unable to locate the consignees. The Director of Civilian Marksmanship reports no record of the shipments or of the names of the consignees, and the Chief of Ordnance states:

> It may be inferred that the rifles in question are the property of the Government, although no definite ownership can be established, as the arms were either issued or sold during the war, when no record of serial numbers was kept.

There is, of course, no liability on the United States to pay express charges on privately owned rifles, the shipment of which was not made by any officer or agent authorized to make such shipments on behalf of the Government. Therefore, unless the proposed payment can be made as a contingent expense necessary to obtain possession of Government property or as the purchase price of the rifles upon the assumption that they legally belong to the American Express Co., there would appear to be no authority for said payment. In view of the fact that other specific provision for the acquisition of rifles has been made by law (act of June 7, 1924, 43 Stat. 498 and 510) the purchase of these rifles from the express company would not be authorized even if said company's right to sell were established. If the War Department claims that the rifles in question are the property of the Government and should administratively de-

termine and certify that the most advantageous and economical means of obtaining possession thereof is by paying the express company the amount of the accrued charges, such payment would appear to be a proper charge under the appropriation for contingencies of the Army, act of June 7, 1924, 43 Stat. 479. The question submitted is answered accordingly and the papers submitted are returned herewith.

(A-5982)

SALES—SURPLUS SUPPLIES—REFUNDS

Where the circular advertisement describing waste paper offered for sale stated the estimated weight and contained a provision stating that the paper would be weighed on delivery to the purchaser and the actual weight would govern the purchaser is entitled to a refund of the amount paid in excess of the value of the quantity actually delivered to him.

Comptroller General McCarl to Maj. H. E. Pace, Finance Officer, United States Army, November 15, 1924:

There has been received your letter of October 23, 1924, transmitting, through the Office of the Chief of Finance, with request for decision whether payment thereon is authorized, a voucher in favor of Marino Bros. in the sum of $228.46 on account of shortage in delivery of waste paper purchased at sale of surplus supplies held at Brooklyn, N. Y., in compliance with circular proposal No. 8, dated September 20, 1924.

By circular advertisement dated September 20, 1924, proposals were requested by the quartermaster supply officer, Brooklyn, N. Y., on certain salvage supplies. The firm of Marino Bros. was awarded lot No. 44, as listed in the advertisement and stated to consist of approximately 50,000 pounds of mixed waste paper, part in bales, part in bags, and part loose in boxes. The claimant paid for 50,000 pounds at the price agreed upon. However, when delivery was made it was discovered that only 32,560 pounds were delivered. The lot sold claimant was described in the advertisement as follows:

* * * Mixed waste paper. Part in bales, part in bags, part loose in boxes. Weight is estimated. There may be more or less. Will be weighed on delivery and actual weight will govern. * * *

The provisions of the advertisement in conformity with which the bid was submitted and accepted clearly show that the sale in this particular instance was not a sale of the lot at a lump-sum price regardless of weight, but that it was a sale of the lot at the price of $1.31 per 100 pounds for the actual weight of the material delivered.

As it appears that payment was made for 50,000 pounds, whereas the actual weight of the lot as delivered was only 32,560 pounds, thereby resulting in an overpayment by the purchaser in the amount of $228.46 as stated on the voucher submitted, refund of that amount is authorized from the proceeds of the sale of any articles listed in

the advertisement covering this sale if a sufficient amount of said proceeds is still carried in a special deposit account.

The voucher and accompanying papers are returned herewith.

(A–4808)

CONTRACTS—AUTO HIRE

An agreement for the hire of an automobile to a field agent of the General Land Office, Department of the Interior, for 11 days during the period from April 2 to 18, 1924, at $12 per day, $132, not having been reduced to writing as required by section 3744, Revised Statutes, the claim for reimbursement is only allowable on the basis of a *quantum meruit*.

The authority given the Department of the Interior by the act of June 5, 1924, 43 Stat. 392, to purchase supplies and equipment or procure personal services in the open market where the amount does not exceed $100, does not authorize the splitting up of procurements which would otherwise exceed $100 into smaller units in order to avoid compliance with sections 3709 and 3744, Revised Statutes.

The objection to the hire of automobiles for lengthy periods as being an indirect violation of the prohibition against the purchase of motor-propelled passenger-carrying vehicles is not applicable where the department or service has been given statutory authority to purchase passenger-carrying vehicles, and in such cases contracts for the hire for extended periods may be made when in the interests of the Government.

Comptroller General McCarl to the Secretary of the Interior, November 17, 1924:

The following is a copy of a letter received from E. D. M. Fowle, special disbursing agent, General Land Office, on August 19, 1924:

That all field employees of the General Land Office may have early and specific instructions as to requirements concerning necessity for advertising and the execution of formal contracts, covering purchases and services other than personal, as well as definitely specified rulings as to when and in what manner the exceptions, under the provisions of the act of June 5, 1924, for the Interior Department, may be applied, specifically with reference to the hire of special transportation, request is hereby made for an advance decision or ruling.

I am enclosing herewith copy of my letter, dated August 11, 1924, directed to Special Agent Henry H. Lepper, Glasgow, Montana, concerning claims of the Magruder Motor Co. Inc., Glasgow, Montana, for auto hire, replying to pointed inquiries as to why I failed to make payment of the claims, as presented, and my reasons for transmitting same to your office for direct settlement as claims.

A disbursing officer is entitled under the law to a decision only on a question specifically involved in a voucher which is properly before him for payment. 4 Comp. Gen. 159, 160. However, this disbursing officer presents certain matters as to which he should be advised, and in view thereof it is deemed proper to bring them to your attention and to state generally the law and procedure applicable.

The claim of the Magruder Motor Co. (Inc.), referred to in the disbursing agent's letter, *supra*, was for the hire by Henry H. Lepper, special agent, General Land Office, Department of the Interior, of one "closed Overland automobile," for 11 days during the period from April 2 to 18, 1924, at $12 per day, the hire of the said automobile, certified as for the official use of said agent, being

by informal agreement not reduced to writing as required by section 3744, Revised Statutes.

The voucher constituting the claim was forwarded to this office for direct settlement, as required by decision of July 5, 1924, 4 Comp. Gen. 14, being transmitted by the Acting Commissioner of the General Land Office, approved for settlement in the amount claimed and being accompanied by certificates by three residents of Glasgow, Mont., who "have been engaged in the hire of automobiles" that the charge "of $12 per day is a very reasonable rate for the use of said automobile in the vicinity of Glasgow, Mont." Upon the facts now appearing the amount claimed will be allowed on the basis of a *quantum meruit*.

There is attached to the voucher constituting said claim a letter, dated April 24, 1924, from E. D. M. Fowle to the Commissioner of the General Land Office, in which it is stated:

Rule 233, Circular 616, approved August 9, 1918, by the Secretary of the Interior, is a lawful regulation providing authority for the hire of special transportation:

"Special conveyances: Hire of special conveyances, such as taxicabs or other automobiles, livery, or boat, only when no public or regular means of transportation are available and the necessary incidental expenses connected therewith, such as feed and stabling of horses and the subsistence of driver, ferriage, and tolls. Also services of and subsistence of guide when no driver is employed. If the charges for special conveyance include feed and stabling of horses and subsistence of driver, or any such items, the principal voucher or subvoucher must so state. The maximum amount that may be paid by special disbursing agents without specific authorization by the commissioner is $20 a day for hire of each auto. If in rare cases it is necessary to exceed this rate, the excess amounts must not be paid until full explanation has been submitted to the commissioner and receives his approval."

Circular 459, approved February 21, 1916:

"By direction of the Secretary, the following instructions are issued for your guidance in the matter of the hire of automobiles:

"1. The hire of automobiles is authorized only for single trips, and in cases where it is clearly advantageous to the Government as against other available means of conveyance."

There was transmitted in connection with the request for decision a copy of a letter dated July 30, 1924, from the Acting Assistant Commissioner of the General Land Office to Henry H. Lepper, special agent, Glasgow, Mont., which reads:

Referring to your inquiry of July 21, 1924, vouchers in favor of the Magruder Motor Company and your own voucher for payments made to that company are held pending receipt of "Written statements from one or more persons engaged in the same vicinity in the hire of automobiles as to what they consider a reasonable rental for the machine used," required by the comptroller's decision of July 5, 1924, a copy of which is inclosed herewith.

If you contract with any motor company for the hire of a machine, for such a period as will amount to more than $100, it will be necessary for you to comply with Secs. 3709 and 3744, R. S., but if the service (whether for the trip or for the week) amounts to less than $100, the statutory requirement as to advertising and as to contracts is waived by the Interior appropriation act of 1925.

The act of June 5, 1924, 43 Stat. 392, provides:

The purchase of supplies and equipment or the procurement of services for the Department of the Interior, the bureaus and offices thereof, including

Howard University and the Columbia Institution for the Deaf, at the seat of government, as well as those located in the field outside the District of Columbia, may be made in open market without compliance with sections 3709 and 3744 of the Revised Statutes of the United States, in the manner common among business men when the aggregate amount of the purchase or the service does not exceed $100 in any instance.

The apparent reason for reference to Rule 233, Circular 616, approved August 9, 1918, is to show the authority of the field officers of the General Land Office to enter into contracts of hire such as here in question. The first sentence of Rule 233, Circular 616, corresponds to the same authority granted all field employees of the Department of the Interior. See paragraph 7, page 4, of the Travel Regulations of the Department of the Interior, approved September 30, 1914.

Circular 459, approved February 21, 1916, was issued at a time when none of the appropriations for the General Land Officce made provision for the purchase, maintenance, and operation of motor-propelled passenger-carrying vehicles. See the appropriations in question, act of March 3, 1915, 38 Stat. 854 to 856, and see also section 5 of the act of July 16, 1914, 38 Stat. 508, 509, which provided:

No appropriation made in this or any other Act shall be available for the purchase of any motor-propelled or horse-drawn passenger-carrying vehicle for the service of any of the executive departments or other Government establishments, or any branch of the Government service, unless specific authority is given therefor, and after the close of the fiscal year nineteen hundred and fifteen there shall not be expended out of any appropriation made by Congress any sum for purchase, maintenance, repair, or operation of motor-propelled or horse-drawn passenger-carrying vehicles for any branch of the public service of the United States unless the same is specifically authorized by law, and in the estimates for the fiscal year nineteen hundred and sixteen and subsequent fiscal years there shall be submitted in detail estimates for such necessary appropriations as are intended to be used for purchase, maintenance, repair, or operation of all motor-propelled or horse-drawn passenger-carrying vehicles, specifying the sums required, the public purposes for which said vehicles are intended, and the officials or employees by whom the same are to be used.

In construing the section just quoted it was held in decision of January 19, 1915, 21 Comp. Dec. 462, that—

* * * While the act of July 16, 1914, *supra*, speaks in terms of the purchase of automobiles, yet to hold that an automobile may be hired by the month or by the year would be an evasion of the law and would nullify it, inasmuch as everyone who could not purchase a machine might accomplish the same purpose by hiring it.

It followed from the provisions of section 5 of the act of July 16, 1914, and the decisions construing that section, that only trip hires of passenger-carrying vehicles were authorized in the absence of authority to purchase such vehicles; and that undoubtedly accounted for paragraph 1 of Circular No. 459, approved February 21, 1916, the authority to make the trip engagements, in the absence of authority to purchase, being on the same basis as the authority to incur expenses for necessary official transportation by the more regular means of public conveyance such as by street car steamboat, railroad, etc. However, since the issuance of Circular No. 459,

authority to purchase passenger-carrying vehicles has been granted in connection with at least one appropriation, to wit, the one here in question, for "Protecting public lands, timber, etc.," act of June 5, 1924, 43 Stat. 395, under which, it is understood, practically all of the hirings of passenger-carrying vehicles are made, hirings of such vehicles under the other appropriations of the General Land Office being only for occasional trips.

It appears that Circular No. 459, *supra*, should be amended, if it has not already been, so that hirings under the appropriation for "Protecting public lands, timber, etc.," may be made for extended periods where to so hire is in the interests of the United States. There would appear no justification for repeated single trip hires where there is authority to hire for extended periods and the needs of the service can be supplied at more advantageous rates by the hiring for an extended period. Neither is there authority for splitting nonpersonal service engagements merely to avoid the requirement of law as to advertising and reducing contracts to writing as required by sections 3709 and 3744, Revised Statutes, such as making two engagements for hire for 5 days each at $12 a day instead of one engagement for 10 days at the same rate. See generally decision of August 6, 1924, 4 Comp. Gen. 159, as to the requirements of, and procedure, etc., in connection with, the $100 purchase provision for the Interior Department, quoted, *supra*.

(A-5195)

CLASSIFICATION OF CIVILIAN EMPLOYEES—UNIT OF APPROPRIATION—DEPARTMENT OF COMMERCE

The appropriation item "Enforcement of China trade act" under the major or general heading "Bureau of Foreign and Domestic Commerce," Department of Commerce, act of May 28, 1924, 43 Stat. 226, constitutes a separate and distinct appropriation unit within the meaning of the average provision restricting payments for personal services under the Department of Commerce in accordance with the classification act of March 4, 1923, 42 Stat. 1488. 4 Comp. Gen. 342 modified.

Comptroller General McCarl to the Secretary of Commerce November 17, 1924:

I have your letter of October 16, 1924, requesting reconsideration of a portion of the decision of October 1, 1924, 4 Comp. Gen. 342, holding that the bureaus under the Department of Commerce constitute the units within the meaning of the average provision restricting payments for personal services in the District of Columbia for the fiscal year 1925 in accordance with the classification act of 1923.

You state in part as follows:

Under the major heading "Foreign and Domestic Commerce," appears the following item:

"Enforcement of China Trade Act. To carry out the provisions of the Act entitled 'China Trade Act, 1922,' including $23,520 for personal services

in the District of Columbia and elsewhere, traveling and subsistence expenses of officers and employees, purchase of furniture and equipment, stationery and supplies, typewriting, adding and computing machines, accessories and repairs, purchase of books of reference and periodicals, reports, documents, plans, specifications, manuscripts, and all other publications; rent outside the District of Columbia, and all necessary expenses not included in the foregoing, $31,020."

The amount above appropriated is for the purpose of enforcing the act of September 19, 1922, otherwise known as the China trade act of 1922. The purpose of this act is to provide a means for companies operating in China to incorporate under a Federal law. It authorizes the Secretary of Commerce to designate an officer of this department as registrar and sets up a code of law to be followed for those desiring to avail themselves of its provisions. Articles of incorporation, when adopted under this law, must be submitted to the Secretary of Commerce for his approval or disapproval, as the case may be. These articles must be carefully considered in order to ascertain whether they meet the requirements of the law, whereupon a certificate of incorporation is issued.

The law, among other things, provides that 25 per cent of the authorized capital stock must be paid for in cash or in real or personal property and in the latter event a certificate is required describing such property. This certificate must be examined in order to determine whether a fair market value has been given to it. Other reports must be submitted from time to time for examination.

It would seem that the duties above referred to are entirely unrelated to any of the other activities contemplated under the general heading "Foreign and Domestic Commerce," and I therefore ask that you reconsider your decision of October 1, 1924, in so far as it affects the amount appropriated by Congress for the enforcement of this act.

Upon further examination of the quoted statute in the light of your explanation as to services performed thereunder it would appear the purposes provided under the appropriation item "Enforcement of China trade act" are sufficiently dissimilar and unrelated to the purposes provided for under the remainder of the appropriation items under the major or general heading of "Bureau of Foreign and Domestic Commerce" as to constitute the item "Enforcement of China trade act" a separate and distinct unit within the meaning of the average provision. Decision of October 1, 1924, is modified accordingly.

(A-5490)

PURCHASES, SIGNS AND PICTURES—BUREAU OF MINES

Signs and pictures used in exhibits by the Bureau of Mines, Department of the Interior, in first-aid contests and in exhibits depicting the various phases of the mining industry, when administratively determined by the Secretary of the Interior to be necessary for the dissemination of information concerning the subjects investigated in carrying out the purposes of the act of February 25, 1913, 37 Stat. 681, establishing the Bureau of Mines and the appropriations in furtherance thereof, may be paid for from appropriations of the bureau "Investigating mine accidents, 1924," and "Mineral mining investigations, Bureau of Mines, 1924."

Decision by Comptroller General McCarl, November 17, 1924:

The Secretary of the Interior applied September 29, 1924, for review of settlement C-12730-I, dated July 11, 1924, in which credit was disallowed for items of $36 and $20 in the account of J. B. Callahan, chief disbursing clerk of the Interior Department.

The item of $36 was a payment from the appropriation "Investigating mine accidents, 1924," for signs and pictures used at an exhibit held in connection with a first-aid contest, and the item of $20 was a payment made from the appropriation "Mineral mining investigations, Bureau of Mines, 1924," for a sign used in an exhibit held by the Bureau of Mines in the Interior Building in Washington to show various phases of the mining industry.

The act of February 25, 1913, 37 Stat. 681, established the Bureau of Mines in the Interior Department and provided that it should, subject to the approval of the Secretary of the Interior, conduct investigations concerning mining with a view to improving health conditions and increasing safety, efficiency, etc., in the various mineral industries and to disseminate information concerning the subjects investigated in such manner as will best carry out the purposes of the act.

The appropriations from which the disallowed payments were made were for purposes set out in the act establishing the Bureau of Mines, and while said appropriations do not specifically provide for the dissemination of information, the purposes of the appropriations are such that the dissemination of certain information would be regarded as properly within the scope thereof. The appropriation for investigating mine accidents, from which the first-aid exhibit signs and pictures were purchased, specifically recognizes first-aid contests by including not to exceed $1,000 for the purchase of trophies in connection with such contests, and the expenditure from the appropriation for mineral mining investigations was for a sign used in connection with an exhibit held at the direction of the Secretary of the Interior.

The purchases in question were not in contravention of any statute and it appears to have been administratively determined that they were necessary for the dissemination of information concerning subjects investigated in carrying out the purposes of the act of February 25, 1913, and the appropriations involved. Therefore, while it is not apparent from the description of the signs, etc., and the statement of the use made of them that they were necessary to the acomplishment of the purposes of the appropriations, in the light of the Secretary's explanations there appears to be sufficient relation between the appropriations and the purposes for which the signs, etc., were used to justify accepting the administrative findings in the matter.

Upon review a difference of $56 is certified for credit in the disbursing clerk's accounts.

(A-5749)

CLASSIFICATION OF CIVILIAN EMPLOYEES—SALARY AVERAGE

The salary average is to be computed on the basis of the total number of persons under any grade receiving compensation at or within the range of rates specifically fixed by the classification act of March 4, 1923, 42 Stat. 1488, for that grade, excluding the salary of those persons receiving compensation administratively fixed under authority of law at rates in excess of the maximum rates specifically fixed by the classification act for that grade.

Comptroller General McCarl to the Attorney General, November 17, 1924:

I have your letter of October 9, 1924, requesting decision of the question whether the salaries of employees which are in excess of the maximum rates specifically fixed by the classification act and which are specifically authorized by other law should be included in computing the average of the grade to which such positions have been allocated.

You refer to the provision in the act of May 28, 1924, 43 Stat. 218, for "Investigation and prosecution of war frauds," expressly made available for personal services in the District of Columbia, containing the following proviso:

* * * *Provided further*, That not more than two persons shall be employed hereunder at a rate of compensation exceeding $10,000 per annum each, whose aggregate compensation shall not exceed $30,000, but the Attorney General may fix the compensation of not to exceed 6 persons at not to exceed $10,000 each.

You state as follows:

There are twelve persons being paid for personal services out of this appropriation whose positions have been allocated by the Personnel Classification Board to grade 6 of the professional and scientific service—5 at the rate of $10,000 per annum, 2 at the rate of $7,500 per annum, 1 at the rate of $7,000 per annum, and 4 at the rate of $6,000 per annum.

I desire to increase the salary of an attorney now receiving $6,000 per annum, and who occupies one of the positions above enumerated, to the next higher rate in the grade; that is, $6,500 per annum.

The classification act fixes the rate of compensation for grade 6 of the professional and scientific service as follows:

The annual rates of compensation for positions in this grade shall be $6,000, $6,500, $7,000, and $7,500, unless a higher rate is specifically authorized by law.

The "average" provision in the appropriation act for the Department of Justice, 43 Stat. 205, contains the following exception, which is common to the average provisions appearing in all the appropriation acts for the fiscal year 1925:

* * * (3) To prevent the payment of a salary under any grade at a rate higher than the maximum rate of the grade when such higher rate is permitted by the classification act of 1923, and is specifically authorized by other law.

The rate of $10,000 per annum is in excess of the maximum rate of $7,500 per annum specifically fixed for grade 6 of the professional and scientific service and is specifically authorized by other law. The rate average for all the grades under the classification act is

an invariable amount based on the rates specifically mentioned in the act. In grade 6 of the professional and scientific service, here for consideration, the rate average is $6,750 per annum. The salary average depends on the total number of persons in the grade and the rate of compensation paid them, which is subject to adjustment by the administrative office not to exceed the invariable rate average. Were the salaries of those persons whose compensation is fixed administratively under authority of law at rates above the maximum specifically mentioned in the classification act to be included in computing the salary average in the grade in which the positions have been allocated, it is obvious that no effect could be given to the quoted exception to the average provision, nor to the express authority of law for fixing rates in excess of the maximum rates specifically mentioned for the grade. Therefore it is reasonable to conclude the intent to be that the salary average is to be computed on the basis of the "total number of persons under any grade" receiving compensation at or within the range of the rates specifically fixed by the classification act for that grade, not including the salaries of persons receiving compensation administratively fixed under authority of law at rates in excess of the maximum rates specifically mentioned in the classification act for said grade.

Accordingly, in the present case, the five positions now paid at the rate of $10,000 per annum are not required to be included in computing the average for the grade. The salary average for the remainder of the seven positions of the grade is $6,571.42 per annum, less than $6,750 per annum, the rate average for the grade. The promotion of one of the persons from $6,000 to $6,500 per annum would be authorized, as the increased salary average resulting therefrom, $6,642.85, would still remain below the rate average for the grade.

(A-1235)

RENTAL ALLOWANCE WHILE ON LEAVE—RETURN TO DUTY NOT CONTEMPLATED—PUBLIC HEALTH SERVICE OFFICERS

An officer of the Public Health Service who, while attached to a permanent station and in receipt of rental allowance as an officer with dependents on account of there being no public quarters available at the station, was granted accrued leave of absence is entitled to rental allowance as an officer with dependents while on said leave, under section 6 of the act of June 10, 1922, 42 Stat. 628, as amended by section 2 of the act of May 31, 1924, 43 Stat. 250, notwithstanding his return to duty at its expiration was not contemplated.

Decision by Comptroller General McCarl, November 19, 1924:

J. L. Summers, disbursing clerk, Treasury Department, applied February 25, 1924, for review of settlement certificate No. T-13773, dated June 29, 1923, and settlement certificate No. C-1386-T, dated September 1, 1923, wherein were disallowed credits on vouchers Nos.

58 and 59, of payments of $100 each, for rental allowance for December, 1922, and January, 1923, to Surg. William C. Witte, United States Public Health Service.

It appears that Surgeon Witte was granted three months' annual leave of absence from November 16, 1922, while he was attached to his regular station in Chicago, Ill., and was in receipt of rental allowance as an officer with dependents, there being no public quarters available for himself or his dependents (wife and two minor children), and that on expiration of accrued leave he was granted extended leave. He was paid by claimant on vouchers Nos. 58 and 59 rental allowance for December, 1922, $100 and rental allowance for January, 1923, $100, which amounts were disallowed, as there was no return to duty contemplated on expiration of accrued leave. He was entitled to and was paid active-duty pay during the period while he was on annual leave of absence.

Allowance is requested under section 6 of the act of June 10, 1922, 42 Stat. 628, as amended by section 2 of the act of May 31, 1924, 43 Stat. 250, 251, which provides:

> Except as otherwise provided in the fourth paragraph of this section, each commissioned officer below the grade of brigadier general or its equivalent, in any of the services mentioned in the title of this Act, while either on active duty or entitled to active duty pay shall be entitled at all times to a money allowance for rental of quarters. * * *

The fourth paragraph is as follows:

> No rental allowance shall accrue to an officer, having no dependents, while he is on field or sea duty, nor while an officer with or without dependents is assigned as quarters at his permanent station the number of rooms provided by law for an officer of his rank or a less number of rooms in any particular case wherein, in the judgment of competent superior authority of the service concerned, a less number of rooms would be adequate for the occupancy of the officer and his dependents.

Section 7 of the act of May 31, 1924, provides:

> That the provisions of this Act shall be effective from and after July 1, 1922.

The items are payable under this provision of law and upon review the disallowances in question, amounting to $200, are now allowed and certified for credit in the claimant's disbursing account.

(A-5669)

CLASSIFICATION OF CIVILIAN EMPLOYEES—OFFICE OF SUPERINTENDENT OF DOCUMENTS—COMPENSATION FOR NIGHT WORK

Employees of the Office of the Superintendent of Documents, Government Printing Office, allocated under the provisions of the classification act of March 4, 1923, 42 Stat. 1488, to the clerical-mechanical service and paid at hourly rate of compensation, are entitled to pay for night work between the hours of 5 p. m. and 8 a. m. at the rates fixed by the provisions of the classification act, plus 20 per cent thereto, under the provisions of the act of January 12, 1895, 28 Stat. 607.

Comptroller General McCarl to the Public Printer, November 19, 1924:

I have your letter of October 9, 1924, requesting decision whether employees of the Office of the Superintendent of Documents, Govern-

ment Printing Office, allocated to the clerical-mechanical service and paid at the hourly rate of compensation fixed by the classification act, are entitled to 20 per cent in addition to their regular compensation for night work between the hours of 5 p. m. and 8 a. m.

Section 39 of the act of January 12, 1895, 28 Stat. 607, provides as follows:

* * * *Provided*, That the pay of all employees of the Government Printing Office engaged on night work (between the hours of five o'clock postmeridian and eight o'clock antemeridian) shall be twenty per centum in addition to the amount paid for day labor.

The classification act of 1923, dated March 4, 1923, 42 Stat. 1488, provides for only two bases for computing compensation, viz, per annum and per hour. Per annum applies to all the various services established by the act except the clerical-mechanical service, which is authorized for payment on an hourly basis. The classification act expressly provides:

The clerical-mechanical service shall include all classes of positions which are not in a recognized trade or craft and which are located in the Government Printing Office, * * * the duties of which are to perform or to direct manual or machine operations requiring special skill or experience or to perform or direct the counting, examining, sorting, or other verification of the product of manual or machine operations.

The act of June 7, 1924, 43 Stat. 658, entitled "An act to regulate and fix rates of pay for employees and officers of the Government Printing Office," provides as follows:

* * * *Provided further*, That employees and officers of the Government Printing Office, unless otherwise herein fixed, shall continue to be paid at the rates of wages, salaries, and compensation (including night rate) now authorized by law until such time as their wages, salaries, and compensation shall be determined as hereinbefore provided.

You state as follows:

No rate different from that as above specifically set having to this date been fixed for employees paid by the hour and working at night in the Office of the Superintendent of Documents, the Public Printer has taken the position that the law setting a rate of 20 per centum in addition to day rates properly applies to such employees, pending the setting of any other rate in the manner required by Public Act 276, 68th Congress.

Acting under the two authorities above quoted, the Public Printer has caused to be paid to Mr. Hugh Rutland, employed in Office of the Superintendent of Documents, allocated to clerical-mechanical service, grade 3, at 65¢ per hour, who worked overtime from 5 p. m. to 9 p. m. on September 9, 1924, the sum of 78¢ per hour for such overtime, this being his rate under the classification act plus the 20% additional provided by law for night work.

In the decision of this office, dated August 25, 1924, 4 Comp. Gen. 202, it was expressly held that the act of June 7, 1924, *supra*, authorizing the Public Printer to regulate and fix the rates of compensation of employees in the Government Printing Office, relates to personal service under the appropriation "Public printing and binding" and superseded the classification act to that extent only, having no application to personal services under the appropriations "Office of Public Printer" and "Office of Superintendent of Docu-

ments." That decision was cited and, in effect, affirmed in decision dated September 11, 1924, 4 Comp. Gen. 293, holding that the appropriations "Office of Public Printer" and "Office of Superintendent of Documents" constitute one appropriation unit within the meaning of the "average" provision appearing in the act of June 7, 1924, 43 Stat. 593, appropriating funds for the Government Printing Office for the fiscal year 1925, and restricting payments of compensation under the classification act of 1923.

Accordingly, the quoted portion of the act of June 7, 1924, 43 Stat. 658, authorizing the continuation of the rates of compensation then in existence until other rates shall have been fixed by the Public Printer "(including night rate)" has no reference to compensation of employees in the Office of Superintendent of Documents.

In determining the question here presented there is for consideration only the act of January 12, 1895, *supra*, authorizing 20 per cent additional compensation for night work, and the provisions of the classification act. The 20 per cent increase authorized by the act of January 12, 1895, is not for overtime work, but for night work; that is, for work between the hours of 5 p. m. and 8 a. m. regardless of the number of hours worked during any period of 24 hours. The flat percentage increase authorized is applicable as well to compensation fixed by the hour, month, or year as to compensation fixed by the day. The provision for the percentage increase is specific permanent legislation, not inconsistent with the classification act, and there is nothing in the classification act to indicate an intention to repeal or supersede said provision.

You are advised, therefore, that the employees in the Office of the Superintendent of Documents may be paid for night work between the hours of 5 p. m. and 8 a. m. at the rate of 20 per cent in addition to the rates fixed by the classification act.

(A-5864)

POSTAL SERVICE—ADJUSTMENTS IN SALARY OF ASSISTANT POSTMASTERS BASED ON INCREASE OF POSTAL RECEIPTS

The adjustment in the salary of an assistant postmaster at a second-class post office, based on the gross postal receipts during a calendar year, in accordance with the provisions of the act of June 5, 1920, 41 Stat. 1047, is not an appointment or a promotion within the intent of the decision of May 12, 1924, 3 Comp. Gen. 844, requiring the approval of the First Assistant Postmaster General to become effective, but may be made effective on July 1, the beginning of the fiscal year subsequent to the end of the calendar year used as the basis for the adjustment in the salary, regardless of whether the determination as to the amount of the gross receipts for the preceding calendar year is made before or after July 1.

Comptroller General McCarl to the Postmaster General, November 19, 1924:

I have your letter of October 22, 1924, requesting decision whether the increase in the salary of Fanny H. Scott, assistant

postmaster at Berlin, Md., from $1,900 to $1,950 per annum, predicated on the gross receipts of the Berlin post office for the calendar year ended December 31, 1923, was automatically effective July 1, 1924, the beginning of the next fiscal year, or not until the increase has been approved by the First Assistant Postmaster General.

It appears that Berlin, Md., is a second-class post office and that the gross receipts for the calendar year 1922 were $13,776.37 and for the calendar year 1923 were $15,765.59.

The act of June 5, 1920, 41 Stat. 1047, provides as follows:

> The Postmaster General is authorized to fix the salaries of assistant postmasters at offices of the second class, based on gross postal receipts for the calendar year immediately preceding the adjustment at the following rates, namely:
> * * *; $12,000, but less than $15,000, $1,900; $15,000, but less than $18,000, $1,950; * * *.

After citing various statutes relative to the basis for fixing the salaries of postmasters and assistant postmasters in the past you state as follows:

> * * * While the act approved June 5, 1920, does not definitely indicate in any of its provisions the date effective of the readjusted compensation of postmasters, assistant postmasters, and supervisory officials, it appears to be obvious from the various laws pertaining to the matter that Congress intended the readjustment of the salaries of assistant postmasters and supervisory employees to coincide with the date of the adjustment of the postmasters' salaries. In this belief, and due to the fact that some time must elapse after the close of the calender year before an ascertainment may correctly be made of the gross receipts of post offices, upon which salary adjustments are predicated, the department has continued the policy long since adopted to adjust the salaries of postmasters, assistant postmasters, and supervisory officials as of July 1 next following the acertainment. As the new appropriation, which is predicated on estimates of anticipated increases in post-office revenues, becomes available on July 1, and as a definite date should be fixed, that date is the earliest, most convenient, and logical date on which such readjustments can be made.
>
> This department has considered a readjustment of salaries of assistant postmasters and supervisory officials of post offices as provided in the act of June 5, 1920, as mandatory, and as effective July 1 next following the ascertainment of the gross postal receipts of post offices, and that if the revenues of a post office show a sufficient increase to entitle the assistant postmaster or supervisory employees to an increase in salary, they become entitled to such increase on July 1, and likewise if a decrease is shown bringing the salaries of the assistant postmaster and supervisory employees to the next lower salary level, such employees must suffer a reduction in salary as of July 1.

The increase or decrease in the salary of assistant postmasters under the quoted provision in the act of June 5, 1920, is not dependent upon any selection or recommendation of a subordinate officer to the appointing power based on comparative efficiency, as was the case of the officers and employees considered in the decision of May 12, 1924, 3 Comp. Gen. 844, but upon a changed condition arising in the work of the post office not subject to the control of the officers of the Postal Service. See 3 Comp. Gen. 924–6.

It is understood to have been the uniform practice, in the adjustment of salaries of postmasters, assistant postmasters, and other officers and employees whose rate of compensation is fixed by law

on the basis of the gross receipts of the post office, to make such adjustments effective July 1 following the end of the calendar year the receipts of which form the basis of the adjustment. The fixing of such effective date of the salary adjustments would appear to be just and logical and in the absence of any statutory provision to the contrary and in view of the specific provision in the act of June 5, 1920, *supra*, that "The Postmaster General is authorized to fix the salaries" at rates specifically stated therein, based on gross receipts, I feel justified in holding that effect may be given to the administrative action in designating July 1 as the effective date of such salary adjustments regardless of whether the determination as to the amount of the gross receipts for the preceding calendar year is made before or after July 1.

Accordingly, you are advised that the increase in the salary of Fanny H. Scott from $1,900 to $1,950 per annum may be considered as effective from July 1, 1924, without further approval of her individual increase by the First Assistant Postmaster General, it appearing that this increase is not an appointment or promotion within the meaning of the decision of May 12, 1924, requiring the approval of the First Assistant Postmaster General to become effective, which decision had reference to those appointments and promotions to the positions of assistant postmaster, supervisory official, and clerk at first and second class post offices, not in the automatic grades, selection or recommendation for which was made by a subordinate officer and approved by the First Assistant Postmaster General.

(A-5756)

PAYMENTS, ADVANCE—TELEPHONE LISTINGS

The payment of a fee for the extra listing of a Government telephone in the local telephone directory, effective for one year in advance, is not prohibited by section 3648, Revised Statutes, as a payment for services in advance of their rendition.

Decision by Comptroller General McCarl, November 20, 1924:

The Secretary of the Treasury applied October 15, 1924, for a review of settlement No. 047220, dated August 12, 1924, disallowing the claim of the Michigan Bell Telephone Co. for $3 for the listing of a local telephone in the name of the United States Public Health Service in the telephone directory, Grand Haven, Mich., for the period from July 1, 1924, to June 30, 1925. The claim was disallowed for the reason that it was believed to involve an advance payment for services to be rendered and as such was prohibited by the provisions of section 3648, Revised Statutes.

It appears that the Secretary of the Treasury approved the request, among others, of the Public Health Service, of June 11, 1924, to incur expenditures for extra listings in local telephone directories

at its various stations requiring the same during the fiscal year ending June 30, 1925, where the Public Health Service is not paying for telephone service and where the telephone of the acting assistant surgeon in charge of the stations is utilized by the Government for extra listings, and that the claim in question is for the expense of such an extra listing.

In decision of February 27, 1922, 1 Comp. Gen. 455, involving the question of payment of fee for registering an abbreviated cable address of a Government bureau, effective for one year in advance, it was pointed out that when the act of registration was completed the whole service was performed and there was nothing to be done preliminary to payment. The service contracted for in the instant case was an authorized listing for the benefit of the United States, in the local telephone directory for a period of one year, beginning July 1, 1924. According to the certification by the administrative officer on the voucher the act of listing has been completed, so that nothing remains to be done in the matter preliminary to payment. It does not appear that the charge is other than or in excess of what is charged others for similar service.

Upon review the amount of $3 is certified to be due the claimant.

(A-6141)

SUBSISTENCE—ACTUAL EXPENSE WHILE AT HEADQUARTERS

A prohibition agent whose place of abode is Minneapolis, Minn., and place of duty is St. Paul, Minn., is not in a travel status while in attendance upon a court in Minneapolis in connection with his official duties and reimbursement for luncheons taken under such conditions while in Minneapolis is not authorized.

Comptroller General McCarl to the Secretary of the Treasury, November 20, 1924:

I have your letter dated October 21, 1924, requesting a review of the action taken on items in voucher 262 included in settlement C-15759, dated September 29, 1924, accounts of Sigurdt B. Qvale, special disbursing agent, Internal Revenue, which resulted in the disallowance of the sums of 50 cents, 50 cents, and 40 cents covering charges for midday meals obtained by Jacob P. Brandt, prohibition agent, while attending court in Minneapolis, October 16, 17, and 19, 1923, concerning which you state:

The General Accounting Office disallowed the charges for subsistence in Minneapolis because that place appears to be within the field of the officer's duties; also the requirement of duty at the place of domicile would involve no additional expense in the performance of that duty. The General Accounting Office for its authority for making the disallowances refers to your decision 3 Comp. Gen. 598.

It is to be noted that the employee left his post of duty October 15 and did not return thereto until October 20, and that during the period of absence he claimed subsistence charges for midday meals October 16, 17, and 19. Your decision 3 Comp. Gen. 598 refers to short temporary absences during the day, and therefore its applicability to the case presented here is not apparent. This department is of the opinion that the employee is clearly entitled to the

subsistence charges claimed, since he was absent from his post of duty on official travel, notwithstanding the fact that the place at which the subsistence was claimed happened to be the employee's domicile.

It is represented, and not denied, that the employee's abode is at Minneapolis and the place of duty is assigned as St. Paul. The diary of duty, however, discloses that some of the time is spent upon duty at an office in Minneapolis, so that the duty station evidently comprises both the adjacent cities, but for reasons hereinafter stated this point is not material.

From the employee's position, and the fact of the charge upon appropriation for the enforcement of the narcotic and prohibition acts, it is assumed that this employee was in attendance upon court in pursuance of his official duty to aid in the enforcement of those acts. Consequently any expenses claimed as incident to such attendance are only such as are allowable in accordance with the acts of March 3, 1875, 18 Stat. 452, and what may be said to be an amendment thereof, the acts of April 6, 1914, 38 Stat. 318, and August 1, 1914, 38 Stat. 680. 16 Comp. Dec. 411.

Under the terms of these acts, to entitle an employee to subsistence there must be a travel status, involving expenses additional to those usually incurred at the duty station. Where an officer or employee, as in this case, has a regular duty station in one city and maintains a home or obtains lodgings in another nearby city, a temporary assignment to duty in the city in which he resides does not operate to place him in a travel status such as is contemplated by the acts authorizing the payment of travel allowance.

Accordingly the disallowance appears correct and upon review is sustained.

(A–4482)

SUBSISTENCE EXPENSES—FRACTIONAL DAYS

Officers and employees are not entitled to a per diem in lieu of subsistence for short trips between the hours of 6 p. m. one day and 8 a. m. of the following day when the absence is of such short duration or between such hours as to preclude the presumption of a necessity for incurring any expenses for subsistence during said period.

Officers and employees temporarily absent on short trips into territory adjacent to their official stations between the hours of 8 a. m. and 6 p. m. are not in a travel status and not entitled to reimbursement for actual expense of subsistence nor to a per diem in lieu thereof.

Employees of the Department of Justice may be allowed a full per diem in lieu of subsistence for days of departure from and return to official station, where authorized by regulation, for trips of more than 12 hours, extending from one day to another.

Comptroller General McCarl to the Attorney General, November 21, 1924:

I am in receipt of your letter dated October 31, 1924, submitting, with request for opinion whether it is in conflict with any provision of law, copy of a circular proposed to be issued to United States marshals and other court officials, and, in addition, with reference

to my decision of September 6, 1924, A-4482, 4 Comp. Gen. 274, and reconsideration thereof dated October 17, 1924. You state:

> Again referring to the question of reimbursement of expenses incurred by employees of this department while absent from their headquarters for short periods, and to your decision of October 17, 1924 (A-4482), I beg to suggest for your further consideration, the question of the allowance of actual and reasonable expenses of subsistence when the employee is necessarily absent from his headquarters for periods in excess of three hours and during the hours when meals are ordinarily taken. While it is perhaps true that in certain of the larger cities the employees ordinarily purchase their lunches at their official headquarters and little, if any, additional expense is incurred by reason of the purchase of a lunch elsewhere, I desire to invite your attention to the fact that hundreds of deputy marshals, deputy clerks etc., residing in the smaller towns and in the rural districts throughout the United States, return to their homes for lunch (or the noonday meal).
>
> It is of course obvious that, when they are necessarily absent from their headquarters on official business during such meal period and are required to purchase a meal elsewhere, they will suffer personal loss if they are not reimbursed therefor. Inasmuch as a large number of such trips are made by process-serving deputies whose average salary is approximately only $1,500 per annum, the strict enforcement of the rule promulgated in your decision above mentioned will, it is feared, have a demoralizing effect upon that branch of the service. It does not seem that, in the interest of the public service, a rule should be made which would prohibit the reimbursement of at least actual and reasonable expenses of subsistence between the hours of 8 a. m. and 6 p. m., when the employee is actually absent from his headquarters on official business, and particularly under the conditions above mentioned.

The rule established in the various decisions previously referred to rests upon the basis of whether there actually exists such a travel status as authorizes payment by the Government of subsistence expenses either on the basis of a per diem or reimbursement of actual expenses. In this connection it has been emphasized that where an employee of the Government is only temporarily absent on short trips into the territory adjacent to his official station between the hours of 8 a. m. and 6 p. m., there is merely an operating within the official district that does not constitute a travel status. Therefore, the question whether the employee under such circumstances does or does not incur any additional expense for the midday meal is not for consideration. The rule as thus announced with reference to absence between the hours of 8 a. m. and 6 p. m. and the reason therefore should not be confused with the rule established with reference to the payment of a per diem in lieu of subsistence for short periods of absence between the hours of 6 p. m. one day and 8 a. m. the following day. The rule with respect to such absence on official business is that reimbursement is authorized for expenses necessarily incurred for subsistence during such period, but that a per diem is not payable if the absence is of such short duration between such hours as would preclude the presumption of necessity for incurring any expense for subsistence during said absence.

There appears nothing in your submission to require or justify any change in either of these two rules as herein stated, and said

rules will be applied with respect to all payments made since June 30, 1924, regardless of the period covered by the claim or account of the employee.

The proposed circular quotes a sentence from my decision of October 17, 1924, A–4482, and states that a former circular is modified in accordance with the rule as quoted effective July 1, 1924. It also amends, effective November 1, 1924, another provision of the former circular to read as follows:

> For any trip of more than twelve hours, extending from one day to another, a full per diem will be allowed for the day of departure from and also for the date of return to official station.

Neither of these changes appears to be in conflict with any provision of law.

(A–5875)

RETIRED FOREIGN SERVICE OFFICERS—SUBSISTENCE EXPENSES WHILE AWAITING STEAMER

An officer of the Foreign Service whose retirement, under the provisons of the act of May 24, 1924, 43 Stat. 140, became effective while he was on duty at his post abroad is not entitled to expenses of subsistence during the period he remained at his post of duty awaiting a steamer to take him to the United States on return to his home.

Decision by Comptroller General McCarl, November 21, 1924:

There is for consideration by this office the question whether a Foreign Service officer whose retirement under the act of May 24, 1924, 43 Stat. 140, becomes effective while he is on duty abroad is entitled to subsistence expenses during the period he remains at his post of duty awaiting a steamer to take him to the United States on his return to his home.

The case giving rise to the question is that of William P. Kent, who was formerly American consul at Hamilton, Bermuda. It appears that on June 28, 1924, the Secretary of State cabled to Mr. Kent, informing him that his retirement would become effective July 1, 1924, directing him to turn over the consulate on that date to the vice consul, and stating that travel and subsistence expenses of himself and family, and transportation of his effects to his home in the United States would be allowable, subject to travel regulations. It also appears that no passenger ship sailed from Hamilton, Bermuda, to New York between July 1 and 10, 1924, and that during such period Mr. Kent and his family continued to occupy the living quarters previously occupied by them and carried on the domestic arrangements as before. Mr. Kent reimbursed himself for the rent and cost of food purchased during the period July 1 to 10, amounting to $56.30, and has claimed credit in his accounts for such reimbursement. The items in question were disapproved in an administrative examination by the State Department on the ground that the

appropriation provides only for expenses incurred after leaving the post.

The statutory authority for the allowance of transportation and subsistence expenses of diplomatic and consular officers incident to their return from their post is found in the annual acts making appropriation for the various activities of the Department of State. The act of May 28, 1924, 43 Stat. 209, making appropriation for the Department of State for the fiscal year 1925 provides as follows:

TRANSPORTATION OF DIPLOMATIC AND CONSULAR OFFICERS

To pay the itemized and verified statements of the actual and necessary expenses of transportation and subsistence, under such regulations as the Secretary of State may prescribe, of diplomatic and consular officers and clerks in embassies, legations, and consulates, including officers of the United States Court for China, and their families and effects in going to and returning from their posts, or of such officers and clerks when traveling under orders of the Secretary of State, but not including any expense incurred in connection with leaves of absence * * *.

The regulations issued by the Secretary of State pursuant to such statutory authority under the heading "I. Transportation of persons," define and limits the expenses for which an officer or clerk is entitled to reimbursement in going to and returning from his post, paragraph 3 thereof providing as follows:

Stopping over at any point, or any detention en route, without prior authority therefor, except as hereinafter provided, will not be permitted unless unavoidable, and the reasons therefor must be satisfactorily explained by a statement of the facts, which must accompany the traveling expense account, but should not be embodied therein. The expense of stopping over at any point en route may not be charged to the Government if the stop-over was for any personal reason except illness, in which latter event a certificate of the attending physician should be furnished with the account.

Under the heading "II. Subsistence on the journey," the regulations provide as follows:

15. An officer or clerk entitled to reimbursement for the expenses of transportation and subsistence in going to and returning from his post shall be entitled to reimbursement for the amounts actually and necessarily disbursed by him for the expenses of himself and family as defined in these regulations for the following:

* * * * * * *

16. Charges for meals on trains and ships will be allowed only when the fare paid does not include meals.

17. Subsistence at stop-overs will be allowed only when they are unavoidable and come within the provisions of paragraph 3 of these regulations. In cases where a land journey of over 24 hours is necessary to reach the port of embarkation, however, a margin of 2 days at such embarkation port, prior to the vessel's published sailing date, may be allowed. Aside from such margin, no allowance will be made for subsistence while awaiting a steamer, unless it can be shown by certificate of the master or agents of the vessel that her published sailing was postponed, or unless such wait is not at the beginning of the journey or in the United States or Canada and constitutes an unavoidable stop-over en route as defined in paragraph 3 of these regulations.

The appropriation is for transportation of diplomatic and consular officers and their families and the subsistence authorized is only

such as is clearly incidental to and in connection with transportation. The consideration of the language of the statute which authorizes reimbursement under such regulations as the Secretary of State may prescribe and of the regulations thereunder prescribed leads to the conclusion that expenses of subsistence are to be reimbursed only when an officer or clerk is in a travel status. Such status does not exist until a journey is actually begun. The law does not authorize reimbursement of expenses incurred for subsistence at post of duty and relief from duty without actual departure from the post can not operate to change the status in so far as right to subsistence at Government expense is concerned.

In this case the wait was before the journey began. Therefore, even the provisions of the regulations relative to waiting time at port of embarkation for certain unavoidable delays while en route have no application here.

Notwithstanding any equities that might appear in such cases, I am constrained to hold that reimbursement of expenses incurred for subsistence at post after relief from duty while awaiting available transportation is not authorized under existing law.

(A–4198)

APPROPRIATIONS—SPECIFIC v. GENERAL

Upon additional evidence that the hot-water tank installed in the garage of the Post Office Department at First and G Streets NE., Washington, D. C., was necessitated by the increase in the number of vehicles required to be washed, and was not the installation of bathing equipment for employees such as is ordinarily part of the construction of a building, the cost thereof is a proper charge against the appropriation "Vehicle service, 1924," act of February 14, 1923, 42 Stat. 1255. 4 Comp. Gen. 173, reversed.

Comptroller General McCarl to the Postmaster General, November 22, 1924:

Receipt is acknowledged of your letter of October 29, 1924, in which you refer to a decision of this office dated August 12, 1924, 4 Comp. Gen. 173, wherein it was held that as the appropriation of $60,000 for the erection and equipment of a post-office garage at First and G Streets NE., Washington, D. C., was exclusive for that purpose, and the total sum appropriated having been exhausted, the appropriation "Vehicle service, 1924," was not available for installing bathing facilities in said building, upon the principle that when an appropriation to which an expense is properly chargeable is exhausted another appropriation can not be used. You request a reconsideration of said decision, and in support thereof state:

The postmaster of Washington, D. C., has brought to the attention of this department your decision A–4198, dated August 12, 1924, in which it is held that an expenditure of $392 for the purchase and installation of a hot-water tank in the post-office garage in this city is not a proper charge against the appropriation for vehicle service. It further appears that this decision was based on the assumption that this installation was made for the purpose of providing bathing facilities in the garage.

In this connection I wish to advise you that at the time this building was erected necessary bathing facilities were installed as well as hot-water lines to the wash rack for washing trucks. The hot-water lines in the garage comprise a single system. With the increase in the fleet of Government-owned trucks assigned to the Washington post office, which amounts to 125 vehicles at the present time, the hot-water supply became inadequate and it was necessary to install a hot-water heater. The appropriation for vehicle service specifically provides for the purchase and maintenance of garage facilities. A hot-water supply is considered a very essential garage facility, and in those instances where it has not been possible to secure such facilities in the rental of garages the installation has been made from the appropriation for vehicle service and the accounts have apparently been approved without question by the Comptroller General's Office, as no previous question has been raised on a similar expenditure.

As previously indicated, the hot-water lines in the post-office garage in this city are on one system, and as the fleet of 125 trucks is washed not less than once a week, it can be readily understood that a very considerable quantity of hot water is required for this purpose and in fact the consumption for truck-washing purposes is very greatly in excess of the small quantity used in the swing room.

In the light of the facts related above, it is requested that the matter be reopened and that credit be restored in the account of the postmaster of Washington for this expenditure.

In view of the foregoing representations as to the purpose of the expenditure, credit for the payment as made will be allowed as a proper charge under the appropriation "Vehicle service, 1924."

(A-6109)

PERSONAL FURNISHINGS—AVIATORS' SUITS—POST OFFICE DEPARTMENT

Aviators' suits, consisting of parachutes with devices for attaching to the aviator's person when flying and for use in emergencies, are essentially articles of equipment of the airplane, as distinguished from personal equipment which an employee could reasonably be expected to furnish in connection with his official duties, and their purchase by the Post Office Department for use in the airplane mail service is authorized.

Decision by Comptroller General McCarl, November 22, 1924:

The Chief, Post Office Department Division, requested November 4, 1924, instruction whether the appropriation for the Post Office Department, fiscal year 1923, act of June 19, 1922, 42 Stat. 657, was available for the purchase by the postmaster at Marion, Ill., of what is styled two aviators' suits, it appearing that credit has been claimed by the postmaster for the amount paid for said suits.

The query is premised upon the supposition that such suits comprise personal apparel, concerning which the decision, 2 Comp. Gen. 258, is quoted to the effect that articles of personal equipment or furnishings for the protection, etc., of employees in the performance of their official duties may not, in the absence of specific authority of law therefor be furnished at the expense of the United States.

It appears that the suit in question is the subject of a patent, No. 1444699, dated February 6, 1923, for an aviator's suit, and in a description of the invention the specifications are represented as stating in part that—

This invention relates to a means for attaching a parachute to the suit of an aviator, the general object of the invention being to provide means for supporting the parachute upon the back of the aviator with means for quickly and easily releasing the parachute to permit it to open when the aviator jumps.

The claims as to the invention are:

1. A suit for an aviator comprising a belt, straps secured thereto at their lower ends, hooks secured to the upper ends of the straps, cables secured to the hooks and connected with a parachute, and a parachute controlling cable connected with the front of the suit.

2. An aviator's suit comprising a belt, cables connected therewith, a parachute connected with the cables, a covering folded about the parachute, a pair of belts passing around the body of the aviator and the covered parachute for holding the same upon the back of the aviator, said straps holding the cover about the parachute and means for quickly unfastening the belts and causing them to release the parachute and to permit the cover to drop therefrom.

While the specifications denominate this invention as an aviator's suit, it appears from the description that the contrivance really consists of a parachute and what may more properly be denominated a harness for attaching all to the aviator's person. To a certain extent such equipment does comprise a personal furnishing, but it is no more such a personal furnishing as an employee would ordinarily obtain as necessary for the performance of his official duties than is a life perserver on a vessel, which the invention more nearly resembles.

A parachute itself is not intended for use except during flights, and it is carried as a life preserver on an airplane for use in an emergency. The parachute is thus essentially an article of equipment of the airplane, and a device in connection with such parachute in aid of prompt and reliable use would seem to be no less an equipment of the airplane because it was strapped upon the aviator's person during flight. It is safe, therefore, to regard this entire device as an equipment of the airplane and not such personal equipment, as contemplated in the various rulings of this office, which an employee is expected to supply for himself. See 3 Comp. Gen. 433; *id.* 926.

The appropriation cited, *supra*, proposed to be charged with this purchase, provides:

For the operation and maintenance of aeroplane mail service between New York, New York, and San Francisco, California, via Chicago, Illinois, and Omaha, Nebraska, including necessary incidental expenses and employment of necessary personnel, $1,900,000.

This appropriation is for operation and maintenance and necessary incidental expenses, and the question is whether such terms may be considered to contemplate the purchase of what is new and additional equipment.

The act of April 24, 1920, 41 Stat. 579, establishing the airplane mail service provided for the purchase of such airplanes as may be necessary to establish, operate, and maintain an airplane mail service, and "for the operation and maintenance of such aeroplanes,

including stations, equipment, tools, and machinery, and other necessary incidental expenses."

Here the term "other necessary incidental expenses" is associated to equipment and tools, and it would appear, therefore, that the same terms in the subsequent appropriations must contemplate articles of equipment of the airplanes as an incidental expense necessary to the operation of the airplane mail service.

Accordingly, the purchase of the parachute equipment, or so-called aviators' suits, is authorized to be charged to the appropriation of the Post Office Department cited, *supra*, if the transaction is otherwise correct.

(A-5897)

CLASSIFICATION OF CIVILIAN EMPLOYEES—REALLOCATION AND EXCHANGE OF DUTIES

The rate of pay received in one grade under an original allocation has no bearing on the rate payable in another grade to which the position is reallocated, but the rate of pay under the reallocation must be based on the rate received on June 30, 1924, and fixed in accordance with the rules of section 6 of the classification act of March 4, 1923, 42 Stat. 1490, which may be paid on the same basis with respect to excess of average as though it were an original allocation.

Where the duties of an employee are materially changed subsequent to July 1, 1924, either totally or partially, the employee is placed in a new and different position than the one held June 30, 1924, and his rate in a grade in which the average is excessive is the minimum rate of the grade.

Upon exchange of duties of two employees in the same grade under the same appropriation unit, no change in the rate of compensation of either employee need be made whether the proper average is or is not exceeded. The promotion of either employee because of exchange of duties, in a grade wherein the proper average has already been exceeded or which would cause the proper average to be exceeded, would not be authorized.

Where different appropriations constitute separate and distinct appropriation units within the meaning of the "average" provision in the appropriation acts for 1925, an exchange of duties of two employees paid under such separate and distinct appropriation units constitutes a transfer, and the rate of compensation payable to either employee in a grade in which the average was already exceeded or would be by the transfer is the minimum rate of the grade.

Comptroller General McCarl to the Secretary of the Treasury, November 24, 1924:

I have your letter of October 22, 1924, requesting decision of four questions as follows:

1. If the position held by an employee receiving the maximum salary in his grade is reallocated on appeal to the next higher grade without change in duties will he be permitted to continue at his existing salary in the new grade if the average of said grade is already in excess of the standard average?

2. Would the result be different if the action of the Personnel Classification Board in raising the grade were based upon a partial or entire change of duties of said employee, due to a redistribution of work among a number of employees without any changes in personnel?

3. If two employees in the same office who are paid from the same appropriation, classified in the same grade, and each of whom receive a salary above the standard rate are directed to exchange duties, will this action cause any reduction in their respective salaries if the average pay of the grade is already in excess of the standard rate?

4. Would the result in the foregoing case be different if the employees, although working in the same office, were paid from different appropriations?

(1) It is the rate of pay received June 30, 1924, and not the rate of pay received initially, or by promotion, under an original allocation of a position effective July 1, 1924, which controls the initial salary rate properly payable under a reallocation of the same position subsequent to July 1, 1924. Decision of October 23, 1924, 4 Comp. Gen. 401. Therefore, what the employee was receiving under his first allocation, whether the maximum rate of the grade or any other rate of the grade, is not for consideration in determining the rate properly payable under the reallocation. The initial rate under the reallocation based on the rate received June 30, 1924, and fixed in accordance with the rules of section 6 of the classification act of 1923, may be paid on the same basis with respect to excess of the average in the grade as though it were an original allocation. Decision of October 22, 1924, 4 Comp. Gen. 397.

(2) If the duties of an employee are materially changed subsequent to July 1, 1924, either totally or partially, the effect would be to place the employee in a new and different position than the one held June 30, 1924, and the change in grade based on the change of duties is not a reallocation of the same position held June 30, 1924, but an original allocation of a new position, or the promotion, demotion, or transfer of an employee between existing positions. The rate of compensation of an employee placed in a new position by reason of change in his duties, or by promotion, demotion, or transfer to an existing position, in a grade in which the average is excessive, must be at the minimum salary rate of the grade. What was said under question 1 has no application to this question.

(3) Not necessarily. Changes in the rates of pay of individual employees within a grade are based on the comparative efficiency of the employees in the grade; that is, all the positions are presumed to have been allocated to the grade because of similarity of duties performed. Accordingly, upon exchange of duties of two employees in the same grade no change in the rate of compensation of either employee need be made, whether the average is or is not excessive. The promotion of either employee because of such an exchange of duties in a grade wherein the proper average has already been exceeded, or which would cause the proper average to be exceeded, would not be authorized.

(4) If the different appropriations constitute separate and distinct appropriation units within the meaning of the "average" provision in the appropriation acts for 1925, an exchange of duties of two employees paid under separate and distinct appropriation units would in effect constitute a transfer. The rate of compensation pay-

able to either employee thus transferred by exchange of duties to a position in a grade wherein the average was already excessive or which would become excessive by reason of the transfer must be the minimum salary rate of the grade.

(A–4445)

COMPENSATION, OVERTIME—CIVILIAN EMPLOYEES OF CORPS OF ENGINEERS

Where the contract of employment of civilian employees of the Corps of Engineers, United States Army, does not require work on Sundays at the same rate of pay as on other days, and a specific promise of 50 per cent additional for work on Sundays is made before the work is performed, payment of such 50 per cent additional is authorized for Sunday work.

Comptroller General McCarl to Lieut. Col. E. J. Dent, Corps of Engineers, United States Army, November 25, 1924:

I have your request of October 27, 1924 (230.4522), for reconsideration of my decision of September 17, 1924, holding that you were not authorized to pay 50 per cent additional to certain employees for work performed on Sundays. In your original submission the only evidence submitted was your statement:

> 3. The assistant in local charge at Lock and Dam No. 8 worked the men on Sundays (such work being imperative). Due to a misunderstanding, it was generally understood that the men would be paid one and one-half times the regular week-day rate. This was in accordance with local commercial practice and the practice of this office during the preceding low-water seasons.

You now state that these employees were promised 50 per cent additional should they be required to work on Sunday, and you submit copy of the supplemental pay roll covering the 50 per cent additional payments approved by the Chief of Engineers.

As there is no law or regulation of the Engineer Corps expressly prohibiting additional pay for Sunday work, if the original contract of employment in these cases did not require the employees to work on Sundays, and if they were thereafter required to work on Sundays and before such Sunday work was performed were promised 50 per cent additional for such work, payment of the additional 50 per cent for work performed on Sunday is now authorized. 24 Comp. Dec. 529.

(A–5216)

APPROPRIATIONS—SPECIFIC v. GENERAL

An appropriation for a specific purpose is exclusive of other appropriations in general terms which might be applicable in the absence of the specific appropriation.

Fund "C" authorized by section 3 of the act of March 3, 1909, 35 Stat. 840, is a specific appropriation for expenses of repairing the United States courthouse and jail at Nome, Alaska, and neither of the appropriations "Miscellaneous expenses, U. S. Courts, 1925," and "Support of prisoners, U. S. Courts, 1925," act of May 28, 1924, 43 Stat. 221, 223, may be used for the purpose.

Comptroller General McCarl to the Attorney General, November 25, 1924:

There has been received your letter of September 12, 1924, requesting decision whether the appropriations "Miscellaneous expenses, U. S. Courts," and "Support of prisoners, U. S. Courts," are available for the expense of repairing the United States courthouse and jail at Nome, Alaska, since there is insufficient money to meet the expense in fund "C," which is understood to be the moneys derived from various sources and available for expenditure as provided in section 3 of the act of March 3, 1909, 35 Stat. 840, and which would otherwise be charged with the expense in question.

The act of March 3, 1909, *supra*, specifies the duties of the clerk of the division of the court and provides that—

* * * He shall also collect and receive all moneys arising from the fees of his office, from licenses, fines, forfeitures, judgments, or on any other account authorized by law to be paid to or collected by him, and shall apply the same, except the money derived from licenses, to the incidental expenses of the proper division of the district court and the allowance thereof as directed in written orders, duly made and signed by the judge, and shall account for the same in detail, and for any balances on account thereof, under oath, quarterly, or more frequently if required, to the court, the Attorney-General, and the Secretary of the Treasury * * * And "after all payments ordered by the judge shall have been made, any balances remaining in the hands of the clerk shall be by him deposited to the credit of the United States and be covered into the Treasury of the United States at such times and under such rules and regulations as the Secretary of the Treasury may prescribe * * * He may appoint necessary deputies and employ other necessary clerical assistance to aid him in the expeditious discharge of the duties of his office, with the approval and at compensation to be fixed by the court or judge, subject to the approval of the Attorney-General. Any person so appointed or employed shall be paid by the clerk on the order of the judge, as other court expenses are paid."

The act of June 6, 1900, 31 Stat. 321, was an act to establish a civil government for Alaska. Section 31 of the act, page 332, provides:

* * * Any division of the court may, where necessary, order the construction or repair of a jail building at the place or places where terms of the court are held, at a cost not to exceed three thousand dollars for each building, the same to be paid by the clerk as provided for the payment of other allowances for the necessary expenses of the court; * * *.

Where a suitable court room is not available or can not be obtained at reasonable rental at the place or any of the places where terms of the court are held, the court may * * * direct the construction of a suitable building where the sessions of the court may be held, the cost of such building not to exceed in any case the sum of five thousand dollars, the same to be paid * * * as in the case of the * * * construction of jail, as hereinbefore provided: *Provided*, No court building or jail shall be constructed in any division of the district without authority from the Attorney-General, to whom the clerk shall furnish a verified account in detail of all expenditures made by him for buildings, repairs, or other purposes together with his authority for each payment made.

From a consideration of the provisions quoted from the act of June 6, 1900, it appears that Congress placed the determination of the necessity for courthouses and jails in the discretion of the judges of the various courts, subject to approval by the Attorney General as the administrative officer in charge of the expenditure of the appropriations involved.

In the act of March 3, 1909, *supra*, it seems to have been the intent to make certain revenues of the courts available for court expenses, subject to accounting requirements as specified in the act. This virtually amounted to an appropriation of said revenues for necessary court expenses.

The ordinary rule is that an appropriation for a specific purpose is exclusive of other appropriations in general terms which might be available in the absence of the specific appropriation.

The appropriation "Miscellaneous expenses, U. S. Courts, 1925," 43 Stat. 221, provides:

> For such miscellaneous expenses as may be authorized or approved by the Attorney General, for the United States courts and their officers, including so much as may be necessary in the discretion of the Attorney General for such expenses in the District of Alaska, * * *.

The appropriation "Support of prisoners, U. S. Courts, 1925," 43 Stat. 223, provides:

> * * * and not exceeding $2,500 for repairs, betterments, and improvements of United States jails, * * *.

The appropriation for miscellaneous expenses of courts relates to expenses of courts as courts and not to repairs of buildings occupied by the court.

The appropriation for support of prisoners provides for repairs of jails generally and would include Alaska if not otherwise provided for. The primary fund chargeable with repairs of jails in Alaska is the moneys collected under the provisions of the act of 1909. This is in the nature of a specific appropriation which operates to exclude use of the general appropriation.

The uses of the two appropriations in question are not authorized for repairs of jails in Alaska.

(A-6147)

PAYMENTS—DISCOUNTS

Vouchers involving the payment of public bills on which discounts are offered but not taken advantage of by the disbursing officer should be accompanied with a statement showing the reason for failure to take such advantage and that the failure was not due to inexcusable delay on the part of the administrative officers concerned. Where the facts do not show the failure to be not due to an inexcusable delay on the part of the administrative officers concerned, the voucher, properly certified, should be submitted to the General Accounting Office for advance decision as to payment, or for direct settlement.

Comptroller General McCarl to Lieut. H. A. Hooton, disbursing officer, United States Navy, November 25, 1924:

By reference of the Secretary of the Navy under date of November 4, 1924, there was received your letter of October 6, 1924, transmitting public bill No. 763, in favor of Minneapolis General Electric Co., Minneapolis, Minn., in the sum of $15.90, with request for de-

cision whether "the disbursing officer is chargeable with the amount of the discount allowed if he pays a public bill which is prepared by the supply officer, and through causes which are or are not stated, the discount period has lapsed and the public bill is drawn for the full amount of the dealer's bill as rendered."

Attached to the public bill submitted by you is the company's certified bill for electric current furnished United States Naval Reserve Force, 3009 Calhoun Boulevard, from June 10 to June 30, gross amount of bill $15.90, with allowance of 5 per cent discount, making net amount $15.10 if "paid at the office of the company on or before August 2, 1924." The number of days comprising the discount period is not stated. Said bill bears indorsement of T. H. Jones, Lieut. R. F. 2, Comdg., as received, inspected, and passed, and that prices are correct. There is no indication of the date on which the bill was rendered by the company or of the date on which it was received by the administrative office to which it was rendered.

The public bill is dated Ninth Naval District, Great Lakes, Ill., September 2, 1924, is for the gross amount, $15.90, and bears on its face a note by J. F. Kutz, Comdr., (SC) U. S. N., as follows:

Note: Inspection call not received in supply office until Aug. 28, 1924, too late to take advantage of discount.

It appears also that no formal contract was entered into for the service rendered by the company.

Vouchers on which discounts are offered and not taken should be accompanied with a statement of the facts on account of which advantage of the discount was not obtained. See 14 Comp. Dec. 1. Accountable and administrative officers should exercise due dilligence in securing to the United States the benefit of cash discounts offered for the prompt payment of bills. From the statement hereinbefore quoted from the public bill it does not clearly appear that some administrative office concerned is not chargeable with inexcusable delay in the matter of initiating promptly the required procedure for payment of the bill.

Hereafter in order to insure, in disbursing officers' accounts, the passing of credit for amount of discount paid on vouchers on which discounts are offered and not taken, the accompanying statement of facts relative to the failure to take advantage of the discount should show clearly that such failure was not due to inexcusable delay on the part of adminstrative officers concerned. Where the facts do not show that failure to take advantage of the discount is not due to inexcusable delay on the part of administrative officers concerned, the voucher properly certified (see 25 Comp. Dec. 653) should be transmitted to this office with resquest for advance decision as to payment, or be referred for direct settlement.

Payment of the public bill, herewith returned, is authorized.

(A-3641)

EMERGENCY MEDICAL AND HOSPITAL TREATMENT—VETERANS' BUREAU

The Director of the Veterans' Bureau had authority under the war risk insurance laws previously in force and now has authority under section 5 of the World War veterans' act of June 7, 1924, 43 Stat. 608, to promulgate regulations limiting the maximum amount that will be paid for medical or hospital treatment furnished beneficiaries of the bureau by private physicians or hospitals, both previously authorized and emergency treatment, and such regulations are of the class usually termed statutory which may not be waived or exception made thereto in individual cases. 4 Comp. Gen. 76, modified.

Comptroller General McCarl to the Director, United States Veterans' Bureau, November 26, 1924:

I have your letter of October 1, 1924, requesting reconsideration of decision of July 19, 1924, 4 Comp. Gen. 76, in which payment was authorized of a voucher in favor of Albert Stein, a beneficiary patient of the Veterans' Bureau, for reimbursement of amounts paid by him for medical treatment procured in an emergency.

The decision held that since the Director of the Veterans' Bureau had approved payment of the voucher and the charges appeared to be reasonable and otherwise proper, payment thereof was authorized. Regulations specifically referred to in the submission in that case, known as General Orders 162 and 162-A of the Veterans' Bureau giving amounts of various fees that would be approved for the items of expense named for payment by the bureau to private physicians for previously authorized services rendered to beneficiaries of the bureau, were not considered applicable to the claim in question, which was for reimbursement of the amounts paid by the beneficiary himself for emergency treatment. It was not brought to the attention of this office at the time the Stein case was under consideration that the Veterans' Bureau also has regulations, General Orders No. 86, No. 86A, and No. 86B, dealing with the adjudication of claims for reimbursement of medical expenses incurred by beneficiaries in emergencies without previous authorization by the bureau.

The question now raised is whether the general principle in decision of July 19, 1924, should be extended to other claims for reimbursement of expenses incurred in emergencies by beneficiaries without regard to the regulations of the Veterans' Bureau applicable thereto. Paragraph 5 of the General Order No. 86 provides:

> In the adjudication of reimbursement claims for medical expenses, the examiner will be guided by the "Table of Fees Authorized as a Guide for Surgical and Other Professional Services," approved June 24, 1921. * * *

Paragraph 5 of General Order No. 86A, dated July 28, 1922, provides, in part, as follows:

> The amounts allowed for unauthorized medical, surgical, or hospital treatment will not be in excess of the authorized fee table of the bureau for similar authorized services.

Paragraph 2 of the General Order No. 162, dated April 7, 1923, provides as follows:

Treatment for minor disabilities due to intercurrent disease or injury which do not interfere with training shall not be given at the expense of the bureau. The schedule of fees as authorized by the bureau and approved by the Assistant Secretary of the Treasury, dated June 9, 1921, establishes the maximum amounts to be paid for the various services enumerated. The maximum amount of fees set forth in the above schedule shall be paid only under such circumstances as the nature of the services rendered justify, and not in all cases.

This was amended by General Order No. 162A, September 14, 1923, as follows:

Treatment for minor disabilities due to intercurrent diseases or injury which do not interfere with training shall not be given at the expense of the bureau. The fees hereinafter stipulated establish the maximum amounts to be paid for the various services enumerated. The maximum amount of fees set forth in the schedule shall be paid only under such circumstances as the nature of the services justify, and not in all cases.

These regulations expressly limit the rates for emergency treatment to the maximum rates fixed by the schedule for similar treatment authorized in advance. Inasmuch as the rates to be paid for treatment authorized in advance could not exceed the maximum rates fixed by the schedule in force at the time service was rendered, it must be held that payment for emergency treatment procured without prior authorization is likewise limited.

Section 5 of the World War veterans' act, 1924, June 7, 1924, 43 Stat. 608, provides as follows:

The director, subject to the general direction of the President, shall administer, execute, and enforce the provisions of this Act, and for that purpose shall have full power and authority to make rules and regulations, not inconsistent with the provisions of this Act, which are necessary or appropriate to carry out its purposes, and shall decide all questions arising under this Act and all decisions of questions of fact affecting any claimant to the benefits of Titles II, III, or IV of this Act, shall be conclusive except as otherwise provided herein. All officers and employees of the bureau shall perform such duties as may be assigned them by the director. All official acts performed by such officers or employees specially designated therefor by the director shall have the same force and effect as though performed by the director in person. Wherever under any provision or provisions of the Act regulations are directed or authorized to be made, such regulations, unless the context otherwise requires, shall or may be made by the director. The director shall adopt reasonable and proper rules to govern the procedure of the divisions and to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits of compensation, insurance, vocational training or maintenance and support allowance provided for in this Act, the forms of application of those claiming to be entitled to such benefits, the methods of making invesitgations and medical examinations, and the manner and form of adjudications and awards.

Several other provisions of the act authorized the director or the bureau to make regulations to carry out its provisions. Among them is section 301, 43 Stat. 624, which authorizes regulations to provide for various kinds of life insurance and for the method of making payments of premiums, etc. The authority of the director to prescribe by regulation a schedule of maximum rates for reim-

bursing private physicians and hospitals for medical treatment furnished beneficiaries of the bureau has not been provided for by specific provisions separate and apart from the general provision for making regulations above quoted, but such regulations are authorized under the provisions of section 5 granting the director "full power and authority to make rules and regulations, not inconsistent with the provisions of the act, which are necessary or appropriate to carry out its purposes." One of the purposes is to provide for medical and hospital treatment to beneficiaries of the act. Section 10 provides for both governmental medical and hospital treatment and for such treatment procured through private sources when governmental facilities are not available. Section 202 (9), 43 Stat. 620, provides as follows:

* * * *Provided*, That where a beneficiary of the bureau suffers or has suffered an injury or contracted a disease in service entitling him to the benefits of this subdivision, and an emergency develops or has developed requiring immediate treatment or hospitalization on account of such injury or disease, and no bureau facilities are or were then feasibly available and in the judgment of the director delay would be or would have been hazardous, the director is authorized to reimburse such beneficiary the reasonable value of such service received from sources other than the bureau.

Regulations which limit the amount of Government funds appropriated under the Veterans' Bureau that will be expended in reimbursement of a particular kind or character of medical and hospital treatment given beneficiaries of the bureau by private physicians or hospitals are regulations "necessary or appropriate to carry out" the purposes of the World War veterans' act and war risk insurance laws previously in force. In the case of *Cassarello* v. *United States*, 271 Fed. Rep. 488, involving regulations governing war risk insurance, the court said, after quoting the general authority of the director to make regulations to carry out the purposes of the war risk insurance act, which has been quoted above as reenacted in the World War veterans' act, as follows:

Furthermore, rules and regulations prescribed by a department of the Government in pursuance of a statutory authority, have the force of law.

The same holding was made in the cases of *Claffy* v. *Forbes* (Director of the Bureau of War Risk Insurance), 280 Fed. Rep 233, and *Covey* v. *United States*, 263 Fed Rep. 768, 775. See also generally *United States* v. *Grimaud*, 220 U. S. 506, and *United States* v. *Birdsall*, 233 U. S. 231. If the regulations therein considered promulgated by the director governing war risk insurance which constitutes one purpose of the controlling statutes, have the force and effect of law, regulations governing another purpose of the controlling statutes, i. e., reimbursement for medical and hospital treatment procured through private sources under contract, both previously authorized and emergency treatment, also have the force and effect of law, until revoked, modified, or sus-

pended. Such regulations must be uniform and general in their application and without retroactive effect, and any modification or suspension thereof must likewise be of a general or prospective application, there being no authority to change the regulation by a waiver or exception thereto in individual cases. 21 Comp. Dec. 482; 26 *id.* 99; 2 Comp. Gen. 342; decision of October 7, 1924, 4 Comp. Gen. 363.

Accordingly, it must be held that the Director of the Veterans' Bureau has authority under the statute to promulgate regulations limiting the maximum amount that will be paid for any medical or hospital treatment furnished beneficiaries of the bureau, both previously authorized and emergency treatment, and that such regulations are of the class usually termed statutory which may not be waived or exception made thereto in individual cases. Decision of July 19, 1924, 4 Comp. Gen. 76, is modified accordingly.

(A-3926)

TRANSPORTATION OF DESTITUTE AMERICAN SEAMEN

The arrest of an American seaman in a foreign port by an officer of the shipping company employing the seaman, for assisting a stowaway on board the vessel and accepting money therefor, resulting in trial and temporary confinement, does not relieve the shipping company from the duty, responsibility, and liability of returning the seaman to the United States when found destitute in the foreign country by the United States consular officer who placed the seaman on the vessel on which he last served, nor obligate the United States to reimburse said company for the cost of such transportation. 3 Comp. Gen. 936, distinguished.

Decision by Comptroller General McCarl, November 26, 1924:

The New York & Cuba S. S. Co. applied October 8, 1924, for reconsideration of decision of August 28, 1924, denying its claim for $24.40 for transporting Jose Matos, a destitute American seaman, from Habana, Cuba, to New York, N. Y., for the reason that no evidence had been submitted showing that the company had been relieved from the responsibility of returning the seaman to this country.

In support of the request for reconsideration the company has furnished statements from the master of the S. S. *Siboney*, the vessel on which the seaman had shipped and on which he was returned to this country, and from the chief of the special police at Habana, Cuba, and a certificate by the secretary of the district court at Habana, Cuba, which statements and certificate definitely establish the following facts:

That Jose Matos was a member of the crew of the S. S. *Siboney* while at the port of Habana, Cuba, February 1, 1924; that he was detected by the "Police division of the vessel's owners" attempting to aid a stowaway aboard the vessel; that he was arrested, tried in the local court on a charge of swindling, and sentenced to

pay a fine of $61 or in lieu thereof to spend a like number of days in jail; and that he was committed to jail February 2, 1924, and released February 12, 1924, having paid the remainder of the fine. It is also shown that he was returned to New York on the S. S. *Siboney*, sailing from Habana March 15, 1924, and that the *Siboney* is the same vessel on which he had last served.

The statutory authority for returning desitute American seamen to the United States at the expense of the Government under certain circumstances does not affect the primary duty, responsibility, and liability of the shipping company, owning or operating the vessel on which he last served, to return the seaman back to the United States when found desitute by a consular officer and placed on a vessel belonging to the same company. 3 Comp. Gen. 148; 4 *id.* 118.

It is urged that the seaman in this case by his own acts breached his contract of employment, or the shipping articles, which control the rights of both parties, and that the facts therefore bring the case within the decision reported in 3 Comp. Gen. 936, involving a claim for transporting a deserting seaman filed by claimant company herein. The two causes are not analogous. Desertion of a seaman, satisfactorily proven, has always been recognized as *ipso facto* terminating all relationship between the owners of the vessel and the seaman, not merely because constituting a violation or breach of the shipping articles, but also for the reason that the very nature of the offense of deserting a vessel while abroad is repugnant to the character of employment and maritime custom. In the present case the offense of assisting a stowaway and accepting money therefor is not such an offense as is shown to have specifically breached the shipping articles signed by the seaman, or of such a nature as would *ipso facto* terminate the relationship between the shipping company and the seaman. The arrest appears to have been made by an officer of the shipping company and the shipping company appears to have acted voluntarily in turning the offender over to the local authorities; but be that as it may, the temporary absence of the seaman from his vessel because of his arrest and confinement from February 2 to February 12, 1924, did not relieve the shipping company from the duty, responsibility, and liability of returning the seaman to the United States, nor obligate the United States to reimburse said company for the cost of such transportation.

Upon reconsideration the decision of August 28, 1924, is affirmed.

(A-6005)

COMPENSATION, DOUBLE—ARMY OFFICERS RETIRED BY ELIMINATION

The retirement of an Army officer by elimination after 14 years' service under the provisions of the acts of June 30, 1922, 42 Stat. 722, and September 14, 1922, 42 Stat. 840, is not a retirement "for injuries received in battle or for injuries or incapacity incurred in line of duty," within the purview of the act of May 31, 1924, 43 Stat. 245, and his subsequent appointment as first assistant surgeon, National Home for Disabled Volunteer Soldiers, at an annual salary of $2,740, is accordingly prohibited by section 2 of the act of July 31, 1894, 28 Stat. 205, and payment for services rendered under such appointment is not authorized.

Comptroller General McCarl to Gen. George H. Wood, President, Board of Managers, National Home for Disabled Volunteer Soldiers, November 26, 1924:

There has been received your letter of October 28, 1924, requesting decision as to what payment, if any, may be made to Dr. Leonard S. Hughes for services rendered as first assistant surgeon of the Danville Branch of the National Home for Disabled Volunteer Soldiers, in view of his appointment to such office at an annual salary of $2,740, he being a retired major in the Regular Army and as such drawing $1,701 per year retired pay.

Section 2 of the act of July 31, 1894, 28 Stat. 205, provides in so far as is here material, as follows:

* * * No person who holds an office the salary or annual compensation attached to which amounts to the sum of two thousand five hundred dollars shall be appointed to or hold any other office to which compensation is attached unless specially heretofore or hereafter specially authorized thereto by law; but this shall not apply to retired officers of the Army or Navy whenever they may be elected to public office or whenever the President shall appoint them to office by and with the advice and consent of the Senate.

This act was amended by the act of May 31, 1924, 43 Stat. 245, as follows:

* * * Retired * * * officers of the Army, Navy, Marine Corps, or Coast Guard who have been retired for injuries received in battle or for injuries or incapacity incurred in line of duty shall not, within the meaning of this section, be construed to hold or to have held an office during such retirement.

It appears from the Official Army Register, 1924, at page 709, that Doctor Hughes was selected for elimination from the Army and retired, after 14 years' service, under the provisions of the acts of June 30, 1922, 42 Stat. 722, and September 14, 1922, 42 Stat. 840. As he was not retired for "injuries or incapacity incurred in line of duty," his appointment as first assistant surgeon at an annual salary of $2,740 was prohibited by the act of July 31, 1894, cited, and I have to advise you that no payment is authorized for services rendered as first assistant surgeon under his appointment at $2,740 per annum.

(A-4582)

MAIL TRANSPORTATION—LAND-GRANT DEDUCTIONS

As that portion of the Chicago, Milwaukee & St. Paul Railway between Madison and Portage, Wis., was not aided in its construction by lands granted by Congress, the charges for the transportation of United States mail over said portion do not come within the provisions of the act of July 28, 1916, 39 Stat. 426, requiring reduction in payment of charges for the transportation of mail over railroads constructed in whole or in part by lands granted by Congress.

Comptroller General McCarl to the Postmaster General, November 29, 1924:

I have your request per letter of August 9, 1924, for decision as to whether the Chicago, Milwaukee & St. Paul Railway between Madison and Portage, Wis., is subject to land-grant deduction from pay for carrying the mails under the act of Congress of July 28, 1916, 39 Stat. 426. Inclosed with your communication is a statement of the General Land Office and an argument submitted by the Chicago, Milwaukee & St. Paul Railway Co., in which the contention is made that the said line of railroad is not a land-grant road and is not subject to land-grant rates for carrying the mail.

The statute referred to by you provides that—

> Railroad companies whose railroads were constructed in whole or in part by a land grant made by Congress on the condition that the mails should be transported over their roads at such price as Congress should by law direct, shall receive only eighty per centum of the compensation otherwise authorized by this section.

By the act of June 3, 1856, 11 Stat. 20, there was—

> * * * granted to the State of Wisconsin for the purpose of aiding in the construction of a railroad from Madison or Columbus, by way of Portage City to the St. Croix River or Lake between townships twenty-five and thirty-one * * * every alternate section of land designated by odd numbers for six sections in width on each side of said roads respectively. * * *
>
> *Provided*, that the lands to be so located shall be selected for and on account of such roads; *Provided further*, that the lands hereby granted shall be exclusively applied in the construction of that road for which it was granted and selected and shall be disposed of only as the work progresses, and the same shall be applied to no other purpose whatsoever. * * *
>
> SEC. 3. That the said lands hereby granted to said State shall be subject to the disposal of the legislature thereof, for the purposes aforesaid, and no other; and the said railroads shall be and remain public highways for the use of the Government of the United States free from toll or other charge upon the transportation of property or troops of the United States. * * *
>
> SEC. 5. That the United States mail shall be transported over said roads, under the direction of the Post Office Department, at such price as Congress may, by law, direct. * * *

The lands, rights, and priveleges thus granted were by the act of the Legislature of Wisconsin of October 8, 1856 (ch. 118, General Acts of Wisconsin, p. 137), formally accepted by the State upon the terms, conditions, and restrictions contained in the act of Congress, and the State by act of October 11, 1856 (ch. 122, General Acts of Wisconsin, p. 217), authorized the LaCrosse & Milwaukee Railroad Co., a corporation created by the laws of Wisconsin, to construct and operate the roads described in the act of Congress from Madison and Columbus via Portage City to St. Croix River

and Lake, and for the purpose of aiding such construction the State granted to that company all its interest and estate, present and prospective, in or to the lands granted by the act of June 3, 1856, for the construction of the railroad between the points and along the routes just named.

The company accepted the grant, and in order to raise money for construction of the road, issued bonds, secured by deeds of trust dated December 31, 1856, upon its franchises and the lands to which it would be entitled and commenced work, beginning at Portage and working westward toward the St. Croix River by Tomah. The line between Portage and Tomah, a distance of 61 miles, was completed by April, 1858, and was used for freight and passenger trains from said time. The governor of the State on July 23, 1858, refused to certify the completion of the road to the Secretary of the Interior upon the ground that the conditions upon which the grant was made by the State to the company had not been complied with, in that the company had not built any road from Madison and from Columbus to Portage, while both of said roads were to have been completed by December 31, 1858.

The trustees under the deed of trust, *supra*, made application July 8, 1859, to the Secretary of the Interior for patents for lands applicable under the act of June 3, 1856, *supra*, to said completed sections between Portage and Tomah. In that application they said:

> Congress granted the land to the State of Wisconsin, the State granted to the railroad company, and the company to the trustees. The equitable, if not the legal, title is in them in trust for the bondholders.

The Secretary of the Interior in his reply said:

> * * * the act of Congress of June 3, 1856, which is the basis of the action of this department in the case, has made a grant or grants to the State of Wisconsin, and it has been the uniform practice in adjusting similar grants in the General Land Office to transact the business directly with the State authorities and with them alone.
>
> Parties who seek recognition or completion of the title of the State to any particular lands must therefore obtain the intervention of the State officers; and it is not necessary for us to entertain or consider questions which arise upon State legislation concerning the lands; questions which appear to be more appropriate for the State authorities or the courts. This position is more manifestly proper when it is considered that in the received construction of existing laws of Congress a patent is entirely unnecessary to assure the title of the State to any of the lands granted by Congress for aid in constructing railroads. These grants are accepted by the States with conditions, and so long as those conditions are complied with by the States, the title of a State to any granted tracts will be duly respected by all the officers of this department.

The said trustees never received patents for any part of said lands.

The LaCrosse & Milwaukee Railroad Co., having made default in the payment of the interest on its bonds, the mortgage to secure the debt was foreclosed in the District Court of the United States for the District of Wisconsin and the mortgaged property, includ-

ing the interest of the company in the congressional grant, was sold and deeded by the marshal to William Wallace Pratt and William Henry White on May 5, 1863, who, on the same day, conveyed the same to the Milwaukee & St. Paul Railway Co., by which this company became owner of the 61 miles of completed road from Portage to Tomah and of the claim for lands earned by the construction thereof. The said company entered into possession of said railroad and has since controlled and operated it, the name later being changed to the Chicago, Milwaukee & St. Paul Railway Co., by which it is now known.

In 1856, shortly after the State had conferred upon it the whole congressional grant, the LaCrosse & Milwaukee Railroad Co. induced persons living along the line of its proposed route to aid in its construction by giving negotiable notes, secured by mortgages upon their farms. Money was raised on these notes by the company and used in great part in the construction of its road between Portage and Tomah. When the LaCrosse & Milwaukee Co. failed, said mortgagors had these notes to pay, thus entailing great hardship and loss upon them.

In view of these facts, on March 6, 1868, the State legislature incorporated the Wisconsin Railroad Farm Mortgage Land Co., on which was conferred the benefit of the land grant for the construction of the road from Portage to Tomah, for the benefit of the aforesaid mortgagors. Said act recited that the Milwaukee & St. Paul Railway Co., as successor of the LaCrosse & Milwaukee Railroad and the owner of said road, was willing to relinquish in favor of said mortgagors its claims to the said lands upon condition that the State of Wisconsin would relinquish its right to tax the said Milwaukee & St. Paul Railway Co. or its traffic, for or on account of its being the owner of said lands, as provided by chapter 122, Laws of 1856, *supra*. (See Private Laws of Wisconsin of 1868, ch. 446, p. 1149.)

On July 27, 1868, Congress passed an act (15 Stat. 238) authorizing the State of Wisconsin "to dispose of the lands granted and which may have enured and been certified" to it under the act of 1856, *supra*, in aid of the construction of the road from Madison or Columbus via Portage to the St. Croix River, "for the benefit" of the aforesaid mortgage company—

Provided, however, that this act shall apply only to such lands as may be due the State of Wisconsin for the portion of the road already completed.

On September 15, 1868, the Milwaukee & St. Paul Railway Co. in due form assigned all its right and interest to the said lands to the Wisconsin Railroad Farm Mortgage Land Co.

In the case of *Schulenberg* v. *Harriman*, 21 Wall. 44, the Supreme Court in its October term, 1874, held (p. 60):

1. That the act of Congress of June 3, 1856, passed a present interest in the lands designated there can be no doubt. The language used imports a present grant and admits of no other meaning. The language of the first section is "that there be, and is hereby, granted to the State of Wisconsin," the lands specified. The third section declares "that the said lands hereby granted to said State shall be subject to the disposal of the legislature thereof"; and the fourth section provides in what manner sales shall be made, and enacts that if the road be not completed within ten years "no further sales shall be made, and the lands unsold shall revert to the United States." The power of disposal and the provision for the lands reverting both imply what the first section in terms declares, that a grant is made; that is, that the title is transferred to the State. It is true that the route of the railroad, for the construction of which the grant was made, was yet to be designated, and until such designation the title did not attach to any specific tracts of land. The title passed to the sections, to be afterwards located; when the route was fixed their location became certain, and the title, which was previously imperfect, acquired precision and became attached to the land.

The right of the mortgage company to select lands according to its claim north of the Saint Croix River, within the indemnity limits of the act of 1856, *supra*, was sustained by the Circuit Court for the Western District of Wisconsin in the case of the *Madison and Portage Railroad Company* v. *Wisconsin et al.*, decided October 28, 1879. The case was tried before Mr. Justice Harlan, of the United States Supreme Court; Judge Drummond, of that circuit; and Judge Bunn, district judge.

Justice Harlan, who delivered the opinion of the court, after reciting acts of Congress and of the State relating to the matter and referred to, *supra*, said:

Congress and the State seem to have concurred in desiring to provide full compensation in lands to the Farm Mortgage Company for the 61 miles of road constructed and in use long prior to 1864. (See 16 Fed. Cas. p. 366, case 8939.)

In the case of *Chicago, Milwaukee and St. Paul Railway Company* v. *United States*, 14 Court of Claims, 125, decided December term, 1878, which was a claim for the transportation of the mail over the road now under consideration from July 1, 1876, to January 31, 1878, the court, after referring to the decision of the Supreme Court in *Schulenberg* v. *Harriman*, *supra*, as settling the nature of the title acquired by the State of Wisconsin under the act of June 3, 1856, *supra*, to the lands referred to, said, page 140:

* * * The measures taken by the State to transfer the land grant to the company differed radically from those taken by Congress to pass the lands to the State. Congress made a statutory grant *in prassenti;* but the State, although declaring that the rights granted by Congress were thereby granted to the company, enacted that the title to the lands should vest in said company only as the governor of the State should certify. * * *

It is manifest that the railroad company did not acquire title by the mere passage of the statute, as did the State of Wisconsin. By the completion of a section, according to the terms of the act, they acquired a right in equity to demand legal title from the State; but the State clearly proposed to keep within itself the legal title until its governor should execute and deliver the deed or deeds contemplated by the act.

That it was the trustee's duty to retain such control over the trust property as would enable it to enforce the application of it to the object of the trust in the manner contemplated by Congress is plain. Whether the State used the power which it thus retained justly or unjustly, wisely or unwisely, towards

the LaCrosse and Milwaukee Railroad Company and toward their privies in estate, among whom are the claimants, is not for us to determine.

The court then held, after reciting facts as set forth above which showed that the lands under consideration were transferred to the mortgage company, that no portion of the claimant's road was constructed in whole or in part by a land grant within the meaning of section 13 of the act of July 12, 1876, 19 Stat. 82, which provides:

That railroad companies whose railroad was constructed in whole or in part by a land grant made by Congress on the condition that the mails should be transported over their road at such price as Congress should by law direct, shall receive only eighty per centum of the compensation authorized by this act.

The court thereupon decided that the 20 per cent deduction for mail transportation was not applicable to the road under consideration.

Upon appeal the Supreme Court held, at its October term, 1881, 104 U. S. 687, that the act of July 12, 1876, was not intended to apply to the case of contracts previously made for a term of years not expired when it took effect, and that "therefore, whether the railroad of the company was or was not the subject of a land grant becomes immaterial; although were it otherwise we should have no hesitation in affirming the finding of the Court of Claims upon that point for the reason set forth in its opinion."

The Commissioner of the General Land Office on May 27, 1886, refused the application of the State of Wisconsin to have certified to it, for the benefit of the Wisconsin Railroad Farm Mortgage Land Co., certain indemnity lands selected under the act of June 3, 1856, *supra*, for the reason:

(1) That the proposed action of the State in disposing of the lands selected for the benefit of the mortgage company would be a diversion of the same from the purpose for which granted—an illegal act which the commissioner was unwilling to countenance and aid; or

(2) if not such diversion then the mortgage company is only entitled to such lands as, being coterminous with the line of the road between Portage and Tomah "may have enured and been certified" to the State under the act of 1856, prior to the passage of the act of July 27, 1868, (15 Stat. 238).

Upon appeal by the State of Wisconsin from the aforesaid decision of the Commissioner of the General Land Office, Secretary of the Interior Lamar, in a decision of August 20, 1886, 5 Land Decisions 89, reversed the commissioner's ruling and authorized the certification of the lands selected by the State for the benefit of the mortgage company, so far as said selections are within the indemnity limits of the grant of 1856, *supra*.

The reasons for this decision are stated to be:

(1) That the existing right of the State of Wisconsin under the congressional grants aforesaid is unimpaired by any congressional declaraton of a forfeiture or any judicial decree to that end, entered under the authority of a law of Congress.

(2) That with respect to lands earned by construction within the period prescribed by and in accordance with all the conditions of the grant, the Wisconsin Farm Mortgage Company is the lawful successor of the State thereto.

The lands were certified in accordance with said decision, thus completing the grant authorized by the act of 1856, *supra*, for the 61 miles of road between Portage and Tomah which were completed in 1858.

The Comptroller of the Treasury by decision of May 7, 1912, 18 Comp. Dec. 867, held that the road between Portage and Tomah is not a land-grant road subject to the conditions of the act of June 3, 1856, *supra*, thus following the decisions of the courts as above set forth.

The question now for consideration is whether the road constructed between Madison and Portage was aided in its construction by a grant of lands and subject to the conditions of the act of June 3, 1856, *supra*.

The Commissioner of the General Land Office, in a letter to the Secretary of the Interior, March 31, 1888, stated:

The LaCrosse and Milwaukee Railroad Company completed its road from Portage to Tomah during the year 1858, and then abandoned the further construction of the same.

Thereupon the legislature of the State, by act approved April 12, 1861, declared so much of the grant to the LaCrosse and Milwaukee Railroad Company as was or could be made applicable to the construction of the road between Madison and Portage forfeited to the State and conferred the same upon the Sugar River Valley Railroad Company.

* * * * * * *

The Sugar River Valley Railroad Company, upon which the State in 1861 conferred the grant between Madison and Portage, having failed to construct the road between said points within the time required by the act of the legislature, the State, by act of its legislature approved February 25, 1870, granted to the Madison and Portage Railroad Company all the rights, privileges, grants, and franchises that were granted to the Sugar River Valley Railroad Company in 1861.

During the years 1870 and 1871 the Madison and Portage Railroad Company completed its road from Madison to Portage and such completion was duly certified to the Secretary of the Interior by the Governor of Wisconsin.

December 18, 1863, the lands within the six miles, or granted limits of the grant of 1856, from Madison, via Portage, to the St. Croix River, or Lake, according to the line originally located by the LaCrosse and Milwaukee Railroad Company, were approved to the State, under the grant of 1856.

Of the lands thus approved but 1,115.38 acres were coterminous with the road between Madison and Portage, and subject to the grant made to the Madison and Portage Railroad Company by the State of Wisconsin.

January 24, 1875, the Madison and Portage Railroad Company made application to select 149.760 acres in the odd-numbered sections outside of the six and within the fifteen mile limits of the grant of 1856, north of the St. Croix River, or Lake, in lieu of the lands disposed of by the United States within the primary limits of its grant between Madison and Portage.

No action upon said application appears to have been taken by this office. The railroad company, however, resorted to the courts for the purpose of enforcing its claim, placing its right to make the selections referred to upon the reservation in the conveyance of Mch. 10, 1857, to the St. Croix and Lake Superior Railroad Company.

The questions involved were decided by the United States Circuit Court for the Western District of Wisconsin, in the case of the *Madison and Portage Railroad Company* vs. *The Treasurer of the State of Wisconsin and Railroad*

Companies. In that case the claim of the Madison and Portage R. R. Co. to make up its deficiencies from the indemnity limits of the grant north of the Saint Croix River, or Lake, was denied by the court, the effect of the decision of the court being to restrict that company to the lands coterminous with its road between Madison and Portage.

The quantity of land within the primary limits of the grant between Madison and Portage which was found to be subject to the grant is, as above stated, but 1,115.38 acres. No selection of indemnity lands between said points has ever been made by the railroad company.

In view of the contention of the Chicago, Milwaukee & St. Paul Railroad Co., transmitted with your request for decision, this office requested specific information from the attorney general of the State of Wisconsin upon the question involved. The attorney general, in his reply of October 28, 1924, stated:

The line between Madison and Portage was completed by the Madison and Portage Railway Company in August, 1871.

None of the lands granted by the act of Congress of June 3, 1856, were certified to anyone on the completion of the road between Madison and Portage. When this road was completed there was no Government land adjacent to any part of this line. (See Cary, "The Organization and History of the Chicago, Minneapolis & St. Paul Railroad Company," page 200, and Merk, "Economic History of Wisconsin During the Civil War," page 282.) The Madison & Portage Railway Company did, indeed, claim that under the Federal and State legislation it had a right to select public lands in the northern part of the State in lieu of lands adjacent to its line, but its contention in this respect was denied by the U. S. Circuit Court in the case of *Madison & Portage Railway Company* vs. *Wisconsin et al.*, 16 Fed. Case. 366, decided in 1879. Thus no Government lands were conveyed to anyone for the construction of the line of railroad between Madison and Portage.

The lands described (1,115.38 acres), stated by the Commissioner of the Land Office to have been granted on account of the completion of said road, were conveyed to the Wisconsin Farm Mortgage Land Company in consideration of the completion of a line of road between Portage and Tomah. This is established by the copy of a conveyance by the Federal Government to the State and by the governor of the State to the Wisconsin Farm Mortgage Land Company, in so far as the two descriptions mentioned are concerned, giving the recitals of said conveyance, which was prepared by Mr. Lampert (chief clerk, State land department) for you. This conveyance, it should be emphasized, had nothing to do with the construction of the line of road between Madison and Portage and was not made in consideration thereof.

It appears that this land, 1,115.38 acres, was conveyed by the State contrary to the act of Congress of July 7, 1868, *supra*, which "applied only to such lands as may be due the State of Wisconsin for the portion of said road already completed"; the road between Madison and Portage was not completed at the time of this act. Yet, notwithstanding such fact, it appears from the foregoing that the lands granted the State were not conveyed as required by the act of Congress to aid in the construction of a railroad between Madison and Portage, but were diverted to the Wisconsin Farm Mortgage Land Co. and on account of the road west of Portage. It thus appears that the said road between Madison and Portage was not aided in its construction by any grant of lands and is therefore not subject to the provisions of law requiring reduction in payment of charges for transportation over railroads constructed in whole or in part by a land grant made by Congress. The inclosures transmitted by you are herewith returned.

(A-4751)

CLASSIFICATION OF CIVILIAN EMPLOYEES

In this decision various questions are decided under the classification act of March 4, 1923, 42 Stat. 1488, and the average provisions appearing in the appropriation acts for the fiscal year ending June 30, 1925, involving vacancies in grades, abolishment and creation of positions, promotions, demotions, transfers, reinstatements, and reassignments. For points involved see decision.

Comptroller General McCarl to the President, United States Civil Service Commission, November 29, 1924:

There has been received your submission of August 15, 1924, requesting decision of 20 questions, with a number of subdivisions thereof, under the classification act of 1923, and the "average provision" appearing in the appropriation acts for the fiscal year 1925, providing for personal services in the District of Columbia.

You have made an extended statement containing definitions of terms, comments, and arguments in support of what you believe the answers should be to certain of the questions. While it is thought unnecessary for the purpose of this decision to meet each and every contention and argument submitted, the entire statement has been given a most careful consideration in arriving at the conclusions herein announced.

The questions will be quoted and answered in the order submitted:

1. As a position is in a grade or class, does not the salary range of the grade or class attach to the position rather than a particular rate within the range, and is not a vacancy therefore in the grade or class, comprising the entire range, rather than at a particular rate within the range?

Yes. See decision of July 29, 1924, 4 Comp. Gen. 126, 128.

2. May the department head abolish or create positions at will where the duties are not fixed by basic law?

Yes; when the needs of the service require, the allocation of a position so created to be with approval of the Personnel Classification Board. Section 3 of the classification act. See also answer to question 11.

3. If question 2 is answered in the affirmative, is not a "vacancy" any unoccupied position which the department head may intend to fill, whether formerly filled by an employee who has been separated or newly created?

Yes. 4 Comp. Gen. 126, 128.

4. When the average provision of the appropriation acts is not a factor, may an employee who is reassigned to a position in the same grade or class in the same bureau or subdivision, or in a different bureau or subdivision within the same department, be paid initially at any rate wthin the range for the grade at the discretion of the department head, subject to such systems of efficiency rating or other rules as may be promulgated by proper authority?

Yes. See decision of July 19, 1924. 4 Comp. Gen. 77.

5. When the average provision is not a factor, may an employee who is promoted to a position in a higher grade or class within the same department be paid initially at any rate within the range of the grade or class, subject to

such systems of efficiency rating or other rules as may be promulgated by proper authority?

Yes.

6. When the average provision is not a factor, may an employee who is demoted to a position in a lower grade or class within the same department be paid initially at any rate within the range for the grade, subject to such systems of efficiency rating or other rules as may be promulgated by proper authority?

Yes.

7. When the average provision is not a factor, may an employee who is transferred from one department to another to a position in the same grade be paid initially—

(*a*) at the rate of compensation he has been receiving?
(*b*) at a higher rate within the range for the grade?
(*c*) at a lower rate within the range for the grade?

(*a*) Yes; (*b*) no, 3 Comp. Gen. 1006; (*c*) yes.

8. When the average provision is not a factor, may an employee who is transferred from one department to another, and simultaneously promoted to a position in a higher grade, be paid initially—

(*a*) at any one of the rates within the range for the grade to which promoted; or
(*b*) if he has been receiving less than the minimum rate of the grade to which promoted must he be paid at that minimum rate; or,
(*c*) when the grade ranges overlap, if he has been receiving more than the minimum rate of the grade to which promoted must he be paid at the same rate?

(*a*) Yes; if there is made a proper comparison of efficiency ratings between the employee transferred to the grade from another office and those already in the grade. While the spirit and intent of the classification act would seem to provide that transfers from a lower to a higher grade between departments should be at the minimum salary rate of the higher grade, in order to protect the interests of those already in the grade in the office to which transferred it is within the administrative authority to determine simultaneously with the transfer the right of the employee to be promoted within the grade to which transferred by comparing his efficiency with the efficiency of those already in the grade. See 4 Comp. Gen. 78.

(*b*) and (*c*) Not necessarily, if the result of the efficiency comparison justifies a higher rate of compensation.

9. When the average provision is not a factor, may an employee who is transferred from one department to another and demoted to a position in a lower grade be paid initially—

(*a*) at any one of the rates in the range for the grade to which demoted; or
(*b*) where the grade ranges overlap, must he be paid initially at one of the rates within the range of the grade which is not higher than he has been receiving?

It was held in decision of June 26, 1924, 3 Comp. Gen. 1006, as follows:

* * * Therefore, an employee transferred from one grade to a lower grade can be transferred to a position in which there is a vacancy in the grade to which transferred at a salary not in excess of the salary of the posi-

tion from which transferred, assuming, of course, that the transfer is authorized under the provisions of the classification act and the civil service acts, and regulations made in pursuance thereof.

Accordingly, in answer to (*a*) and (*b*), it may be stated that transfers may be made at any one of the rates in the range for the grade to which demoted not in excess of the rate the employee was receiving in the grade from which transferred. His right to promotion thereafter in the grade to which transferred is a matter for administrative determination on the basis of comparative efficiency.

10. When the average provision is not a factor, may an employee who is reinstated in the same department be paid initially—

(a) at any rate within the range for the grade or class to which the position is allocated, whether of the same, a higher, or a lower grade or class than the position from which he was separated; or

(b) if reinstated to a position in the same grade or class must he be paid initially at a rate not higher than he was receiving when separated, or if separated prior to July 1, 1924, at a rate not higher than the rate that would have been fixed initially under the rules of section 6 of the classification act had he been in the position on July 1, 1924; or

(c) if reinstated to a position in a higher grade than that from which separated must he be paid initially at the minimum rate of the grade, or where the grade ranges overlap and the rate fixed initially for his former position as of July 1, 1924, would have been above the minimum rate for the grade to which reinstated, may he be paid initially no more than the rate that would have been so fixed; or

(d) if reinstated to a position in a lower grade may he be paid any rate within the range which is no higher than the rate which would have been fixed initially as of July 1, 1924 for the position he formerly occupied?

Decision of June 26, 1924, 3 Comp. Gen. 1004, held that—

Reinstatement to existing vacancies under civil service rules and regulations are not "new appointments" within the meaning of section 6 of the classification act. * * *

This had reference to reinstatements in the sense of being restored to the position formerly held by the employee or one similar thereto. But be that as it may, and assuming that a reinstatement is not a new appointment, there appears no material distinction, in so far as the provisions of the classification act are concerned, between a new appointment and a reinstatement to a position so different from the one previously vacated by the employee as to be allocated in another grade. In either case the employe must qualify for the position independently of any former service, and the fact that an employee previously occupied a position in another grade requiring different qualifications, etc., should not operate to give the reinstated employee an advantage over a new appointee. The evident purpose of the requirement made by Congress in the classification act that new appointments must be at the minimum salary rate of the grade was the protection of the employees already in the grade. Decision of September 4, 1924, 4 Comp. Gen. 263–4. And in the absence of any specific provision in the classification act for reinstatements

in a grade other than that from which separated at a salary above the minimum fixed for said grade, I am constrained to hold, in accordance with what appears to be the spirit and intent of the classification act, that a reinstatement to a grade other than that from which separated must be at the minimum salary of said grade. The question of promotion of the employee after reinstatement is one for the determination of the administrative office based on comparative efficiency with others in the grade. Accordingly questions (*a*), (*b*), (*c*), (*d*) are answered as follows: Where the question of average is not involved, reinstatements in the same office to the same grade from which an employee was previously separated may be at any salary rate of the grade whether the separation was prior or subsequent to July 1, 1924. With respect to separations prior to July 1, the grade to which the position held by the employee was allocated will control. Reinstatements to the same grade in another office may not be at a salary greater than that which the employee was receiving when the prior service ceased. 3 Comp. Gen. 1004. Reinstatements to a different grade, whether higher or lower than the one from which separated, either prior or subsequent to July 1, 1924, must be at the minimum salary rate of the grade.

11. Where the average of salaries in a grade as fixed under the rules of section 6 of the classification act on July 1, 1924, exceeds the rate average, the average provision does not require reductions to bring the salary average down to the rate average. It is understood from your Opinion of June 26, 1924, that if the salary average was below the rate average on July 1, 1924, and by increases in compensation the salary average should be raised to the rate average, and subsequently vacancies should occur in the lower rates, thus bringing the salary average of the remaining employees above the rate average, it would not be necessary to reduce their salaries to come within the rate average pending the filling of the vacancies. In such a case if the department head should decide to abolish the positions instead of filling them, would it be necessary to reduce the salaries of the remaining employees to come within the rate average despite the fact that the existing salaries when fixed were in entire conformity with the law?

No.

12. Does the statement found in your Decision of June 26, 1924, that "The initial salaries on July 1, 1924, of those persons coming within the exceptions provided in the average provision may be eliminated in determining the average" mean that the salaries of positions for which a rate has been fixed by law which is higher than the maximum rate of the grade to which their positions have been allocated may be excluded in determining the average?

The quotation from decision of June 26, 1924, 3 Comp. Gen. 1002, showed that excess averages would exist on July 1, 1924, by reason of the exceptions expressed in the "average provision." In decision of July 29, 1924, 4 Comp. Gen. 127, 129, in answer to question 4, the previous decision from which you quote was amplified as follows:

* * * But any new adjustment of compensation in a grade subsequent to July 1, 1924, must take into consideration all persons in the grade, including those excepted upon allocation of initial salaries, in determining the proper average. * * * (See also decision dated November 17, 1924.)

13. May vacancies be filled by new appointments at the minimum rate of the grade, even though the salary average remains above the rate average?

Yes. Decision of July 19, 1924, 4 Comp. Gen. 79, stated:

Clearly it was not the intent of Congress that all appointments in or transfers to a grade must cease on and after July 1 if the average of the grade has already been exceeded. * * *

14. May an employee who is reassigned to a position in the same grade in another bureau within the same department be paid initially the same rate he is receiving, even though the salary average in the unit to which he goes is above the rate average, or would by such action be brought above the rate average—

(*a*) if his present rate is as fixed initially under the classification act on July 1, 1924; or

(*b*) if his present rate is above the rate as fixed initially under the classification act on July 1, 1924?

This question will be considered in the light of following definition appearing in your submission:

"Reassignment" means change of duties within the same grade or class, either within the same bureau or in a different bureau within the same department.

The "average provision" appearing in the various appropriation acts specifies a large unit, viz, "bureau, office, or other appropriation unit," and a small unit within the large unit, viz, "grade or class." The "grade or class" has been construed to refer to the grades established by the classification act. Decision of September 30, 1924, 4 Comp. Gen. 333. The control of appropriated funds that Congress sought by these average provisions was intended to be in each unit separate and distinct from any other unit, both the large and small unit therein specified. The determination and maintenance of the salary averages in grades under one "bureau, office, or other appropriation unit" has no reference whatever to the determination and maintenance of the salary averages in grades under another "bureau, office, or other appropriation unit" whether in the same or different departments. Had Congress intended the department to control the salary averages it would have so provided. Therefore, the payment of salaries of employees reassigned from one bureau, office, or other appropriation unit to another bureau, office, or other appropriation unit in the same department must be made on the basis of conditions existing in the grade to which reassigned with respect to the average provision. The exception to the average provision, by reason of which reductions in the salaries of employees are not required, is a "saving clause" applicable only so far as the

positions in which allocated July 1, 1924, are concerned. It does not follow the employee from position to position between grades, or in the same grade between different bureaus, offices, or other appropriation units, after July 1, 1924. Accordingly both (*a*) and (*b*) are answered in the negative.

15. May an employee who is promoted to a higher grade in the same department, where the grade ranges overlap, be paid initially the same rate he has been receiving if that rate is above the minimum rate of the grade to which promoted, even though the salary average of the grade is above the rate average—

(*a*) if his present rate is as fixed initially under the classification act on July 1, 1924; or

(*b*) if his present rate is higher than that fixed initially under the classification act on July 1, 1924?

(*a*) and (*b*) No. Decision of September 12, 1924, 4 Comp. Gen. 294. See also answer to question 14 herein.

16. May an employee who is demoted to a position in a lower grade within the same department, where the grade ranges overlap, be paid initially at any rate within the range of the grade to which demoted which is not higher than the rate he is receiving, even though the salary average of the grade is above the rate average?

No. Decision of September 12, 1924, 4 Comp. Gen. 294.

17. May an employee who is transferred from one department to another to a position in the same grade be paid initially the same rate he has been receiving, even though the salary average in the unit to which transferred may exceed the rate average—

(*a*) if his present salary is as fixed initially under the classification act on July 1, 1924; or

(*b*) if his present salary is higher than as fixed initially under the classification act on July 1, 1924?

(*a*) and (*b*) No. 4 Comp. Gen. 79, and last sentence of answer to question 14 herein.

18. May an employee who is transferred from one department to another and promoted to a position in a higher grade where the ranges for the grades overlap be paid initially the same rate he is receiving, if that rate is higher than the minimum rate of the grade to which promoted, even though the salary average in the unit to which transferred is above the rate average—

(*a*) if his present rate is fixed initially under the classification act on July 1, 1924; or

(*b*) if his present rate is higher than that fixed initially under the classification act on July 1, 1924?

(*a*) and (*b*) No. See decision of September 12, 1924, 4 Comp. Gen. 294, and answer to question 14 herein.

19. When a vacancy is filled by reinstatement may the employee be paid initially at other than the minimum rate for the grade if the salary average of the unit to which reinstated is above the rate average?

No. 4 Comp. Gen. 79.

20. Under what pay conditions may an employee be reassigned within the same department from a grade in another service having the same pay range?

The term "service" is defined in section 2 of the classification act as "the broadest division of related offices and employments," and five services have been established by the act, viz, professional and

scientific, subprofessional, clerical, administrative and fiscal, custodial and clerical-mechanical. The difference in the education, qualifications, experience, etc., necessary for employment in these services is so great that it is not clearly understood how there could be reassignments between the services without civil service examination or an equivalent test to show the employee's fitness. It would appear therefore that reassignments between services would in fact be new appointments requiring the payment of the minimum salary rate of the grade to which the employees are "reassigned." In this connection see answer to question 10.

You also request reconsideration of the following portion of decision of June 26, 1924, 3 Comp. Gen. 1006:

> In view of the fact that the positions of the field service have not been classified as provided by law, I am constrained to hold that under a transfer from an unclassified position in the field service to a classified position in the District of Columbia, assuming that such transfer is authorized under the civil service laws and regulations, the compensation to be paid would be the minimum compensation of the grade to which transferred, as constituting in effect a new appointment.

This question was reconsidered and affirmed in decision of September 4, 1924, addressed to the Director of the United States Veterans' Bureau, 4 Comp. Gen. 263.

(A-6161)

WITNESSES, INTERNAL REVENUE HEARINGS—TRAVELING EXPENSES

There is no authority of law for the payment of expenses incident to securing the attendance of witnesses at hearings conducted by the Bureau of Internal Revenue for the purpose of determining whether permits issued under section 6 of Title II of the national prohibition act of October 28, 1919, 41 Stat. 310, should be revoked or reduced.

Comptroller General McCarl to the Secretary of the Treasury, November 29, 1924:

There has been received your letter of November 6, 1924, requesting decision relative to the authority to pay expenses of witnesses in attending hearings for the purpose of determining whether permits issued under section 6 of Title II of the national prohibition act of October 28, 1919, 41 Stat. 310, should be revoked or reduced.

The appropriation involved "Enforcement of narcotic and national prohibition acts, Internal Revenue, 1925," provides in part as follows:

> For expenes to enforce the provisions of the National Prohibition Act and the Act entitled "An Act to provide for the registration of, with collectors of internal revenue, and to impose a special tax upon, all persons who produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away opium or cocoa leaves, their salts, derivatives, or preparations, and for other purposes," approved December 17, 1914, as amended by the Revenue Act of 1918, and the Act entitled "An Act to amend an Act entitled

'An Act to prohibit the importation and use of opium for other than medicinal purposes,' approved February 9, 1909," as amended by the Act of May 26, 1922, known as "the Narcotic Drugs Import and Export Act," including the employment of executive officers, agents, inspectors, chemists, assistant chemists, supervisors, clerks, and messengers in the field and in the Bureau of Internal Revenue in the District of Columbia, to be appointed as authorized by law; the securing of evidence of violations of the Acts, and for the purchase of such supplies, equipment, mechanical devices, laboratory supplies, books, and such other expenditures as may be necessary in the District of Columbia and the several field offices, and for rental of necessary quarters, $10,629,770; * * *.

Sections 5 and 9 of the act of October 28, 1919, 41 Stat. 309 and 311, respectively, provide as follows:

SEC. 5. Whenever the commissioner has reason to believe that any article mentioned in section 4 does not correspond with the descriptions and limitations therein provided, he shall cause an analysis of said article to be made, and if, upon such analysis, the commissioner shall find that said article does not so correspond, he shall give not less than fifteen days' notice in writing to the person who is the manufacturer thereof to show cause why said article should not be dealt with as an intoxicating liquor, such notice to be served personally or by registered mail, as the commissioner may determine, and shall specify the time when, the place where, and the name of the agent or official before whom such person is required to appear.

If the manufacturer of said article fails to show to the satisfaction of the commissioner that the article corresponds to the descriptions and limitations provided in section 4 of this Title, his permit to manufacture and sell such article shall be revoked. The manufacturer may by appropriate proceeding in a court of equity have the action of the commissioner reviewed, and the court may affirm, modify, or reverse the finding of the commissioner as the facts and law of the case may warrant, and during the pendency of such proceedings may restrain the manufacture, sale, or other disposition of such article.

* * * * * * *

SEC. 9. If at any time there shall be filed with the commissioner a complaint under oath setting forth facts showing, or if the commissioner has reason to believe, that any person who has a permit is not in good faith conforming to the provisions of this Act, or has violated the laws of any State relating to intoxicating liquor, the commissioner or his agent shall immediately issue an order citing such person to appear before him on a day named not more than thirty and not less than fifteen days from the date of service upon such permittee of a copy of the citation, which citation shall be accompanied by a copy of such complaint, or in the event that the proceedings be initiated by the commissioner with a statement of the facts constituting the violation charged, at which time a hearing shall be had unless continued for cause. Such hearings shall be held within the judicial district and within fifty miles of the place where the offense is alleged to have occurred, unless the parties agree on another place. If it be found that such person has been guilty of willfully violating any such laws, as charged, or has not in good faith conformed to the provisions of this Act, such permit shall be revoked, and no permit shall be granted to such person within one year thereafter. Should the permit be revoked by the commissioner, the permittee may have a review of his decision before a court of equity in the manner provided in section 5 hereof. During the pendency of such action such permit shall be temporarily revoked.

Section 1837, article 18, of Regulation 60, revised March, 1924, effective May 1, 1924, under the heading "Procedure in directors' offices," provides as follows:

In passing upon the renewal application of retail druggists and hospitals, previous allowances thereunder will be authorized without delay or question, unless the director is in possession of proof sufficient to warrant the inquiry provided for in section 1843.

The said section 1843 provides:

A retail druggist or hospital permittee shall be permitted to procure the full amount fixed by his basic permit and no director or other officer shall reduce the amount so procurable when applied for, except upon satisfactory proof that it is more than is needed for legitimate use, and no director or other officer shall make any reduction of this allowance without first giving the permittee an opportunity to appear in person, or by attorney, or submit a statement in writing, giving his reasons why he should have the amount applied for, and a reasonable time shall be given the permittee to supply this information.

It thus appears that under the law and the regulations made in pursuance thereof the permits in question are not to be revoked or reduced unless the director is in possession of proof to indicate the necessity for such action. It is not contemplated that a hearing shall be conducted and witnesses called for the purpose of obtaining such proof. When the Government is in possession of proof sufficient to indicate that the permit should be revoked or reduced the permittee is to be given a hearing to present such evidence as he may be able to adduce to show why the permit should not be revoked or reduced. There would appear to be no necessity for the Government to produce witnesses at such hearing. If, notwithstanding the evidence presented by the permittee, it is decided to revoke or reduce the permit and the permittee exercises his right to take the matter to court as the law provides, the expenses of witnesses then called by the Government would be payable as in other like cases.

Answering the specific question presented, I have to advise that there appears to be no authority of law for the payment of expenses incident to securing the attendance of witnesses at hearings conducted by the Bureau of Internal Revenue for the purpose of determining whether permits issued under the national prohibition act should be revoked or reduced.

(A-6201)

ESTATES OF DECEDENTS, ASSETS—BURIAL EXPENSES OF VETERANS

Homesteads, joint estates, or community property, when exempted from claims for expenses of burial of a decedent under a State law, are not assets within the meaning of section 201 (1) of the World War veterans' act of June 7, 1924, 43 Stat. 617, providing for the payment of expenses of burial of deceased veterans of any war who died without leaving sufficient assets to meet such expenses. The proceeds of commercial insurance payable to a veteran's designated beneficiary who had no insurable interest in the life of the insured are assets so far as they exceed the premiums paid by the beneficiary, but are not assets when the designated beneficiary has an insurable interest unless they are subject to the payment of the expenses of burial by virtue of some law of the jurisdiction.

Comptroller General McCarl to the Director, United States Veterans' Bureau, November 29, 1924:

I have your letter of November 5, 1924, requesting decision of questions presented as follows:

In the administration of the provisions of section 201 (1) of the World War veterans' act, which provides for payment of burial expenses of deceased ex-

service men, this bureau is called upon to determine whether certain veterans die without leaving sufficient assets to meet the expenses of burial and transportation of the body. The particular language of this section which requires such determination reads as follows:

"Where a veteran of any war dies after discharge or resignation from the service and does not leave sufficient assets to meet the expenses of his burial and the transportation of his body and such expenses are not otherwise provided for, the United States Veterans' Bureau shall pay the following sums: For a flag to drape the casket, and after burial to be given to the next of kin of the deceased, a sum not exceeding $5; also for burial expenses a sum not exceeding $100, to such person or persons as may be fixed by regulations."

In making this determination this bureau is confronted with the following problems:

(1) A veteran dies leaving as his sole estate property exempted by law as a homestead, which is free of liability for all debts except such as are expressly made chargeable. Burial expenses are not included in the class of debts so made chargeable. Does such a veteran die without leaving sufficient assets to defray the expenses of burial within the meaning of section 201 (1) of the statute? In this connection your attention is invited to the decision of the Comptroller of the Treasury, dated January 20, 1896, wherein it was held in a case where the property left by a deceased pensioner consisted solely of a homestead not liable for burial expenses that no assets were left within the meaning of the act of March 2, 1895. [2 Comp. Dec. 358.]

(2) A veteran at the time of his death had as his sole estate joint ownership in certain property, such as a U. S. gold bond, joint Treasury certificate, promissory note, real estate held under a tenancy by the entirety or as community property, all right and title to which passes to the survivor on the death of the veteran. Does such a veteran die without leaving sufficient assets to defray the expenses of burial within the meaning of section 201 (1) of the statute?

(3) A veteran dies leaving no estate whatever, but leaves insurance payable to a designated beneficiary. Does such a veteran die without leaving sufficient assets to defray the expenses of burial within the meaning of section 201 (1) of the World War veterans' act?

Assets are defined by Bouvier to be—

> The property in the hands of an heir, executor, administrator, or trustee which is legally or equitably chargeable with the obligations which such heir, executor, administrator, or other trustee is, as such, required to discharge.

Ordinarily burial expenses are a preferred charge against any assets left by decedent. However, by various State laws particular forms of property or estates pass to others, upon the death of persons having a limited interest therein, exempt from all claims for burial expenses of the decreased. The limits of the exemption depend upon the statutes of the particular jurisdiction and the construction given the statutes by the courts within the said jurisdiction. Upon the assumption therefore that, in connection with the forms of property recited in questions 1 and 2 of your submission, the laws of the particular jurisdiction and the construction thereof by the courts entitle the surviving beneficiary to the entire property or estate without payment of or deduction for burial expenses of the deceased, such forms of property or estates do not constitute assets of the deceased within the meaning of section 201 (1) of the act of June 7, 1924, 43 Stat. 617, and in the absence of other assets the burial expenses of the deceased may be paid by your bureau within the limits prescribed by the act.

As to question 3, if the designated beneficiary had an insurable interest in the life of the deceased and the State laws do not make the proceeds of the policy subject to the burial expenses, such proceeds could not be considered assets of the deceased such as would bar payment of the burial expenses by your bureau. However, if the beneficiary had no insurable interest, any proceeds of the policy in excess of the premiums paid by the beneficiary are assets of the estate of the deceased and must be applied to his burial expenses; if they exceed $100 no portion of the expenses would be payable by your bureau, if less than $100 and the deceased leaves no other assets, the difference between the net proceeds and $100 may be paid, but the amount paid and the proceeds must not exceed the actual burial expenses. 8 Comp. Dec. 534; 9 *id.* 643.

(A-5133)

PERSONAL SERVICES—HIRE OF, WITHOUT ADMINISTRATIVE APPROVAL

An expenditure incurred by a special agent of the Indian Office for the typing of certain records of the office on a contract basis, the expense having been incurred without prior administrative authority, reimbursement for the amount paid by the agent is not authorized in the absence of an affirmative administrative approval of such expenditure.

Decision by Comptroller General McCarl, December 1, 1924:

Frank J. McKinley, special agent, Choctaw Agency, Philadelphia, Miss., applied June 12, 1924, for a review of disallowance of a certain item in settlement No. C–9437–In., dated April 23, 1924, of his accounts covering period July 1 to September 30, 1923, to wit, voucher No. 16, October, 1922, of payment to Mrs. Adam Hare of $16.80 for typing, at 10 cents per page, "1,680 pages of matter in connection with land abstracts and deeds covering property to be purchased by the Government for reimbursable sale to Indians."

In letter dated March 22, 1923, addressed to the special agent, the administrative office took exception to the item, stating:

* * * As the pay roll shows the continuous service of two clerks during the quarter this expenditure can not be passed. Administrative approval should be requested of this office, at the same time submitting an explanation of the necessity justifying the expenditure. Answer required.

The special agent replied under date of April 27, 1923:

This service covers the printing of certain forms necessary in the purchase and reselling of land under the reimbursable regulations. These forms are not furnished by the department and it was found the quantity needed could be obtained cheaper from a typist than from the local printer. The service was not in connection with the regular work of the office performed by the regular employees. Order 32 applies.

This reply, in which no request is made for administrative approval of the expenditure, as indicated in Indian Office letter of March 22, 1923, should be made, was referred to this office by the

Indian Office without any indication of approval of the expenditure, and the item was thereupon disallowed.

The special agent states he is advised by the Indian Office that he has authority under order 32 to employ an additional clerk to assist in compiling vital statistics for Indians, information required for monthly reports, and from this he concludes that said order applies also to "the purchase of material, even though the material cost is composed to a large extent of labor." He contends also that there was no disapproval of the item by the Indian Office.

As previously stated, it does not appear that the expenditure received the approval of the Indian Office, and from the facts recited it would appear that administrative approval was not intended to be inferred. From the facts presented the item in question does not appear to have been a necessary expense which the agent was authorized to incur, therefore, in the absence of affirmative administrative approval of the expenditure, the disallowance is sustained.

(A–6187)

FEES OF UNITED STATES COMMISSIONERS—BONDS ISSUED IN BLANK

A bond executed before a United States commissioner in which certain blank spaces were left unfilled, but which was subsequently completed by the commissioner with the knowledge and consent of the principal and surety, is not invalidated so as to preclude the commissioner from receiving the prescribed statutory fee for execution, as such action of the principal and surety constituted the commissioner their agent to so act which they are estopped from denying.

Comptroller General McCarl to the Attorney General, December 1, 1924:

There were received your letters dated October 14 and October 25, 1924, inclosing report of examiners Hubbard and Wright upon the office of United States Commissioner A. H. Browne for the Eastern District of Louisiana, in which there is recommended for disallowance certain items for which credit was claimed and allowed in his accounts for the quarter ended September 30, 1923, and I am requested to reopen the settlement involving this period and recharge to the commissioner the amount of fees itemized in the examiner's report, in so far as in my opinion the facts warrant such action.

The period ended September 30, 1923, was included in settlement No. O17048–J, dated March 17, 1924.

The exceptions filed by the examiner for this period are designated, per exhibit "A" as "Charges recommended for disallowance from the account of United States Commissioner A. H. Browne for the September quarter, 1923," the same being stated as "Charges for drawing final bonds appearing on the following pages of the account are recommended for disallowance on the grounds that the blank spaces in the instruments had not been filled in at the time the signatures of the principals and sureties were affixed. Such an

instrument is not a bond at the time it is signed and does not become one as a result of filling in the blank spaces after it has been executed by the parties thereto."

A copy of this statement of exceptions was furnished Commissioner Browne and in reply thereto he states that:

> This has been the custom for several years, inasmuch as when the accused and the surety sign bonds, they are fully cognizant of what they are signing, and the surety is duly sworn as to the amount and location of his property. This has been done for the purpose of facilitating matters, and for that sole reason only. The district attorney has been fully cognizant of the practices, and has never intimated, in any manner, his objection to the same.

It appears that this practice has also been brought to the attention of the Federal judge for that district who in a letter dated October 20, 1924, copy of which has been submitted, states:

> Regarding the practice of the commissioner to take bonds in blank, this too has been entirely discontinued, but with regard to that, it would seem to me that if the sureties and principals signed bonds in blank before the commissioner for a purpose within his authority, they would impliedly constitute him an agent for the filling out of the bond. The bond could be enforced on default and Commissioner Browne would be entitled to his fee for executing it.

This view of the district judge appears to be well grounded, being substantiated by numerous decisions.

In 5 CYC., page 739, it is stated textually that:

> A bond is said to take effect by delivery, and therefore where one executes a bond and delivers the same to another he will be bound thereby, and his liability will not be affected by the fact that there were blanks in the instrument when executed, provided he executed it with knowledge thereof and in the absence of fraud in filling up such blanks, since he consents by implication in such case that they may be so filled. * * * Cases cited therein, *Essallenne* v. *Citizens' Bank*, 3 La. Ann. 663; *Bell* v. *Keefe*, 13 La. Ann. 524. See also in this connection *Palacios* v. *Brasher* (18 Colo. 593) 34 Pac. 251, and *Rose* v. *Douglas* (52 Kan. 451) 34 Pac. 1046.

From the decisions thus cited there would appear to be no room for doubt that where a bond is signed by principal and surety who are not illiterate, in the absence of fraud they are legally accountable for what is subscribed, and upon a signing, sealing, and delivering to the official authorized to execute such an instrument containing blank spaces, which clearly require to be filled in, there is a presumption of authority in the executing official to act as agent in completing the instrument by filling in the blanks, and both the surety and principal would be estopped from repudiating such action of the agent as to a third party whose rights and interests have been affected by a reliance upon the result of such action.

The act of May 28, 1896, 29 Stat. 184, section 21, provides that a United States commissioner shall be entitled for drawing a bond of defendant and sureties, taking acknowledgment of same and justification of sureties, to 75 cents.

It is not alleged that the commissioner did not execute the bonds in question, the only objection raised being to the fact that he in addition filled out the bonds subsequently. The fact that such in-

struments were subsequently completed with the knowledge and consent of the parties would not appear to invalidate the instrument so as to preclude the right to the legal fee for executing the bond.

Accordingly there appears to be no ground for reopening the settlement as made and recharging the items listed.

(A–4873)

COMPENSATION, DOUBLE—RETIRED ARMY OFFICERS

The act of May 31, 1924, 43 Stat. 245, amending section 2 of the act of July 31, 1894, 28 Stat. 205, has the effect of validating payments made to a retired Army officer, retired for incapacity incurred in line of duty, for services rendered under an appointment as acting assistant surgeon, temporary, in the Bureau of War Risk Insurance, which appointment when made was contrary to the act of July 31, 1894.

Decision by Comptroller General McCarl, December 2, 1924:

The director, United States Veterans' Bureau, has requested review of settlement No. M–8599–V, dated July 5, 1924, disallowing credit in the accounts of William H. Holmes, disbursing clerk, United States Veterans' Bureau, for payments aggregating $1,500 made to Lieut. Col. Charles N. Barney, retired (Medical Corps), United States Army, for services rendered as an acting assistant surgeon, temporary, during the period from August 1, 1921, to January 31, 1922.

It appears that Doctor Barney, having been retired from active duty in the Army for incapacity incurred in line of duty and receiving pay at the rate of $3,375 per annum as such retired officer, was appointed April 1, 1921, as temporary acting assistant surgeon in the Public Health Service with compensation at the rate of $3,000 per annum, and was transferred July 1, 1921, to the Bureau of War Risk Insurance as acting assistant surgeon, temporary, at same salary.

The disallowance was made on the ground that the appointment under which Dr. Barney was serving in the Bureau of War Risk Insurance and the Veterans' Bureau was contrary to section 2 of the act of July 31, 1894, 28 Stat. 205, which provides:

> * * * No person who holds an office the salary or annual compensation attached to which amounts to the sum of two thousand five hundred dollars shall be appointed to or hold any other office to which compensation is attached unless specially heretofore or hereafter specially authorized thereto by law; but this shall not apply to retired officers of the Army or Navy whenever they may be elected to public office or whenever the President shall appoint them to office by and with the advice and consent of the Senate.

The act of May 31, 1924, 43 Stat. 245, provides as follows:

> That section 2 of the Legislative, Executive, and Judicial Appropriation Act, approved July 31, 1894, is amended by adding at the end thereof a new sentence to read as follows: "Retired enlisted men of the Army, Navy, Marine Corps, or Coast Guard retired for any cause, and retired officers of the Army, Navy, Marine Corps, or Coast Guard who have been retired for injuries received

in battle or for injuries or incapacity incurred in line of duty shall not, within the meaning of this section, be construed to hold or to have held an office during such retirement."

It has been held that a retired officer or enlisted man of the Army or Navy holds an office within the meaning of said act of July 31, 1894, cited, and that such retired officer or enlisted man was prohibited by said act from being appointed to or holding another office not covered by the express exception in the act, provided his retired pay or the salary attached to the other office amounted to $2,500 or more per annum. See 1 Comp. Gen. 219, 571, 700, and cases therein cited.

In 3 Comp. Gen. 1009, it was held that by reason of the amendment of 1924, cited, a retired officer of the Navy retired for incapacity incurred in line of duty was eligible for appointment to an office to which he would have been ineligible under the original act of 1894.

The question here presented is whether the said amendment has the effect of validating the payments in question made to Dr. Barney.

In the Army appropriation act of March 2, 1923, 42 Stat. 1384, it is provided:

Payments heretofore made to retired enlisted men of the Army, Navy, Marine Corps, or Coast Guard, under appointments to civil offices with a compensation of $2500 or more per annum, are hereby validated.

This provision validated the payments theretofore made to retired enlisted men under appointments to civil office in violation of the act of 1894, but did not except them from the operation of that act, nor did it apply to retired officers. The amendment of May 31, 1924, cited, now so provides, and it is concluded that the said amendment had the effect of validating the payments made to Dr. Barney under his appointment as acting assistant surgeon, temporary, in the Bureau of War Risk Insurance and the Veterans' Bureau.

Upon review there is certified a credit of $1,500 in the accounts of William H. Holmes, disbursing clerk, United States Veterans' Bureau.

(A-6047)

TRAVELING EXPENSES, REPEATED TRAVEL—NAVAL OFFICERS

Unrepeated trips by an officer of the Navy to separate destinations, the return journeys being performed partly over the same routes, do not constitute any portion of the journeys "repeated travel" within the meaning of section 12 of the act of June 10, 1922, 42 Stat. 631, and only entitle the officer to mileage for the travel actually performed.

Decision by Comptroller General McCarl, December 2, 1924:

Lieut. Joseph H. Currier, United States Navy, applied October 24, 1924, for review of settlement No. O46912-N, dated September 26, 1924, wherein $28.72 mileage was allowed instead of

$39.77 claimed as reimbursement of expenses incurred in traveling under orders of March 22, 1924.

The orders of March 22, 1924, read in part as follows:

1. The Secretary of the Navy having determined that repeated travel between the below-mentioned points is appropriate, you are hereby authorized to perform such travel, from time to time, as may be necessary for the purpose indicated below, this being in addition to your present duties:

Between Philadelphia, Pa., and Washington, D. C., and such points within the Fourth Naval District as may be necessary to visit in connection with your duties.

This authority for repeated travel supersedes your orders of 8 January, 1924, and will terminate 30 June, 1924.

* * * * * * *

3. * * * you will be entitled to reimbursement for expenses, other than the actual cost of travel, incurred in the execution of these orders, at a rate not exceeding $7 per day, as specified in the act of 10 June, 1922.

Section 12 of the act of June 10, 1922, 42 Stat. 631, provides in part:

That officers of any of the services mentioned in the title of this Act, when traveling under competent orders without troops, shall receive a mileage allowance at the rate of 8 cents per mile, distance to be computed by the shortest usually traveled route and existing laws providing for the issue of transportation requests to officers of the Army traveling under competent orders, and for deduction to be made from mileage accounts when transportation is furnished by the United States, are hereby made applicable to all the services mentioned in the title of this Act, but in cases when orders are given for travel to be performed repeatedly between two or more places in the same vicinity, as determined by the head of the executive department concerned, he may, in his discretion, direct that actual and necessary expenses only be allowed. * * * Unless otherwise expressly provided by law, no officer of the services mentioned in the title of this Act shall be allowed or paid any sum in excess of expenses actually incurred for subsistence while traveling on duty away from his designated post of duty, nor any sum for such expenses actually incurred in excess of $7 per day. * * *

The travel in question for the expenses of which reimbursement is claimed was made from June 23 to 26, 1924, from Philadelphia, Pa., to Ocean City, Md., thence to Bethany Beach and Lewes, Del., and return to Philadelphia. It appears that under the original orders of January 8, 1924, of which the orders of March 22, 1924, were but an extension, travel had previously been made from February 18 to 20, 1924, from Philadelphia to Bethany Beach and Lewes and return.

The phraseology of that part of section 12 of the act of June 10, 1922, as to "travel to be performed repeatedly between two or more places" is similar to that used in the act of July 1, 1902, 32 Stat. 663. To be entitled to reimbursement for actual expenses, in lieu of mileage, under the 1902 act, it was repeatedly held that more than one journey or round trip between the same places was necessary to constitute travel "performed repeatedly between two or more places." *Willets* v. *United States*, 38 Ct. Cls. 534; 9 Comp. Dec. 353; 12 *id.* 718; 13 *id.* 391; 14 *id.* 897; 23 *id.* 368; 88 MS. Comp. Dec. 1418, March 26, 1919. This rule is applicable to the 1922 act, 2 Comp. Gen. 72; *id.* 673.

From the facts presented it appears that Lieutenant Currier has so far made but one round trip between Philadelphia and Lewes or Bethany Beach. While these two latter places were a second time visited they were so visited incident to returning from Ocean City, to which place Lieutenant Currier had gone from Philadelphia for the performance of duty and which had been visited but once under the orders here in question. He is entitled to mileage for the journey to Ocean City and return unless and until the travel thereto is repeated under these orders, and on a continuous journey there can not be mileage for a part and actual expenses, as for repeated travel, for the remainder of a journey.

The settlement allowing mileage for the travel performed between June 23 and 26, 1924, is sustained, without prejudice to claimant's right to be paid the difference between actual expenses and mileage upon a showing that a second trip has been made from and a return to Philadelphia, via the places visited during the June 23 to 26 trip.

(A–6217)

ADVANCE PAYMENTS—SCRIP BOOKS

The purchase of coupon books to be used in the procurement of gasoline and oil incident to the operation of Government-owned vehicles is not authorized, as such purchase involves the payment for supplies in advance of delivery and is in contravention with section 3648, Revised Statutes.

Comptroller General McCarl to George W. Love, Disbursing Clerk, Department of Labor, December 2, 1924:

Receipt is acknowledged of your letter of November 7, 1924, in which you request my decision of a question presented as follows:

There is submitted herewith a voucher in favor of Union Oil Company of California, in the sum of $20, for one coupon gasoline book furnished the Immigration Service at Yuma, Arizona, on September 12, 1924, to be used in the purchase of gasoline incident to the operation of a Government-owned automobile.

These so-called scrip books have been adopted by most of the oil companies for the convenience of operators of automobiles, who present the necessary coupons in procuring gasoline or oil instead of paying cash, and are particularly beneficial to the Immigration Service by reason of the large number of machines in use for patrol and other purposes. Many of the employees are under heavy expenses and if coupon books were not available would be compelled to pay cash, obtain receipts for the numerous purchases of gasoline and oil, and wait a considerable time for reimbursement of their expense accounts, which, under the regulations of the department, are submitted monthly. It may also be pointed out the Government will save through the use of these books, inasmuch as the face value of the books is in many instances more than the actual cost thereof. For instance, the books of the Standard Oil Company in Florida, having a face value of $10, actually cost to procure $9.04, a saving of almost 10 per cent.

There is, however, a doubt whether the procurement of such books and payment therefor before the supplies are furnished constitutes an advance of public money, which is prohibited by law, and your decision on this point is requested.

In a similar question it was held, on December 20, 1919, 91 MS Comp. Dec. 1879, that—

Section 3648, Revised Statutes, prohibits advances of public money or payments for supplies in excess of amounts due for articles delivered previously to such payment. This coupon book has no value in itself. Payment for the book is therefore, in fact, payment for the gasoline or oil which the coupons represent. Such payment in advance for gasoline and oil is clearly prohibited by this statute.

To the same effect were decisions of March 18, 1920, and October 18, 1920. Said decisions appear to be correct.

Accordingly you are advised that the proposed payment in advance of actual delivery of the gasoline and oil is not authorized.

(A–4668)

PANAMA CANAL—COMPENSATION OF RETIRED ENLISTED MEN OF THE MILITARY AND NAVAL SERVICES EMPLOYED BY

Under the act of May 31, 1924, 43 Stat. 245, the retired pay of enlisted men of the military and naval services of the United States is no longer compensation of "an office" within the intent and meaning of section 2 of the act of July 31, 1894, 28 Stat. 205; however, and notwithstanding the provisions of the act of May 31, 1924, such retired enlisted men are "persons in the military or naval service of the United States," and, being in the service, the amount of their "official salary," which is the amount of their retired pay, is required by section 4 of the act of August 24, 1912, 37 Stat. 561, to be deducted from the amount of their compensation provided in connection with their employment by the Panama Canal.

Comptroller General McCarl to the Governor of the Panama Canal, December 3, 1924:

There has been received a letter of August 13, 1924, from the chief of office, the Panama Canal, Washington, D. C., "By direction of the governor," referring to decision of September 28, 1923, 3 Comp. Gen. 164, wherein it was held, quoting the syllabus, that—

Retired enlisted men of the Army or Navy are persons within the military or naval service within the meaning of the act of August 24, 1912, 37 Stat. 561, and their employment by the canal is therefore not prohibited by the act of July 31, 1894, 28 Stat. 205, but their compensation from the canal is subject to deduction of their retired pay the same as though on the active list. 26 Comp. Dec. 209, overruled.

and requesting decision whether, in view of the provisions of the act of May 31, 1924, 43 Stat. 245, "The Panama Canal is now required to deduct the amount of retired pay received by retired enlisted men of the Army or Navy employed by the Panama Canal from compensation due them under their Panama Canal employment."

The provisions of the act of May 31, 1924, referred to are as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 2 of the Legislative, Executive, and Judicial Appropriation Act, approved July 31, 1894, is amended by adding at the end thereof a new sentence to read as follows: "Retired enlisted men of the Army, Navy, Marine Corps, or Coast Guard retired for any cause, and retired officers of the Army, Navy, Marine Corps, or Coast

Guard who have been retired for injuries received in battle or for injuries or incapacity incurred in line of duty shall not, within the meaning of this section, be construed to hold or to have held an office during such retirement."

In decision of May 25, 1922, 1 Comp. Gen. 700, 702, it was said:

Enlisted men on the retired list are now as much a part of the Army or Navy respectively, as retired commissioned or warrant officers are. Mere nomenclature is not material, and I see no ground for distinction among retired enlisted men between those ranking as noncommissioned officers of the Army or petty officers of the Navy and those ranking below such noncommissioned or petty officers. The term office as used in the act of 1894 is a broad general term which has been construed to include any person holding a place or position under the Government and paid from Government funds. 26 Comp. Dec. 897; 1 Comp. Gen. 219. I must conclude, therefore, that a retired enlisted man of the Army or Navy holds an office with compensation attached within the meaning of section 2 of the act of July 31, 1894.

The act of July 31, 1894, 28 Stat. 205, precludes those holding an office with compensation in excess of $2,500 from holding another office with compensation. The specific direction of the act of May 31, 1924, is that the retired service men shall not be construed to hold or have held an office during such retirement within the meaning of the act of 1894, cited.

The direction of the act of August 24, 1912, 37 Stat. 561, is that the compensation of those who are in the military or naval service shall be deducted from the salary or compensation provided for in connection with employment by the Panama Canal. The enactment of May 31, 1924, does not exclude considering these retired men as in the military or naval service as heretofore. The excluding them from being considered as holding an office has relation wholly to the limitations upon the amount of compensation through holding two positions. The enactment of 1912 continues in force, which requires the amount of such compensation to be deducted from compensation where such retired men are in the employment of the Panama Canal. It would therefore appear that this requirement of the act of 1912 must be enforced, notwithstanding the provisions of the act of May 31, 1924, cited.

(A-5372)

LEAVE OF ABSENCE—TEMPORARY PER DIEM EMPLOYEES OF THE DISTRICT OF COLUMBIA

Per diem employees of the District of Columbia temporarily employed or paid from appropriations expressly and exclusively available for temporary personal services, are not entitled to leave of absence with pay, either under the act of March 2, 1911, 36 Stat. 966, or the act of February 22, 1921, 41 Stat. 1144. (*See* 4 Comp. Gen. 552.)

Comptroller General McCarl to the President, Board of Commissioners, District of Columbia, December 3, 1924:

I have your letter of September 22, 1924, requesting decision whether it is within the administrative discretion of the commis-

sioners to grant sick leave of absence with pay to A. C. Oliver, an employee of the District of Columbia.

You forward a copy of a letter from A. C. Oliver, as follows:

I am employed as clerk in the office of the water registrar (revenue and inspection branch), engineer department, District of Columbia, at an annual compensation of $1,320, and have occupied my present position for over five years. The Personnel Classification Board classified the position I am filling under CAF–2, bureau No. 11–22–96, and P. C. B. No. 268.

On August 29, 1924, I was confined to my home through illness. On August 30, 1924, I returned to duty and filled out the prescribed application for sick leave with pay for the absence on August 29th. My application was disallowed on the ground that the position I occupy does not entitle me to sick leave with pay, this notwithstanding the fact that other employees in the same office, working under the same classification, are granted sick leave with pay.

I can find no authority of law for this discrimination and therefore respectfully request a ruling from you as to whether holding the position that I do I am, under the law, entitled to sick leave with pay in the discretion of the appropriate administrative officer.

You state that he is employed and paid on a per diem basis under the following provision appearing in the annual appropriation act for the District of Columbia for the fiscal year 1925, approved June 7, 1924, 43 Stat. 577:

Sec. 4. That the services of assistant engineers, draftsmen, levelers, rodmen, chairmen, computers, copyists, and inspectors temporarily required in connection with water department work authorized by appropriations may be employed exclusively to carry into effect said appropriations, and be paid therefrom when specifically and in writing ordered by the commissioners, and the commissioners in their budget estimates shall report the number of such employees performing such services and their work and the sums paid to each: *Provided*, That the expenditures hereunder shall not exceed $25,000 during the fiscal year 1925.

There are two statutes controlling the granting of leave of absence to employees of the District of Columbia. The first is dated March 2, 1911, 36 Stat. 966, extending the provisions of the act of March 15, 1898, 30 Stat. 316, as amended by the act of July 7, 1898, 30 Stat. 653, regulating leave of absence of employees of the Federal Government, to the "regular annual employees of the government of the District of Columbia, except the police and fire departments and public-school officers, teachers, and employees." The second is dated February 22, 1921, 41 Stat. 1144, providing as follows:

Sec. 8. That the commissioners are authorized in their discretion, and under such regulations as they may prescribe, to grant not exceeding fifteen days leave of absence with pay each year to per diem employees of the District of Columbia who have been employed for ten consecutive months or more.

If A. C. Oliver actually occupies his position under a temporary appointment, made under authority of and in accordance with the provisions of section 4 of the act of June 7, 1924, hereinbefore quoted, as distinguished from a permanent appointment as a regular employee, the compensation of which is properly chargeable to the regular appropriation for the water department, he would not be entitled to leave of absence with pay under the act of March 2, 1911.

The act of February 22, 1921, granting not to exceed 15 days' leave of absence, within the discretion of the commissioners, to "per diem employees of the District of Columbia" is expressly limited to those who have been employed for 10 consecutive months or more. This negatives granting leave of absence with pay to temporary employees. See, generally, 3 Comp. Gen. 382; 4 Comp. Gen. 18.

It would appear, therefore, upon your representation that A. C. Oliver is a temporary employee. He is not entitled to leave of absence with pay under either of the statutes controlling the granting of leave of absence to employees of the government of the District of Columbia.

(A-5454)

ONE YEAR'S PAY TO DISCHARGED NAVAL OFFICERS

A warrant officer of the Navy dropped from the services for failure to qualify professionally for promotion, in accordance with section 1505, Revised Statutes, as amended by the act of March 11, 1912, 37 Stat. 73, is entitled to one year's pay computed at the rate provided by law for shore duty.

Decision by Comptroller General McCarl, December 3, 1924:

There is before this office for decision the questions whether former Pay Clerk Claude M. Nash, United States Navy, is entitled to one year's pay under the provisions of section 1505, Revised Statutes, as amended by the act of March 11, 1912, and if so, whether he is entitled to have such pay computed at the rate provided for warrant officers "at sea" or "on shore," under the act of June 10, 1922.

Section 1505, Revised Statutes, as amended by the act of March 11, 1912, 37 Stat. 73, reads as follows:

Any officer of the Navy on the active list below the rank of commander who, upon examination for promotion, is found not professionally qualified, shall be suspended from promotion for a period of six months from the date of approval of said examination, and shall suffer loss of numbers equal to the average six months' rate of promotion to the grade for which said officer is undergoing examination during the five fiscal years next preceding the date of approval of said examination, and upon the termination of said suspension from promotion he shall be reexamined, and in case of his failure upon such reexamination he shall be dropped from the service with not more than one year's pay: *Provided,* That the provisions of this Act shall be effective from and after January first, nineteen hundred and eleven.

Under date of August 26, 1924, the Chief of the Bureau of Navigation, addressed to claimant the following letter:

1. You are advised that the Naval Examining Board before which you recently appeared found you to be mentally and morally, but, not professionally qualified to perform efficiently all the duties both at sea and on shore of the grade of chief pay clerk and did not recommend you for promotion.

2. The Secretary of the Navy, under date of 21 August, 1924, approved the proceedings, findings, and recommendation of the Naval Examining Board in your case, and directed that you be dropped from the service with one year's pay, in conformity with the provisions of section 1505 of the Revised Statutes, as amended by the act of March 11, 1912.

3. Accordingly, you will be dropped from the naval service with one year's pay, in accordance with the above-named provisions of law, effective upon the date of receipt of this letter.
4. Please acknowledge receipt.

Claimant received the said letter September 2, 1924, was detached from the U. S. S. *Reina Mercedes* and dropped from the Navy on the same date. The supply officer carrying his accounts allowed him credit and paid him one year's shore pay amounting to $2,016. His claim is for the difference between pay at sea, $2,268, and pay on shore at $2,016, or $252.

The language of the act of March 11, 1912, "Any officer of the Navy on the active list below the rank of commander" includes a warrant officer. In 53 Ct. Cls. 90, a warrant officer, machinist of the Navy, eligible for promotion to the grade of chief machinist, was recognized as coming under this statute.

As to whether claimant was entitled to one year's pay computed at the rate provided by law for sea duty at $2,268, or for shore pay at $2,016 per annum, the pay of a warrant officer after 12 years' service, it is concluded that he was entitled under the said act to one year's shore pay, which has been paid him by his supply officer.

An officer is entitled when dropped from the Navy under the act of March 11, 1912, to one year's pay measured by the base rate of pay provided by law of his permanent rank when dropped 4 MS. Comp. Gen. 1179, December 21, 1921; 1 Comp. Gen. 326. The higher rate of pay is predicated upon the actual performance of duty at sea, and only by the performance of such duty can an officer become entitled thereto.

(A-5928)

MEDICAL TREATMENT OF PENSIONERS IN NAVAL HOSPITALS

Under the act of May 4, 1898, 30 Stat. 377, the full amount of a Navy pension is chargeable with the cost of hospitalization of the pensioner in a naval hospital, and where the pensioner is a veteran entitled to hospital treatment from the United States Veterans' Bureau, under the provisions of section 202 (10) of the World War Veterans' Act of June 7, 1924, 43 Stat. 620, the appropriations under the Veterans' Bureau are chargeable only with the cost of the hospitalization over and above the full amount of the pension.

Comptroller General McCarl to the Secretary of the Interior, December 5, 1924:

I have your letter of October 4, 1924, requesting decision as to whom payment of a naval pension should be made when the beneficiary is being cared for in a naval hospital.

The act of May 4, 1898, 30 Stat. 377, provides as follows:

* * * And whenever any officer, seaman, or marine entitled to a pension is admitted to the Naval Home at Philadelphia, or to a Naval Hospital, his pension, while he remains there, shall be deducted from his accounts and paid

to the Secretary of the Navy for the benefit of the fund from which such home or hospital, respectively, is maintained; and section forty-eight hundred and thirteen of the Revised Statutes of the United States is hereby amended accordingly.

Section 202 (10) of the World War Veterans' Act, dated June 7, 1924, 43 Stat. 620, authorizes the Veterans' Bureau to furnish hospitalization to veterans of any war, military occupation, or military expedition since 1897 who were not dishonorably discharged without regard to the nature or origin of their disability. But there appears to be nothing in this act to indicate an intent to repeal or modify the provision hereinbefore quoted from the act of May 4, 1898.

In decision dated November 13, 1924, addressed to you, involving a pensioner cared for at St. Elizabeths Hospital, it was held that the pension of the inmate was primarily chargeable with his care to the extent of the amount properly fixed by regulations of the Secretary of the Interior under the act of February 2, 1909, 35 Stat. 592, and that the appropriations under the Veterans' Bureau are chargeable only with the cost of the hospitalization over and above the amount properly deducted from the pension. The reasoning there used is equally applicable to this case, the difference being only in the amount of the pension chargeable. Under the act of May 4, 1898, *supra*, the entire amount of a Navy pension is chargeable with the support of the pensioner while in the Naval Home or a naval hospital, and in such cases the Veterans' Bureau should be billed only for the cost of the hospitalization over and above the amount of the pension.

Answering the specific question presented I have to advise that the pension in the cases referred to should be paid to the Secretary of the Navy in accordance with the provisions of the act of May 4, 1898, *supra*.

(A–6031)

VETERANS' BUREAU BENEFICIARIES—LOSS OF WAGES

Where a beneficiary of the Veterans' Bureau is regularly employed and his compensation or wages are regularly computed on the basis of the amount of work performed by a crew of which he is a member, the amount to be reimbursed him by the Veterans' Bureau for loss of wages occasioned by his absence from employment, incident to medical examination or hospitalization ordered by the bureau, may be computed on the basis of what his wages would have been had he worked the full time the crew worked during his absence.

Decision by Comptroller General McCarl, December 5, 1924:

The director of the Veterans' Bureau has requested review of settlement 042228, dated July 14, 1924, disallowing the claim of William Olsen for $69.94, loss of wages while hospitalized for observation in hospital No. 69, Fort Thomas, Ky., from August

14 to August 31, 1923. The claim was administratively approved for payment by the bureau.

The paymaster of the Central Steel Co., Massillon, Ohio, employing the claimant, states that $69.94 represents the amount of wages claimant would have received had he worked the regular number of "turns" with the crew. His statement in letter dated April 25, 1924, is partly as follows:

> Please be advised that William Olsen was absent from duty from August 14th to 31st, 1923, inclusive, and was not paid any part of this time.
>
> Inasmuch as this man did not work during the above stated period there was no wages paid to him. Had Mr. Olsen worked during the above stated period, the amount of wages he would have received would have been sixty-nine dollars, ninety-four cents, ($69.94).
>
> The amount of hours worked per turn are eight hours. The numper of turns worked, thirteen, therefore, he would have worked 104 hours. Inasmuch as this is a straight tonnage proposition and the men receive pay according to the various gauges of steel worked there is no rate per hour paid.
>
> In your communication you ask us to verify the statement that this amount was actually deducted from his wages. Please be advised that inasmuch as he did not work during the above stated period there was no amount to be deducted from his wages, but as before stated, had he worked his regular turn with the crew, he would have drawn the amount of money heretofore stated.

The daily earnings are not computed on a piecework basis as is ordinarily understood, depending on the efforts of the individual employee, but governed by the amount of work performed by the crew as a whole. Accordingly, the amount of $69.94 is claimed on the presumption that the claimant would have worked the full number of hours worked by the crew during his absence. In letter dated May 10, 1924, from the paymaster of the employer, there is given the number of days worked by claimant and the amount received each day during July and September, 1923, the months immediately preceding and following the month in which the absence occurred and the statement made that claimant did not work full time during either month, but this fact is not sufficient to raise a presumption that he would not have worked full time during the period of his absence incident to hospitalization. In other words, the fact that he took leave of absence during other months does not create a presumption that he would have been absent during the period in question.

The authority for reimbursing claimant is found in section 303 of the war risk insurance act of October 6, 1917, 40 Stat. 406, providing for "loss of wages incurred" reimbursable "in the discretion of the director." Section 8024, regulations 1923, supplement No. 1, September 30, 1923, authorizes reimbursement of loss of wages "computed to the actual extent thereof, for the period of absence from employment from the time of departure to that of return, at the rate of the fixed daily wage or weekly salary for which the claimant was employed at that time, but no reimbursement for loss of wages in excess of $80 in any one month shall be allowed."

While in the present case the employee had no "fixed daily wage or weekly salary" he was a regular employee and there was a definite basis for computing his daily wage. Applying the legal maxim—"That is certain which can be rendered certain," it may be held that the loss of wages in this case is susceptible of definite ascertainment and reimbursable in accordance with the governing law and regulations.

This case is to be distinguished from the decision reported in 3 Comp. Gen. 549, where the claim of a substitute or employee on the extra list was denied. In that case it was not wages that were lost but the possible opportunity to earn wages. In the present case the employee was regularly employed and actually lost wages and in view of all the circumstances the evidence presented is deemed sufficient to establish the amount of such loss.

Upon review a difference of $69.94 is certified due claimant.

(A–563)

RENTAL ALLOWANCE—DEPENDENTS OF NAVAL OFFICERS

An officer of the Navy with dependents, attached to the U. S. S. *Ortolan* for duty in connection with the settlement of his accounts and furnished quarters for himself on board the ship, is entitled to rental allowance for his dependents while on such duty, under section 6 of the act of June 10, 1922, 42 Stat. 628, as amended by section 2 of the act of May 31, 1924, 43 Stat. 250, where there were no public quarters assigned for use of the dependents.

Decision by Comptroller General McCarl, December 8, 1924:

There is for consideration the question arising in the examination of the accounts of J. T. Lareau, lieutenant (j. g.), supply corps, United States Navy, as to whether he is entitled to credit for the payment of rental allowance to Lieut. C. W. Charlton, supply corps, United States Navy, an officer having a dependent not assigned public quarters, for the period from January 10 to 24, 1923, while settling accounts on board the U. S. S. *Ortolan.*

It appears that by order of November 24, 1922, as modified by order of December 16, 1922, Lieut. Charlton was directed upon the reporting of Lieut. George W. Masterton, supply corps, United States Navy, to make the necessary transfers to that officer of public funds in hand and on deposit, including public property in his possession; to regard himself detached from duty as assistant for disbursing and assistant to the supply officer of the U. S. S. *Tennessee;* and from such other duty as may have been assigned him; to report to the commanding officer of the U. S. S. *Ortolan* at the Submarine Base, San Pedro, Calif., for duty on board that vessel in connection with the settlement of his accounts. The indorsements thereon show that

he was detached from the *Tennessee* January 9, 1923, reported on board the *Ortolan* January 10, 1923, and was detached from the latter vessel January 24, 1923.

Section 6 of the act of June 10, 1922, 42 Stat. 628, as amended by section 2 of the act of May 31, 1924, 43 Stat. 250, effective July 1, 1922, provides:

> Except as otherwise provided in the fourth paragraph of this section, each commissioned officer below the grade of brigadier general or its equivalent, in any of the services mentioned in the title of this act, while either on active duty or entitled to active duty pay shall be entitled at all times to a money allowance for rental of quarters. * * *.

The fourth paragraph of this section provides:

> No rental allowance shall accrue to an officer, having no dependents, while he is on field or sea duty, nor while an officer with or without dependents is assigned as quarters at his permanent station the number of rooms provided by law for an officer of his rank or a less number of rooms in any particular case wherein, in the judgment of competent superior authority of the service concerned, a less number of rooms would be adequate for the occupancy of the officer and his dependents.

The Executive order of August 13, 1924, provides, paragraph 1-(e):

> The term "permanent station" as used in this act shall be construed to mean the place on shore where an officer is assigned to duty, or the home yard or the home port of a vessel on board which an officer is required to perform duty, under orders in each case which do not in terms provide for the termination thereof; and any station on shore or any receiving ship where an officer in fact occupies with his dependents public quarters assigned to him without charge shall also be deemed during such occupancy to be his permanent station within the meaning of this act.

In this case there was no assignment of quarters other than the quarters assigned to the officer on board ship for his personal use. As the facts do not bring Lieut. Charlton within the exceptions prescribed in said fourth paragraph he was entitled to rental allowance for the period in question.

(A-3752)

IMMIGRATION VISAS—REFUND OF FEES

Fees paid by immigrants for visas of passports issued between May 26, 1924, date of approval of immigration act (43 Stat. 153) restricting immigration, and July 1, 1924, the effective date thereof, may be refunded directly to the immigrants by the consular officer, where the visa could not properly have been used by the immigrant because of insufficiency of time between the date of issuance and July 1, 1924, or subsequent to July 1, 1924, because of the statutory changes in the provisions governing immigration.

Comptroller General McCarl to the Secretary of State, December 9, 1924:

I have your letter of September 15, 1924, asking further consideration of the question of refunding to the immigrant holders of unused and unexpired visas of passports the amount of the fee paid thereon under prior laws who show that they were not used "because the

quota to which they (such immigrants) would lawfully have been charged was exhausted, or because there was not sufficient time between the date of granting the visa and the date of the exhaustion of the quota or the taking effect of the immigration act of 1924 on July 1 to enable them to reach the United States and present their visas at the appropriate ports of entry."

The decision by this office of July 19, 1924, 4 Comp. Gen. 81, negatives issuing gratuitously visas of passports pursuant to the immigration act of May 26, 1924, 43 Stat. 153, to those who were holders of unused visas of passports issued under prior laws. That decision and prior decisions of this office involving the question of refunding to immigrants the fees charged for unused visas of passports (3 Comp. Gen. 115; *id.* 458) were based on the proposition that such fees are authorized to be refunded only where there has been a defect in the service performed by the consular officer or for any reason the visas of passports have been improperly issued. Thus, the exhaustion of a quota, or the passage of a new immigration law, would not of themselves justify the refunding of the fees charged for visas of passports regularly issued under laws previously in force.

Your submission presents a phase of the question now for special consideration, that is, the visas of passports issued between May 26, 1924, the date of the new immigration law, and July 1, 1924, the effective date thereof. The passage of the new immigration law of May 26, 1924, was notice to the consular officers of the change in the statutory provisions governing the admission of immigrants into the United States. Any visas of passports issued subsequent thereto which could not possibly have been used by the immigrants prior to July 1, 1924, because of insufficiency of time to reach the United States and present them to the appropriate ports of entry, and which could not be used subsequent to July 1, 1924, because of the changes in the statutory provisions governing immigration, may be considered to have been improperly issued. Therefore, on such basis refunds may be made of the fees for the visas so improperly issued during that period. I see no objection to the procedure suggested by you of having the consuls make the refund direct to such immigrants; but to warrant credit for such refundments in the accounts of the consular officers, there must be submitted the original passport in each case, showing the fact and date of the visa, together with a receipt by such immigrant holder for the amount refunded and a certificate from the consular officer setting forth facts from which it can be determined that it was impossible for any one departing from place of visa on the date thereof to arrive at the appropriate port in the United States before July 1, 1924.

(A-5818)

MISCELLANEOUS RECEIPTS—REFUNDING CUSTOMS FINES ERRONEOUSLY DEPOSITED AND COVERED INTO TREASURY

The permanent annual appropriation contained in section 3689, Revised Statutes, to "refund moneys received and covered into the Treasury before the payment of legal and just charges against the same," is not applicable to the refunding of customs fines erroneously imposed, collected, deposited and covered into the Treasury as miscellaneous receipts.

Comptroller General McCarl to the Secretary of the Treasury, December 9, 1924:

I have your letter of October 16, 1924, requesting decision as to the availability of funds for the refundment of customs fines erroneously imposed, collected, deposited and covered into the Treasury of the United States as miscellaneous receipts.

The facts of the case giving rise to your submission are stated therein as follows:

> The department is in receipt of a letter from the Collector of Customs at Ogdensburg, N. Y., regarding the question of refundment of a part of a fine of $87.50 imposed upon the Rutland Railroad Company for the irregular delivery of a shipment of one package of effects covered by baggage check No. 432728.
>
> It was discovered, upon reviewing the case, that an additional fine of 25 per cent of the estimated duty on the importation had been erroneously imposed, and, accordingly, the department, on June 24, 1924, reduced the amount of the fine from $87.50 to $70. On July 12, 1924, the collector at Ogdensburg advised that the fine, as originally imposed, was paid by the carrier on January 4, 1924, and had been deposited to the credit of the Treasurer of the United States. The fine was subsequently covered into the Treasury.

Moneys deposited and covered into the general fund of the Treasury of the United States, even though erroneously so deposited, are not authorized to be withdrawn therefrom or otherwise applied except in consequence of appropriations made by law. There has been given no authority by appropriation or otherwise to withdraw moneys from the Treasury for refund of customs fines claimed to have been erroneously imposed as in this case after the amount collected has been covered into the Treasury, although it appears that in a few similar cases prior to September 13, 1923, refundments were made and charged under the appropriation for "Refunding moneys received and covered," Section 3689, Revised Statutes, upon the approval and recommendation of the Secretary of the Treasury and under a misapprehension of the purposes for which said appropriation was available. When these erroneous settlements came to my attention it was deemed neither necessary nor advisable to attempt to recover the amounts of the refundments thus made, there being no question as to the propriety of the allowances from any standpoint other than the matter of the availability of the appropriation.

With reference to one of the refunds just referred to, you were advised by letter of September 13, 1923, and you are again advised, that such settlement, or any other like settlement—

> * * * is not to be considered as authorizing a departure from the practice heretofore obtaining with reference to the availability of the appropriation made under section 3689, Revised Statutes, for refunding moneys erroneously received and covered. The rule announced in 10 Comp. Dec., 239, is not to be regarded as set aside, changed, or modified by the settlement of January 11, 1923, in the case of M. Berries & Co.

The decision, 10 Comp. Dec. 239, provides, quoting the syllabus, as follows:

> The permament annual appropriation contained in section 3689, Revised Statutes, to "refund moneys received and covered into the Treasury before the payment of legal and just charges against the same," is not applicable to the refunding of a fine collected and covered into the Treasury.

The rule as thus announced is correct and should be observed in all cases involving claims for refund of customs fines.

(A–6052)

ACCOUNTING, SET-OFF—RETIREMENT DEDUCTIONS

The receipt by an employee of two salaries exceeding in the aggregate the annual rate of $2,000, is prohibited by the act of May 10, 1916, 39 Stat. 120, as amended by the act of August 29, 1916, 39 Stat. 582, notwithstanding the employee may have been on a leave of absence from one of the positions, and the amount received under one of the two positions constitutes a proper charge against any amount due the employee by the United States and may be set off against any credits of the employee in the retirement fund.

Comptroller General McCarl to the Secretary of the Interior, December 9, 1924:

There has been received your letter of November 1, 1924, transmitting for decision the record in the case of Frank T. Holmes, who has applied for refund of retirement deductions made from his pay as a laborer in the New York post office from January 5, 1922, to April 5, 1922. The Commissioner of Pensions has found that there is to the credit of the claimant in the retirement fund, $7.47. It appears, however, that during the period January 5, 1922, to January 10, 1922, claimant drew two salaries, receiving $22.78 as a rigger, navy yard, Brooklyn, which was at the rate of $5.84 per day, or $1,524.24 per annum (five-day-week basis); and $21.23 for the same period as a laborer in the New York post office, which was at the annual rate of $1,350 per annum.

The claimant was notified of the excess payment and requested to refund the $21.23, the lesser of the two salaries, but has objected thereto, stating:

> In reply to your letter received October 2, dated Aug. 19, 1924, in reference to my claim for money deducted from my pay while employed as laborer at the New York post office, in which you state that I was employed in two places at one time, it is contrary to the facts.

My service as rigger at the navy yard, Brooklyn, terminated on the morning of Jan. 4, 1922, when I presented my resignation and received my discharge and pay. At that time I had earned and coming to me, 5 or 6 days' vacation. Now please don't lose sight of the fact that that vacation was earned before Jan. 5, 1922. At the time of my discharge Jan. 4, I was given pay in lieu of vacation.

If as you state the book shows that I received pay from two places at one time, it is simply a case that the method of bookkeeping in the Government service shows me holding down two jobs at one time.

Technically that may be true, but in fact it is not, because from the time I presented my resignation and received my discharge and pay from the navy yard, Brooklyn, on Jan. 4, 1922, I was no nearer than 8 miles from this place, so how could I be employed here.

The administrative report from the commander of the navy yard is as follows:

As requested in your letter Acm-r of June 17, 1924, you are advised that Frank T. Holmes, rigger, $5.84 per diem, was paid for 4 days' leave with pay for January 5, 6, 9 & 10, 1922. On January 7, 1922, the navy yard was closed as the 5 days a week schedule was in effect.

It is immaterial that Holmes' right to the leave with pay was earned prior to January 5, 1922; the fact nevertheless remains that he was paid for the period from January 5 to 10, inclusive, two salaries exceeding in the aggregate the annual rate of $2,000, thus contravening the act of May 10, 1916, 39 Stat. 120, as amended by the act of August 29, 1916, 39 Stat. 582.

The claimant having been overpaid $21.23, which is in excess of the amount found due him on account of retirement deductions, the amount to his credit in the retirement fund should be applied to reduce the amount of his indebtedness to the United States on account of such overpayment of salary, by paying said amount to the Postmaster General of the United States for deposit to the credit of the appropriation from which originally paid. 3 Comp. Gen. 86; 37 MS. Comp. Gen. 774.

(A–6195)

ACCOUNTING—SET-OFF

The amount of postal money-order funds paid to a state bank, immediately prior to the closing of its doors, for drafts on its correspondent and which drafts were dishonored by the correspondent, because of the closing of the drawer bank, may be set off against the amount of taxes erroneously paid to the United States by the receiver of the drawer bank.

Decision by Comptroller General McCarl, December 9, 1924:

The Bank of Duchesne, through its receiver, requested payment of its claim for $468.61 on account of $400.24 taxes illegally assessed and collected for the years 1918 and 1919, with $68.37 interest thereon, notwithstanding the Government's claim of $514.41 against said bank on account of postal money-order funds paid to it by the postmaster at Tabiona, Utah, for exchange drafts which were not paid by the drawee bank for the reason that the Bank of Duchesne had

been placed in the hands of a State examiner because of its insolvent condition.

The State examiner, who under the State law appears to be the receiver, contends that:

> The funds paid the revenue department were creditor's funds paid by the receiver and the claim was filed by the receiver in charge. The deposit was in the Bank of Duchesne and the depositor is only entitled to his pro rata share in all the assets of the failed bank and this refund of taxes should go to all the depositors instead of just the one.

The sum of $514.41 had been exchanged at the post office in Tabiona for postal money orders and had become the money of the United States. The situation here is simply one where the insolvent bank is indebted to the United States in the sum of $514.41 and the United States is indebted to the insolvent bank in the sum of $468.61. It is one of debits and credits and the language of the court in *Taggart* v. *United States*, 17 Ct. Cls. 322, at page 327, is peculiarly apropos. The court there said that:

> Where a person is both debtor and creditor of the United States, in any form, the officers of the Treasury Department (now of the General Accounting Office), in settling the accounts, not only have the power, but are required in the proper discharge of their duties, to set off the one indebtedness against the other, and to allow and certify for payment only the balance found due on one side or the other. * * *

See also 2 Comp. Gen. 479, and authorities there cited. See also *United States* v. *Harris*, 7 Fed. Rep. 821. The fact that the drafts were sold to the Government immediately preceding the examiner taking charge and the taxes illegally exacted were paid thereafter while the examiner was in charge does not affect the Government's right to make the set-off and is not significant except for the prima facie inference that the bank was insolvent when it took the public money in return for the drafts. Sums due to the United States from a corporation may be set off against sums due from the United States to a receiver. 3 Comp. Gen. 697; *Scott* v. *Armstrong*, 146 U. S. 499; *Allen et al.* v. *United States*, 17 Wall. 207.

There is also for consideration another phase of this case. Section 3466, Revised Statutes, provides that:

> Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed.

Here the Bank of Duchesne is in the hands of a receiver and insolvent. The language of the court in *Allen et al* v. *United States*, *supra*, where the debtor was insolvent and there had been an assign-

ment for the benefit of creditors is pertinent and is, in part, as follows:

* * * Of the creditors of Russell, Majors & Waddell (the debtor) the United States are therefore entitled to be preferred in the payment of their demand out of the proceeds of the property in the hands of the claimants (the assignees), the property not being subject at the date of the assignments to any specific charge or lien. This preference the claimants can not disregard in the distribution of the proceeds without making themselves personally liable for the amount payable on the demand of the United States (*United States* v. *Clark*, 1 Paine, 629). If they could recover the amount claimed in the present suit, they would be required immediately to pay it over to the United States on the debt of the assignors, after deducting the expenses of its collection. * * * The demand is therefore the proper subject of set-off in a suit for the recovery by the claimants of the amount due upon a sale to the United States of property held by them under the deeds of assignment.

So here, the amount due the United States for postal moneys paid to the Bank of Duchesne immediately prior to the closing of its doors for drafts on its correspondent and which were not paid by the correspondent because of the closing of the doors of the drawer bank, is a proper set-off against an amount erroneously paid to the United States after the closing of the bank and during the receivership. The set-off will be made and the difference of $45.80 certified due the United States.

(A-6241)

CLASSIFICATION OF CIVILIAN EMPLOYEES—PROMOTION

Employees within the scope of Executive order of June 19, 1924, by reason of allocation under the classification act of 1923, in a grade for which they were not qualified under the civil service rules, may be promoted within the grade for which they have a civil service status, subject to the requirements as to efficiency ratings and provided the average of the grade to which allocated has not been exceeded.

Comptroller General McCarl to the Chairman, Commission in Charge, State, War and Navy Department Buildings, December 9, 1924:

I have your letter of November 5, 1924, requesting decision whether Clayton Harris and William L. Hill may be promoted to $1,080 per annum.

It appears that the employees in question prior to July 1, 1924, had the status of unclassified laborers but had been assigned to duties as chauffeurs and that their total compensation was $960 and $1,020 per annum, respectively. The positions which they actually held were allocated to grade 3 of the custodial service in accordance with the provisions of the classification act of 1923, hence their salaries as of July 1, 1924, were fixed at $1,020 per annum, in accordance with the provisions of section 6 of the said classification act.

Under the authority of the Executive order of June 19, 1924, the employees were permitted to remain in the positions to which they

were allocated. It appears that they were promoted on July 3, 1924, to $1,080 per annum but that subsequent to the decision of August 13, 1924, 4 Comp. Gen. 174, they were reduced to $1,020 per annum which is the minimum salary of grade CU–3 and the salary to which they were entitled on July 1, 1924, under the provisions of the classification act.

The Civil Service Commission, in a letter to you dated October 24, states that though the employees in question may not legally be promoted to chauffeur positions, yet because of the provisions of the Executive order of June 19, 1924, they retained their restricted status as unclassified laborers and that under such status the commission would approve promotions within the limits prescribed for unclassified laborers.

The apparent object of the Executive order cited was to prevent an employee from being put in a civil service status other than that previously held by him as a result of his allocation based on the duties he was performing prior to July 1, 1924, under a detail which was not in accordance with civil service rules as then existing, and such effect was given to said order in the decision of August 13, 1924, *supra.*

The question involved in the case here presented is whether an employee allocated to a certain grade because his duties on June 30, 1924, are found in said grade, though his civil service status would have put him in another grade, may receive promotion in the grade in which he has a civil service status, or whether he is restricted to the minimum rate of salary of the grade to which allocated.

The Executive order of June 19, 1924, provides that:

> Employees will be permitted to remain in the positions to which they have been allocated in accordance with the classification act of 1923 and receive the compensation attaching to such allocations, although contrary to existing provisions of the civil service rules, but shall not thereby be given any different status for promotion or transfer than they had acquired under the civil service rules prior to such allocation.

The purpose and effect of this provision is that an employee allocated to a position on the basis of duties performed for which he had not qualified under civil service rules is not to have any greater advantages or different status in the matter of promotion or transfer than he would have had if he had been performing the duties of the position for which he had qualified and had been allocated accordingly; on the other hand, there is no evidence of an intent that such an employee should be at a disadvantage in respect to promotion by reason of the fact that he was performing the duties of and had been allocated to a grade above that for which he had qualified under civil service requirements.

If the employees in the instant case had on June 30, 1924, been performing the duties of unskilled laborers for which they had

qualified, they would have been allocated to grade 2 of the custodial service and would have been entitled to be promoted in that grade, subject to the other requirements of the classification act, to a maximum salary of $1,140 per annum. They did not lose that right by reason of their allocation to a higher grade.

Answering your question specifically, you are advised that Clayton Harris and William L. Hill may be promoted to $1,080 per annum provided the requirements are met as to efficiency ratings and the average provision as applicable to grade 3 under the appropriation unit involved, but they may not be promoted above $1,140 per annum unless and until they qualify for appointment to a position under grade 3 in accordance with the civil service requirements.

(A–4034)

CONTRACTS—CANCELLATION

Where the Government for its own interest entered into an agreement for the cancellation, prior to its completion, of a valid contract, authorized under an existing appropriation and said agreement called for payment to the contractor of a certain amount in full settlement of the contract, payment of the amount agreed upon, if not in excess of the value of the material delivered, will be allowed.

Decision by Comptroller General McCarl, December 11, 1924.

The director of the United States Veterans' Bureau has transmitted for consideration and direct settlement the claim of the Better America Lecture Service, Inc., for $10,840.99 for which voucher is submitted with recommendation that it be paid.

The claim arises out of a contract approved by the director of the United States Veterans' Bureau dated December 13, 1922, entered into with claimant corporation, under the terms of which 100 complete sets each of 10 separate series of studies on various topics of business and government were to be prepared, and with each of said studies there was to be included and delivered to the bureau 25 to 35 illustrative stereopticon slides for each lecture; 2,000 books of 10 studies complete, and 20,000 pamphlets of one study each, or 2,000 for each study. As a further consideration it was agreed that the services of Newell Dwight Hillis as an instructor in these courses were to be furnished to instruct the teachers in vocational rehabilitation schools in the various districts established by the Veterans' Bureau, and for this service complete claimant was to receive $80 per study or a total sum of $80,000 for the 100 sets each of the 10 separate series of studies or lectures.

In April, 1923, a change in the method and policies of the bureau was adopted, and the feature of the visual instruction of the trainees contemplated under this contract was abandoned, and claimant was

notified that this contract would be canceled, and the claim now presented represents the cost of preparation of manuscript studies, stereopticon slides and expenses incurred in the course of executing the contract up to the time of its cancellation by the bureau. The manuscript lectures and slides have been completed and delivered to the Veterans' Bureau, and found to comply with the terms of the contract.

The director of the Veterans' Bureau in a letter dated May 7, 1924, with reference to the cancellation of the contract states:

> In April, 1923, it was determined to abandon this part of the visual education program of the Veterans' Bureau owing to the expense that such plan would entail in maintaining an organization of specialized personnel to handle the lecture service. Accordingly the Better America Lecture Service, Inc., was informed that the contract of December 13, 1922, would be cancelled.

Under an act approved June 27, 1918, the Federal Board for Vocational Education was created, and funds were provided " for studies, investigations, reports, and preparation of special courses of instruction, $55,000."

Under an act approved August 9, 1921, which created the Veterans' Bureau, the powers, duties, and functions of the Federal Board for Vocational Education were transferred to the Veterans' Bureau. (See section 3.) Section 8 of this act provides that all sums heretofore appropriated for carrying out the provisions of the war risk insurance act and amendments thereto, and to carry out the provisions of the act entitled:

> "An Act to provide for vocational rehabilitation and return to civil employment of disabled persons discharged from the military or naval forces of the United States, and for other purposes," approved June 27, 1918, and amendments thereto, shall, where unexpended, be made available for the Veterans' Bureau, and may be expended in such manner as the director deems necessary in carrying out the provisions of this Act. * * *

The act of June 12, 1922, 42 Stat. 649, making appropriation for the Executive, and for sundry independent executive bureaus, etc., for the fiscal year ended June 30, 1923, appropriated the sum of $146,409,188.80 for the purpose of carrying out the provisions of the act of June 27, 1918, as amended, for the vocational rehabilitation and return to civil employment of disabled persons discharged from the military or naval forces of the United States.

The act of June 27, 1918, as amended, imposed upon the board the duties of providing for vocational rehabilitation and return to civil employment of disabled persons discharged from military and naval forces of the United States, and section 5 of the act made it the duty of the bureau to make or cause to be made studies, investigations, and reports covering the vocational rehabilitation of these disabled persons and their placement in gainful occupation. (See 1 Comp. Gen. 535.)

It appearing that the making of the contract in question was authorized, and that funds were available to meet such expenditure, and that the cancellation of the contract and settlement made thereunder before completion of the same was in the interest of the United States, no more being paid for than the value of that which had been delivered, payment of the claim in the sum of $10,840.99, which has been approved by the director of the Veterans' Bureau will be allowed. The certificate of settlement will state that the check of the Treasurer of the United States issued upon the certificate and the warrant is to be accepted in full settlement of all claims and demands whatsoever under said contract dated December 13, 1922. (See 26 Comp. Dec. 170.)

(A–4726)

RENTAL ALLOWANCE—CHANGE OF STATION—ARMY OFFICER

An officer of the Army with dependents who, pursuant to War Department regulations relating to the assignment and relinquishment of public quarters, surrendered his quarters upon going on a leave of absence at the expiration of which he was to report at San Francisco for transfer to Honolulu, T. H., for permanent duty is entitled to rental allowance for himself and dependents, under section 6 of the act of June 10, 1922, 42 Stat. 628, as amended by section 2 of the act of May 31, 1924, 43 Stat. 250, for the period of such leave.

Decision by Comptroller General McCarl, December 11, 1924:

Harold L. Clark, first lieutenant, Air Service, United States Army, requested review of settlement No. M–83726–W, dated November 23, 1923, wherein was disallowed his claim for rental allowance for the period August 4 to September 22, 1923. The allowance was claimed on account of a wife.

Paragraph 63, special orders No. 141, dated War Department, June 18, 1923, announced claimant's relief from duty at Langley Field, Va., effective at such time as would enable him to comply with that order and ordered him to proceed at the proper time to San Francisco, Calif., and sail on the transport scheduled to leave that port on or about September 25, 1923, for Hawaii, and upon arrival at Honolulu to report to the Commanding General, Hawaiian Department, for assignment to duty with the Air Service.

Paragraph 40, special orders No. 154, dated War Department, July 3, 1923, announced that he was granted leave for one month and ten days, effective on or about August 15, 1923, and paragraph 2, special orders No. 158, dated Headquarters, Langley Field, Va., July 19, 1923, announced a further grant of leave for ten days, effective August 5, 1923.

Under date of August 4, 1923, Lieut. Col. Charles H. Danforth, commanding, headquarters, Langley Field, Va., signed the following statement:

First Lieutenant Harold L. Clark, A. S., has this date relinquished quarters at this post, his permanent duty station, and is departing on leave, the expiration of which he is reporting at San Francisco, for transportation to Honolulu, his new permanent station.

Section 2 of the act of May 31, 1924, 43 Stat. 250, amending by substitution section 6 of the act of June 10, 1922, 42 Stat. 628, provides:

Except as otherwise provided in the fourth paragraph of this section, each commissioned officer below the grade of brigadier general or its equivalent, in any of the services mentioned in the title of this act, while either on active duty or entitled to active duty pay, shall be entitled at all times to a money allowance for rental of quarters. The amount of such money allowance for the rental of quarters shall be determined by the rate for one room * * *. Such rate for one room is hereby fixed at $20 per month for the fiscal year 1923, and this rate shall be the maximum and shall be used by the President as the standard in fixing the same or lower rates for subsequent years.

To an officer having a dependent, receiving the base pay of the * * * second period the amount of this allowance shall be equal to that for three rooms, * * *.

* * * * * * *

No rental allowance shall accrue * * * while an officer with or without dependents is assigned as quarters at his permanent station the number of rooms provided by law for an officer of his rank or a less number of rooms in any particular case wherein, in the judgment of competent superior authority of the service concerned, a less number of rooms would be adequate for the occupancy of the officer and his dependents.

Regulations in execution of the provisions of this section in peace and in war shall be made by the President and shall, whenever practicable in his judgment, be uniform for all of the services concerned, including adjunct forces thereof.

Section 7 of this same act provides:

That the provisions of this act shall be effective from and after July 1, 1922.

Paragraph 2 (a) of the Executive order of August 13, 1924, provides:

II. *Assignment of quarters.*—(a) The assignment of quarters to an officer shall consist of the designation in accordance with regulations of the department concerned of quarters controlled by the Government for occupancy without charge by the officer and his dependents, if any.

War Department regulations made in pursuance of paragraph 2–a of the Executive order of August 13, 1924, provide:

2. *Termination of assignments.—a.* An officer's assignment of quarters at his permanent station shall be terminated by the officer chargeable with making assignments of quarters thereat under the following conditions, and, except as provided in paragraph 3*c* below, under no other conditions, unless upon specific order of The Adjutant General.

* * * * * * *

(3) On his departure from his permanent station * * *, on leave of absence * * *, under orders which relieve him from duty at his permanent station during or at the termination of his absence, unless the officer files request to the contrary.

Paragraph 3*c* above referred to has reference to termination of joint occupancy of quarters by two or more officers or their dependents by the withdrawal of one of them.

Between August 4 and September 22, 1923, Clark was "on active duty" and "entitled to active duty pay," and as he relinquished quarters on August 4, 1923, by direction of the commanding officer at Langley Field, the "competent superior authority" at Langley Field, contemplated by the law, and thereafter to and including September 22, 1923, was not again assigned quarters, he is entitled, under the act of May 31, 1924, its provisions being effective from July 1, 1922, and Executive order and regulations made in pursuance thereof, to rental allowance for the period August 5 to September 22, 1923.

However, in view of the provisions of paragraph 3–(d) of the Executive order of August 13, 1924, and of paragraph 4–*b* of the War Department regulations on the subject, and to avoid duplication of payments, the claim will be dismissed to the files until he files with this office a certificate from the finance officer who regularly pays him that he, the finance officer, has not and will not pay him rental allowance for the period covered by this claim, and such certificate is forwarded through the office of the Chief of Finance.

(A–6309)

STAR MAIL ROUTE CONTRACTS—SUBCONTRACTOR'S LIEN

A subcontractor's lien on funds due the prime contractor of a star mail route does not establish any privity of contract with the United States nor render the United States liable for payments to the subcontractor for mail transportation over the route when no funds of the prime contractor have been retained by the United States and the subcontract was not filed or approved by the Postmaster General within the time required by law and regulation.

Decision by Comptroller General McCarl, December 12, 1924:

The Postmaster General on November 15, 1924, submitted for direct settlement the claim of George Morrell for pay for services performed under a contract with Joseph Hooten, jr., who was the contractor with the Government for mail transportation on star route No. 69172. The facts gathered from the submission and accompanying papers may be stated briefly as follows:

The prime contract was between the United States and Joseph Hooten, jr., covering the period from July 1, 1918, to June 30, 1922. On or about December 20, 1921, Hooten contracted with George Morrell to perform a portion of the service between Richfield and Fremont, Utah, for one-half of the contract price between

the United States and Hooten. Morrell performed 95 trips in December, 1921, and January and February, 1922, for which he now claims as due and unpaid $680.01. Notice of Morrell's claim with a copy of the subcontract was first filed with the Post Office Department July 28, 1922, at which time there was due Hooten $268.53 but through some inadvertence final payment was made to Hooten a few days thereafter without taking into consideration Morrell's claim. Demand was made upon Hooten and upon his sureties by a postal inspector to pay or make some arrangements to pay the claim of Morrell but one of the sureties has since died and the other surety, who is the father of the prime contractor, is reported as financially unable ot make any payments. Hooten, jr., the contractor, also pleads inability to pay, stating that he lost everything he possessed in fulfilling the contract and is now dependent upon his day labor to support himself and family.

Section 1365 of the postal regulations provides that no subletting or transfer of any mail contract shall be permitted without the consent in writing of the Postmaster General, and section 1368 requires the consent of the Postmaster General in all cases before making a subcontract. Section 1367 requires copies of all subcontracts, when lawfully made, to be filed in the office of the Postmaster General and prescribes the method, when so filed, by which the subcontractor may be paid direct by the General Accounting Office. Section 1369, based on the act of May 18, 1916, 39 Stat. 162, is as follows:

> That if any person shall hereafter perform any service for any contractor or subcontractor in carrying the mail, he shall, upon filing in the department his contract for such service and satisfactory evidence of its performance, thereafter have a lien on any money due such contractor or subcontractor for such service to the amount of same; and if such contractor or subcontractor shall fail to pay the party or parties who have performed service as aforesaid, the amount due for such service within two months after the expiration of the month in which such service shall have been performed, the Postmaster General may cause the amount due to be paid said party or parties and charged to the contractor: *Provided*, That such payment shall not in any case exceed the rate of pay per annum of the contractor or subcontractor.

In the present case neither Hooten nor Morrell notified the Postmaster General nor secured his consent in writing before entering into the subcontract in question, and no copies thereof were filed until long after the service had been rendered. It is evident therefore that Morrell has no rights as a subcontractor that the United States is bound to recognize and that no privity of contract exists between the United States and the subcontractor. The provision for a lien under certain circumstances in favor of the subcontractor upon any money due the prime contractor is followed by a provision for the enforcement of such lien, said provision being that "the Postmaster General may cause the amount due to be paid said party or parties and charged to the contractor." Even if the requirements

of the law and regulations had been complied with by the subcontractor in this case, in order for the lien to attach and payment to be authorized it is essential that there be funds due the prime contractor in the possession of the United States. As all funds due the prime contractor have been paid to him there are now no funds in the possession of the United States upon which the lien could operate. The fact that the lack of funds to pay a portion of Morrell's claim may be due to the erroneous or inadverent action of some employee of the Post Office Department could not obligate the United States to assume responsibility for a debt for which it is not legally liable. See 1 Comp. Gen. 178, and cases therein cited.

The claim is therefore disallowed.

(A–6325)

INDIAN SERVICE—PHYSICIANS—FEES AND MILEAGE

Physicians of the Indian Service employed on a full-time basis are not authorized to be paid the fees and mileage provided in the act of September 22, 1922, 42 Stat. 1030, for making examinations of claimants for pensions and annuities. Where examinations of claimants for pensions and annuities by such physicians are directed to be made, the only payments authorized in connection therewith are those in the nature of reimbursement of the expenses of travel.

Comptroller General McCarl to the Secretary of the Interior, December 12, 1924:

I have your letter of November 14, 1924, transmitting a copy of a circular proposed to be issued by the Commissioner of Indian Affairs, with your approval, with request for decision as to whether the fees and mileage therein provided are authorized to be paid to physicians of the Indian Service for making examinations of claimants for pensions and annuities. The said circular provides:

> Physicians of the Indian Service who receive less than $1,860 a year or those who are not employed on full-time basis will be paid by the Bureau of Pensions for making examination of claimants for pensions and annuities.
>
> The fee for an ordinary examination is $3, but when the physician is directed by the Commissioner of Pensions to visit the home of the patient, a fee of $5 is allowed, and 20 cents a mile for the going and returning trips, provided the aggregate mileage is not in excess of 100, in which case special authority would be required from the Commissioner of Pensions.
>
> Physicians should not incur expenses for travel except when directed by the Commissioner of Pensions.

The act of September 22, 1922, 42 Stat. 1030, provides:

> That hereafter each duly designated examining surgeon, except expert and foreign surgeons, and each member of a board of examining surgeons, appointed by the Commissioner of Pensions for the examination of pensioners and claimants for pension or increased pension, shall receive the sum of $3 for each examination and satisfactory report thereof: *Provided, however,* That the fee for each examination made by an examining surgeon at a claimant's residence for use in a pension claim shall be $5, and in lieu of actual traveling expenses there shall be paid the sum of 20 cents per mile for the distance actually and necessarily traveled, not exceeding the distance by the usually traveled route

from the surgeon's office to the claimant's home and return: *Provided further*, That no fee shall be paid to any member of an examining board unless he is personally present and assists in the examination of the claimant: *And provided further*, That the report shall specifically and accurately set forth the physical condition of the claimant and include a full description of every existing disability.

Section 1764, Revised Statutes, provides:

No allowance or compensation shall be made to any officer or clerk, by reason of the discharge of duties which belong to any other officer or clerk in the same or any other Department; and no allowance or compensation shall be made for any extra services whatever, which any officer or clerk may be required to perform, unless expressly authorized by law.

In decision of October 7, 1922, in answer to the question as to whether fees "Can * * * be paid to surgeons in the Indian Service who receive a salary of more than $720 per annum," you were advised that:

Section 82 of the Indian Office regulations specifies who are entitled to the services of a regularly appointed physician and provides that:

" * * * It is also his duty to examine applicants for a pension when called upon to do so by the Indian Office. No charge shall be made for this service."

Since it is made part of the duties of a regularly appointed physician of the Indian Service to examine applicants for a pension at the request of the Indian Office without charge it follows that the payment to him of a fee for such service would be in violation of section 1764, Revised Statutes, which forbids payment of any allowance or compensation for extra service were it otherwise allowable.

and your attention was invited to section 5 of the Civil Service Retirement Act, of May 22, 1920, 41 Stat. 616, which was held to negative the payment of any fees to "medical officers of the United States" for examinations under and pursuant to said act. The provision in question reads:

Fees for examinations made under the provisions of this section by physicians or surgeons who are not medical officers of the United States shall be fixed by the Commissioner of Pensions, and such fees, together with the employee's reasonable traveling and other expenses incurred in order to submit to such examinations, shall be paid out of the appropriations for the cost of administering this Act.

Your attention is also invited to decision of December 15, 1917, 24 Comp. Dec. 350, wherein it was held as to the payment of extra compensation for the performance of services by employees of one bureau of a department for another bureau of the same department that:

The * * * question must be answered negatively for the reason that as to the employees of the Treasury Department it would be in the nature of extra services, which might be required of them without additional compensation.

The information furnished in the circular quoted, supra, and the letter transmitting it with request for decision, does not disclose the nature of the employments with sufficient exactness to warrant other than the following general reply.

Physicians of the Indian Service employed on a full-time basis are not authorized to be paid the fees and mileage provided in the act of September 22, 1922, 42 Stat. 1030. If examinations of claimants for pensions and annuities by such physicians are directed to be made, the only payments authorized to be made in connection therewith are in reimbursement of the expenses of travel, etc., and such reimbursement should be made pursuant to Indian Office regulations, the additional cost charged under Indian Office appropriations by reason of such examinations to be reimbursed thereto and charged under the appropriation for "Fees of examining surgeons, pensions," or "Salaries and expenses, employees' retirement act, Bureau of Pensions," depending upon whether the claim is for a pension or an annuity.

Whether or not physicians employed on a part-time basis are authorized to charge and be paid the fees and mileage would depend upon the terms and conditions of the part-time employment and can not be determined from the information furnished.

(A-5361)

PAYMENTS—DISCOUNTS

Where a contract for the furnishing of supplies provided that if payment were made within 10 days after receipt of the material a discount of 2 per cent of the purchase price would be allowed, the United States is not entitled to such discount where payment was not made within the 10-day period, the failure of the vendor to submit a voucher for payment until over three months after delivery not being material.

Decision by Comptroller General McCarl, December 13, 1924:

The National Electrical Supply Co. requested review of settlement No. 02128-(5), September 3, 1924, disallowing its claim for $1.71 deducted from voucher No. 17746 for $85.34 and paid by the United States Veterans' Bureau in the sum of $83.63, $1.71 having been deducted as 2 per cent discount.

The contract under which the company agreed to furnish the supplies provides in Form A, paragraph 27, as follows:

When discounts are quoted for payment within a specified time, it is understood and agreed that the discount period shall begin with the date of receipt of material.

The contract further provides that discounts of 2 per cent will be allowed if payment is made within 10 days after receipt of material.

It appears that delivery of the material purchased was completed on August 27, 1923, but that the voucher therefor, submitted December 22, 1923, was not paid until January 29, 1924, on which date check No. 3,563,274 of W. H. Holmes, disbursing clerk, United States Veterans' Bureau, was mailed to claimant.

Inasmuch as more than 10 days elapsed between the date of delivery of the material and the date upon which payment was made the Government is not entitled to the 2 per cent discount in question.

Upon review the settlement is reversed and $1.71 found due the claimant.

(A–6328)

CONTRACTS, SUPPLEMENTAL—PROGRESS PAYMENTS

Where, during the performance of a contract for public work and before payment of principal, a supplemental agreement is entered into changing the percentage of progress payments to be made to the contractor such supplemental agreement will not be objected to if the change is in the interest of the Government and the payment of such percentages does not exceed the value of the services rendered or the materials furnished.

Comptroller General McCarl to the Secretary of State, December 13, 1924:

I have your letter of November 14, 1924, as follows:

Your attention is invited to a contract prepared by the superintendent of the State, War and Navy Department buildings for the installation of two concrete fuel oil storage and service tanks in the courtyard of temporary building No. 6 at 19th Street and Virginia Avenue NW., Washington, D. C.

The specifications for this work state that:

"Payment in the amount of 90 per cent of the contract price will be made upon the completion of the entire work to be performed under this contract, the satisfactory completion of the acceptance test and the acceptance of the work by the superintendent, less any credits due the Government; the remaining 10 per cent will be paid after the plant has been operating in a satisfactory manner for a period of 30 days after completion and after final acceptance by the superintendent."

After the award was made to the Concrete Oil Tank Co., that company made the following proposition in a letter to the superintendent under date of October 27, 1924:

"If partial payments are made, instead of waiting until the entire job is complete, on the basis of receiving forty (40) per cent of contract price upon delivery of all equipment, and form lumber and the completion of necessary excavations for both tanks, and an additional payment of thirty (30) per cent of contract price upon completion of first tank, with the understanding that ten (10) per cent of these payments are retained until completion of entire contract, we will allow a discount of two (2) per cent of all partial payments made."

The offer of the contractor would mean an approximate saving to the Government of $95, but the attention of the superintendent was directed to your decision, vol. 1, page 529, stating "that it is not within the power or jurisdiction of any contracting officer of the Army or the War Department to make a supplemental agreement with a contractor to pay any part of the contract price before it is due in consideration of the reduction of the total amount to be paid under the original contract, where no change in the work covered by the original contract is involved."

As the interests of the Government are fully protected by the delivery, in the first instance, of the material necessary for the installation of these storage tanks and the necessary excavations for same at the time of the first contemplated payment and by the completion at the time of the second contemplated payment, of one of the tanks, leaving 30 per cent of the entire amount still due when the first tank is completed, it would seem that it would be to the manifest interest of the Government to take advantage of the 2 per cent discount involved, and your decision is desired as to whether the superintendent may legally enter into this agreement.

With reference to the manufacture and installation of the tanks the contract provides:

A. It is mutually understood and agreed that the contractor will furnish all labor and material, with the exception of the reinforcing steel, which will be furnished by the Government, and will install complete, ready for use, two (2) concrete fuel oil storage and service tanks in the courtyard of temporary building No. 6 at 19th Street and Virginia Avenue, Northwest, Washington, D. C., together with all necessary equipment, fittings, and specialties, the work to include the excavation and backfill and to be located in the 16 foot driveway, west of boiler house to be erected under another contract, with a clear distance of 12 feet, more or less, between the tanks which shall be rectangular in shape, approximately 15 feet outside width, 34 feet 6 inches outside length, and 7 feet 6 inches outside depth, and which shall be buried in an excavation approximately 9 feet below grade.

This appears as a simple proposition of necessities of a contractor in relief of which he is willing to pay a percentage of the contract price in the form of a discount—probably a lesser amount than borrowing a sum at interest. The United States should not be placed in such a position with contractors. If the work is such that payments on account are proper before completion, the contract should provide for progress payments. Where it is not so provided the conclusion is justified that the work is such that the interests of the United States require no payment to be made until completion of the work. This is called to attention as it is important that contracts be carefully drawn with respect to payments to be made thereunder. The amendment in question will not be objected to in this instance, the consent of the surety to appear in connection therewith.

(A-6504)

TRAVELING EXPENSES—USE OF OWN AUTOMOBILE

In the absence of specific legislative authority therefor there is no authority to commute actual expenses to a fixed rate of pay for the official use of a privately-owned automobile.

An allowance of $2 a day granted an employee of the Indian Service, under the terms of his appointment, for the use of his own automobile for each day it is used by him on official business, in addition to reimbursement for gasoline, oil and other actual running expenses of the automobile, is, in the absence of specific legislative authority, prohibited.

Decision by Comptroller General McCarl, December 15, 1924:

H. J. Hagerman, Special Disbursing Agent, Indian Service, Interior Department, has requested review of the following disallowances in his accounts:

Settlement C-3427-In:	
Voucher 6. H. J. Hagerman, auto, $2 per day, May 17 to 31	$30
Settlement C-7077-In:	
Voucher 1. H. J. Hagerman, auto, $2 per day, July 1 to 15	30
Voucher 2. H. J. Hagerman, auto, $2 per day, July 15 to 31	30
Voucher 9. H. J. Hagerman, auto, $2 per day, August 1 to 31	60
Voucher 5. H. J. Hagerman, auto, $2 per day, June 1 to 7, June 17 to 30	36

Settlement C-14144-In:

Voucher 2. H. J. Hagerman, auto, $2 per day, September 1 to 30	$60
Voucher 11. H. J. Hagerman, auto, $2 per day, October 1 to 25	50
Total	$296

It appears from the record that an emergency existed necessitating a vast amount of traveling throughout the Indian reservations and no Government car being available, and in view of the emergency and necessity for action the claimant used his Wills-St. Claire car in the work. Reimbursement for oil and gasoline used on official business has been allowed. Claimant felt that he should also be compensated for the wear and tear on his car and upon taking the matter up with the Indian Office there was an attempt to modify his appointment dated January 3, 1923, so as to provide, effective on April 30, 1923, an allowance of $2 per day for the use of his automobile on each day it was used on official duties, such allowance to be in addition to the allowance for gasoline and oil.

The acts of March 3, 1875, 18 Stat. 452, and April 6, 1914, 38 Stat. 318, provide for payment of only actual traveling expenses. In the absence of specific legislation therefor, there is no authority to commute actual expenses to a fixed rate of pay for the official use of a privately owned automobile, or to provide an allowance therefor as a part of compensation. See 20 Comp. Dec. 666; 4 Comp. Gen. 86, 116. See also provision in act of June 5, 1924, 43 Stat. 418, specifically authorizing compensation on a mileage basis for use of own automobile under certain circumstances.

The $2 per day allowance in the instant case is an allowance of an estimated amount in lieu of actual expenses and is not authorized under the law.

Upon review the settlement is sustained.

(A-5140)

TRANSPORTATION—LAND-GRANT DEDUCTIONS—ATTENDANT TO ARMY HORSE

A civilian employee of the Army traveling as attendant to a stallion, the property of the United States Army, is traveling on military duty as a part of the troops of the United States within the meaning of the land-grant laws, and the charges for his transportation are subject to the land-grant deductions applicable to transportation of United States property and troops.

Decision by Comptroller General McCarl, December 17, 1924:

The Chicago, Burlington & Quincy Railroad Co., by letter of July 30, 1924, submitted its supplemental bill 32613, being in effect an application for review of settlement T-75066-W, June 30, 1924, by which was disallowed $4.23 on its claim per bill 32613 for $167.25, for transportation per bill of lading 503306, February 4,

1924, of one Government stallion from Springfield, Ill., to Casper, Wyo., including attendant.

The company in submitting its bill applied land-grant deduction in determining the charges for the transportation of the horse, but claimed full commercial fare for the transportation of the attendant. This office determined the allowance for the attendant by making land-grant deduction in the same manner as the freight charges on the horse were computed, resulting in disallowance of $4.23. The company contends that the attendant was a civilian, the charges for the transportation of which are not subject to land-grant deduction, and claims the amount disallowed.

The transportation of the attendant was required in connection with the transportation of the horse, the bill of lading for the shipment bearing indorsement:

Charges for transportation of attendant where provided for in classification must be waybilled to be paid on this B/L.

The transportation required in this case was the transportation of the horse, the transportation of the attendant being merely incidental to and required in connection with the movement of the horse. The entire cost of transporting the horse thus included the charge for the attendant. The entire service is essentially a freight service, whatever may be the method of determining the cost. In certain cases no additional charge is made for the transportation of an attendant with live stock, the charge for the transportation of the stock including the transportation of the attendant. Whether the attendant is furnished free transportation or an additional charge is made therefor, the entire cost of transporting stock and attendant is essentially the cost of transporting the stock. Whatever expenses are required for the transportation of the attendant in connection with the movement of the stock are, as far as the shipper is concerned, a part of the cost of the freight transportation. The charges are provided for by freight tariffs, though the amount thereof may be determined from passenger tariffs.

The total expense required in connection with the transportation of the horse, including the fare of the attendant, is an expense required for the transportation of the horse, which being Government property, the charge therefor is subject to land-grant deduction.

Furthermore, the horse was the property of the United States Army and the duty connected with its care and transportation was a military duty, and it is therefore immaterial that the attendant was a civilian, as civilian employees traveling on military duty have been considered as a part of the troops of the United States within the meaning of the land-grant laws.

The settlement on the basis of land-grant deduction was correct and is affirmed.

(A-5717)

ARMY PAY, CONTINUOUS-SERVICE—MEMBERS OF NATIONAL GUARD DRAFTED INTO THE FEDERAL SERVICE

As section 111 of the act of June 3, 1916, 39 Stat. 211, required that members of the National Guard drafted into the Federal service receive the same pay and allowances as officers and enlisted men of the Regular Army of the same grade and same prior service, the rules applicable to continuous-service pay for enlisted men of the Regular Army are applicable to such drafted members of the National Guard. Settled accounts, however, involving continuous-service pay of National Guardsmen while in the Regular Army under the draft of August 5, 1917, will not be disturbed.

Decision by Comptroller General McCarl, December 17, 1924:

There is for consideration the correctness of decision of October 31, 1924, in regard to computing the continuous-service increase of pay of an enlisted man of the National Guard drafted into the Federal service.

Section 111 of the act of June 3, 1916, 39 Stat. 211, provides that officers and enlisted men of the National Guard in the service of the United States under the terms of that section shall have the same pay and allowances as officers and enlisted men of the Regular Army of the same grades and the same prior service.

In the decision of August 18, 1917, 24 Comp. Dec. 121, it was held:

> The enlistment period of enlisted men of the Organized Militia or National Guard in which serving when drafted into Federal service is determined by dividing previous continuous service by three, the integer in the quotient representing the number of enlistment periods already served.

This appears to have been based solely upon the provision of the act of May 11, 1908, 35 Stat. 110:

> * * * that the present enlistment period of men now in service shall be determined by the number of years continuous service they have had at the date of approval of this Act, under existing laws, counting three years to an enlistment * * *.

The act of May 11, 1908, prescribed the basis of determination of the enlistment period in which an enlisted man of the Regular Army was serving on that particular date, for continuous-service pay purposes. The period of continuous service was divisible by three, which was the number of years stated by the act to constitute an enlistment. Between the passage of that act and August 5, 1917, the date the National Guard was drafted into the Federal service, other legislation was enacted which affected the conditions under which enlisted men of the Regular Army received continuous-service pay, namely, the act of August 24, 1912, 37 Stat. 590, which provided that commencing November 1, 1912, all enlistments in the Regular Army should be for seven years, four of which should be active service and three with the reserves, and

> * * * that for all enlistments hereafter accomplished under the provisions of this Act, four years shall be counted as an enlistment period in computing continuous-service pay * * *.

The act of June 3, 1916, 39 Stat. 185–186, provides that commencing November 1, 1916, all enlistments in the Regular Army shall be for seven years, three on active duty and four with the reserves. and

> * * * that in all enlistments hereafter accomplished under the provisions of this Act, three years shall be counted as an enlistment period in computing continuous-service pay: * * *.

The decision of March 5, 1920, 26 Comp. Dec. 715, resulting from a consideration of those laws states that:

> In determining the enlistment period of enlisted men of the Army for purposes of continuous-service pay, each three years or four years of continuous service shall be counted as one enlistment, according to the length of regular enlistment periods for the purposes of continuous-service pay prescribed by the statute in force when the enlistment was entered into, without regard to length of time actually served in any particular enlistment under acts authorizing enlistments for shorter periods or authorizing discharges prior to the expiration of regular enlistments, provided the men remain continuously in the service within the meaning of the act of May 11, 1908, 35 Stat. 109.

It is evident that it was the intention of Congress as expressed in the act of June 3, 1916, that whenever the National Guard was drafted into the Federal service it should be on a parity with the Regular Army in regard to pay and allowances according to grades and the same prior service. The National Guard when drafted into the Federal service could therefore receive no greater benefits or rights as to pay and allowances than the military organization of which it became a part. If consideration were confined to the provisions of the act of May 11, 1908, to the entire exclusion of the subsequent acts of August 24, 1912, and June 3, 1916, greater benefits would accrue to the National Guardsmen by making their continuous National Guard service on August 5, 1917, divisible only by three as an enlistment period, whereas a Regular Army man would necessarily have to have his enlistment period for continuous-service pay purposes determined on a basis of three or four years according to the act effective during the period of his military service. The necessity for a common basis of computation is apparent if there is to be equality of pay and allowances when rendering identical service in the Federal forces. Therefore the method prescribed in 26 Comp. Dec. 715, will be applied from the date hereof in all unsettled accounts involving continuous-service pay of National Guardsmen while in the Regular Army under draft of August 5, 1917.

The decision of October 31, 1924, in the case of Linus W. Osborne, formerly private, Co. E, 146th Infantry, is correct and is adhered to.

(A-5245)

TRAVELING EXPENSES—USE OF OWN AUTOMOBILE

Reimbursement of actual expenses for gasoline, oil, and garage to personnel of the Army when traveling on official business in their privately-owned automobiles between two points entirely connected by free land-grant railroad is not authorized, but for such journeys or portions of journeys as could not be performed over a free land-grant railroad, or journeys between points connected by a 50 per cent land-grant railroad, reimbursement may be allowed, provided that in no event such reimbursement exceed what it would have cost the United States to have furnished transportation in kind. Reimbursement may also be allowed for travel performed separate from a troop movement when not in excess of the saving in troop transportation.

Comptroller General McCarl to the Secretary of War, December 18, 1924:

I have your request of November 20, 1924, for a reconsideration of decision of October 1, 1924, regarding proposed regulations of the War Department for the reimbursement of officers and others for the gasoline, oil, and garage expenses incurred when traveling on official business in their own automobiles. The comments in my decision of October 1, 1924, were not intended as covering all the circumstances in which reimbursement for gasoline and oil and garage rent might or might not be allowed the personnel of the Army, as you will note from the last paragraph thereof, in which it was stated that no more definite opinion on the question as then presented could be given and suggested that the regulations be recast and submitted for more definite consideration. In view of your present submission, however, it may be stated that no objection would be made to a properly framed regulation denying reimbursement to Army personnel for the use of their privately-owned automobiles in official travel over a route between two points entirely connected by a free land-grant railroad, but permitting such reimbursement for such journeys or portions of journeys as could not be performed over a free land-grant railroad and for journeys between points connected by a 50 per cent land-grant railroad, provided that in no event should such reimbursement for the use of the traveler's own automobile exceed what it would have cost the United States to have furnished transportation in kind. Neither would it be objectionable to provide for reimbursement for travel of an officer in connection with the movements of an organization or detachment of troops when the officer is not required to personally accompany the body of troops and it can be definitely ascertained that the cost of transporting the organization would be lessened in a definite amount by the travel of the officer separate from the body of troops, the reimbursement in such case for the actual expenses incurred in the use of his own automobile not to exceed the ascertained saving in troop transportation.

(A-6577)

TRANSPORTATION OF SHIPWRECKED AMERICAN SEAMEN

Section 4526, Revised Statutes, as amended by the act of December 21, 1898, 30 Stat. 755, providing for the return of shipwrecked American seamen to the United States where their service terminated at the time of the wreck, is not applicable to seamen rescued at sea from a burning ship, whose contract of employment called for their pay until return to the United States, and reimbursement for the amount paid to the rescuing vessel by the owners of the wrecked vessel for the transportation of such seamen back to the United States is not authorized.

Decision by Comptroller General McCarl, December 18, 1924:

The United States Shipping Board Emergency Fleet Corporation applied November 10, 1924, for review of settlement No. 9021 of February 7, 1922, in so far as it disallowed its claim N2-49 for reimbursement of an amount paid by it to the owners of the S. S. *William A. Graber* for picking up and transporting to St. George Bermuda, 37 seamen who were survivors of the S. S. *Roy H. Beattie*, burned at sea April 18, 1919.

In support of the request for review the claimant states:

Our charge is based on consular regulations No. 290 which provides that "When American seamen are picked up at sea or transported from a port where there is no consular officer, the master of the transporting vessel is entitled to receive from the consular officer at the port where the seamen are landed 50 cents per day for each seaman." This bill was disallowed by your office as per your certificate No. 9021, for reason that the claim did not exhibit the wage condition of the seamen and did not establish a state of destitution, to entitle them to relief under the appropriation, "Relief and protection of American seamen."

We are attaching hereto a copy of our bill supported by a statement of the master before a notary public and copy of a telegram from the Acting Secretary of State, which established the fact that these seamen were actually destitute.

With regard to the wage condition of the seamen, consular regulations No. 271 provides that "Shipwrecked seamen shall not be required to use their own funds and that the entire charge for relief is to be paid by the Government," and for this reason we do not see why the wage condition of the seamen should apply.

Section 4526, Revised Statutes, as amended by the act of December 21, 1898, 30 Stat. 755, provides:

In cases where the service of any seaman terminates before the period contemplated in the agreement, by reason of the loss or wreck of the vessel, such seaman shall be entitled to wages for the time of service prior to such termination, but not for any further period. Such seaman shall be considered as a destitute seaman and shall be treated and transported to port of shipment as provided in sections forty-five hundred and seventy-seven, forty-five hundred and seventy-eight, and forty-five hundred and seventy-nine of the Revised Statutes of the United States.

The paragraphs of the consular regulations referred to by claimant are as follows:

271. *Relief of shipwrecked seamen.*—When seamen of American vessels are rescued from shipwreck, or are brought after shipwreck from places where there is no consular officer, and are landed at or find their way to a port

where such officer is stationed, the latter will be authorized to afford relief without regard to the nationality of the seaman, or the character of American seaman, as herein defined. If they can not be reshipped, they should be provided with passages to the United States, or to an intermediate port where employment may be had or passages obtained.

290. *Transportation of shipwrecked seamen.*—When American seamen, whether transported from a port or place where there is no consular officer or picked up at sea, are landed at a consulate of the United States, the consular officer is authorized to pay the master of the vessel in which they are transported a reasonable compensation for the service, not exceeding 50 cents per day for each seaman, * * *.

The sentence purported to be quoted from paragraph 271 of the consular regulations in the claimant's request for review can not be found in the regulations on file in this office.

The consular regulations can not extend the scope of the laws upon which they are based but are subject to all restrictions found in the laws themselves. The relief provided by section 4526, Revised Statutes, is to be applied "In cases where the service of any seaman terminates before the period contemplated in the agreement" by reason of the loss or wreck of the vessel. It becomes of importance therefore to know what period of service is provided in the agreement or shipping articles. Claimant has failed to furnish with this request for review any evidence of the shipping agreement, but it is understood by this office that some, if not all, of the seamen shipping on vessels owned or controlled by the Emergency Fleet Corporation are engaged upon the standard shipping articles to which are appended supplemental provisions, agreeing among other things, that in case of the loss or wreck of the vessel on which serving the seaman's pay shall continue until he is returned to the United States, and a further provision that the seaman may be transferred from the vessel on which shipped to any other vessel of that line. Under such an agreement the service of the seamen would not appear to be "terminated" by the loss or wreck of the vessel and therefore the loss or wreck of the vessel would not terminate the duty of the claimant to return the seamen safely to the United States. Section 4526, Revised Statutes, is not applicable under such circumstances. 1 Comp. Gen. 337.

The claim here involved is not the claim of the rescuing vessel but the claim of the owner of the lost vessel based upon an alleged payment to the rescuing vessel. There does not appear to be any liability of the United States in connection with such a claim. 3 Comp. Gen. 148.

Upon review no differences are found and the settlement is sustained.

(A-6585)

CLASSIFICATION OF CIVILIAN EMPLOYEES—TRANSFER AND PROMOTION

An employee transferred between bureaus in the same department or between departments to fill a new or vacant position may be promoted to any rate of pay in the grade to which transferred which does not cause the proper average to be exceeded, provided the administrative office determines that the efficiency of the transferred employee in comparison with the efficiency of those employees already in the grade justifies such promotion.

Comptroller General McCarl to the Secretary of Agriculture, December 18, 1924:

I have your letter of November 29, 1924, as follows:

Your decision is respectfully requested upon the following questions arising in connection with the provisions of the classification act, approved March 4, 1923.

(1) Can an employee occupying a position at $1,860 per annum, in grade 6, of the subprofessional service in one of the bureaus of the department, be transferred and promoted to a new or to a vacant position at $2,200 per annum in the same grade and service in another bureau of the department, the average salary in the grade to which the transfer and promotion is desired not being exceeded by the proposed transaction?

(2) Can an employee occupying a position at $3,000 per annum in grade three of the professionl service in another department be transferred and promoted to a new or to a vacant position at $3,300 per annum in the same grade and service in this department, provided such action does not violate the average provision?

The rate of pay of an employee transferred from one bureau or department to a new or vacant position in the same grade in another bureau or department may be fixed administratively at any one of the rates of pay in the grade provided by the classification act of 1923 which does not cause the proper average for the grade to be exceeded. 4 Comp. Gen. 126, 128, and question and answer 1, decision of November 29, 1924, 4 Comp. Gen. 493. In both questions submitted by you there are involved two administrative actions, transfer and promotion. An employee transferred without promotion between bureaus in the same department or between departments may not be paid in the grade to which transferred at a higher rate of compensation than he was receiving in the grade from which transferred. 3 Comp. Gen. 1006, and question and answer 7, decision of November 29, 1924, 4 Comp. Gen. 493. But where, after such transfer, the administrative office determines that the efficiency of the transferred employee in comparison with the efficiency of those employees already in the grade to which transferred justifies such action, the transferred employee may be promoted to any rate of pay in the grade to which transferred which does not cause the proper average to be exceeded. 4 Comp. Gen. 77, and question and answer 4, decision of November 29, 1924, 4 Comp. Gen. 493.

Accordingly, both questions are answered in the affirmative.

(A-6622)

PAY AND ALLOWANCES OF NATIONAL GUARD OFFICERS ATTENDING SERVICE SCHOOLS

An officer of the National Guard ordered to the Army War College for a course of instruction is not entitled while sick in the hospital to pay, or rental and subsistence allowances, notwithstanding he continued his studies while in the hospital and satisfactorily completed the course, as he was not "in actual attendance at such school" within the meaning of section 99 of the act of June 3, 1916, 39 Stat. 207, as amended by the act of September 22, 1922, 42 Stat. 1035.

Section 4 of the act of June 3, 1924, 43 Stat. 364, does not authorize pay and allowances retroactively to those officers and enlisted men of the National Guard who, prior to the date of its enactment, might have been injured while attending service schools and recovered therefrom, as the validating clause includes only expenditures made for medical and hospital treatment for officers or enlisted men injured.

Decision by Comptroller General McCarl, December 18, 1924:

Joseph V. Schur, United States property and disbursing officer for the State of Oregon, has applied for review of settlement No. M-1921-W, dated October 18, 1923, wherein credit was disallowed in his accounts for $404 paid to Maj. Roy R. Knox, ordnance department, Oregon National Guard, as pay and rental and subsistence allowances for the period February 1 to 28, 1923, while the officer was sick in hospital.

It appears that Major Knox is married and that he was paid rental allowance at the rate of $100 a month, subsistence allowance at the rate of $1.80 a day for 30 days, and pay at the rate of $250 a month. The month of February, 1923, had 28 days and the subsistence allowance, if proper in his case, should have been only $50.40 instead of $54 as paid.

The question presented is whether Major Knox was entitled to any pay or allowances during the month of February, 1923.

By special orders No. 116, dated Adjutant General's Office, Salem, Oreg., December 21, 1922, Major Knox was ordered to proceed from Oregon to Washington, D. C., to attend the G-4 course, Army War College, for the term January 11 to February 27, 1923, and upon completion of this duty to return to his proper station. Pursuant to this order, Major Knox reported for duty at the Army War College on January 11, 1923, but from January 30 to February 28, 1923, he was sick in the Walter Reed General Hospital at Washington, D. C., where he was operated upon for an acute attack of appendicitis. The medical officer stated that the condition arose within the few days just prior to reporting sick, and while attending the course at the Army War College.

Major Knox states that three days after the operation for appendicitis, with the assistance of Major Mills, another National Guard officer taking the same course, he resumed the work being carried on at the college by reading all the lectures and getting all other infor-

mation and data through Major Mills, and that upon his release from the hospital he requested that he be given an examination in order to secure credit for the work, but that he was informed an examination was unnecessary, and that without an examination he was given a certificate from the college stating that he had satisfactorily completed the G–4 course for 1923.

Section 99 of the act of June 3, 1916, 39 Stat. 207, as amended by the act of September 22, 1922, 42 Stat. 1035, provides:

> National Guard officers and men at service schools, and so forth: Under such regulations as the President may prescribe, the Secretary of War may, upon the recommendation of the governor of any State or Territory or the commanding general of the National Guard of the District of Columbia, authorize a limited number of selected officers or enlisted men of the National Guard to attend and pursue a regular course of study at any military service school of the United States, except the United States Military Academy, or to be attached to an organization of the same arm, corps, or department to which such officer or enlisted man shall belong, for routine practical instruction at or near an Army post during a period of field training or other outdoor exercises; and any such officer shall receive out of any National Guard allotment of funds available for the purpose, the pay and allowances provided in the Pay Readjustment Act of June 10, 1922, for officers of the National Guard when authorized by law to receive Federal pay and the travel allowances provided in section 12 thereof, and any such enlisted man shall receive therefrom, except as otherwise provided in section 14 of the Pay Readjustment Act of June 10, 1922, the same pay and allowances, including allowances for quarters, subsistence, and travel to which an enlisted man of the Regular Army of like grade would be entitled for attending such school, college, or practical course of instruction under orders from proper military authority, while in actual attendance at such school, college, or practical course of instruction, and for the necessary period of travel from and to his home station.

The phrase "while in actual attendance at such school, college, or practical course of instruction," was contained in the original section 99 of the act of June 3, 1916, and was construed in 27 Comp. Dec. 777, to prohibit pay to an officer or enlisted man while on sick or ordinary leave of absence as there is no "actual attendance at such school" when absent; and in 1 Comp. Gen. 456, it was said:

> I am of opinion that an officer on detached service away from the school for the purpose of playing basket-ball games per a schedule arranged by the basket-ball team of the school is not during such period "in actual attendance at such school" within the meaning of the statute.

In consonance with the uniform construction of this section Maj. Knox was not "in actual attendance at such school" within the meaning of the statute while he was sick in hospital even though he pursued his studies while in the hospital and received a certificate to the effect that he had satisfactorily completed the course. Constructive attendance is not "actual attendance." See, also, 15 MS. Comp. Gen. 1172, November 27, 1922, to Secretary of War.

There is also for consideration the question whether the officer was entitled to pay and allowances under the provisions of section 4 of the act of June 3, 1924, 43 Stat. 364, which, so far as is here material, provides:

> That officers * * * of the National Guard injured in line of duty while at * * * service schools, under the provisions of Sections * * * 99 of the National Defense Act of June 3, 1916, as amended * * * persons hereinbefore described who may now be undergoing hospital treatment for in-

juries so sustained shall be entitled, under such regulations as the President may prescribe, to medical and hospital treatment at Government expense, and to a continuation of the pay and allowances whether in money or in kind, they were receiving at the time of such injuries, until they are fit for transportation to their homes, and upon termination of such medical and hospital treatment shall be entitled to transportation to their homes at Government expense * * *. Any expenditures heretofore made by the Government in caring for persons injured under the conditions specified herein are hereby validated * * *.

The context of this act indicates clearly by the words "who may now be undergoing hospital treatment" that it was not intended to authorize pay and allowances retroactively for officers and enlisted men of the National Guard who in the past might have been injured while attending service schools and recovered therefrom. The validating clause includes only expenditures made by the Government "in caring for" such injured persons. The phrase "in caring for" contemplates medical or hospital treatment. Under this view it is unnecessary to consider whether Maj. Knox was "injured" within the meaning of the act. As to this, however, see 2 Comp. Gen. 6, 224 and 784.

Upon review the settlement is sustained.

(A-6588)

SEAMEN—CLAIM FOR WAGES AND ALLOWANCES WHILE ON LEAVE OF ABSENCE

A seaman who shipped on a United States Army transport for a voyage, under shipping articles which stipulated that the crew would receive wages and subsistence until they returned to the port of hire, is not entitled to compensation or allowances for quarters and subsistence while on a leave of absence granted during the voyage at his request and upon his signing at the time a waiver relinquishing all claim for pay and allowances during the period of the leave of absence.

Decision by Comptroller General McCarl, December 19, 1924:

O. N. Moshkoloff, seaman, requested November 19, 1924, review of settlement No. 042708, dated November 3, 1924, wherein was disallowed his claim for payment of salary and allowance for quarters and subsistence for time spent in Manila, P. I., as a member of the crew of the United States Army transport *Merritt*, while waiting for return transportation to the United States.

This seaman claims wages for the period August 21, 1923, to September 21, 1923, at $70 per month, $72.33, and subsistence at 50 cents per day, and quarters at 25 cents per day, from August 22, 1923, to September 16, 1923, 26 days, or $19.50, total $91.83.

It appears that the claimant, a wheelman, shipped from San Francisco on the transport *Merritt*, sailing July 14, 1923, under shipping articles for a voyage which stipulated that the crew would receive wages and subsistence until they returned to the port of hire, as well as transportation to such port.

The articles of agreement between master and seaman dated port of San Francisco, July 14, 1923, provide:

It is agreed between the master and seamen, or mariners, of the United States Army transport *Merritt*, of which Capt. Frank Randall is at present master, or whoever shall go for master, now bound from the port of San Francisco, Calif., to Manila, P. I., and such other ports and places in any part of the world and in any ocean as the master may direct, for a term of time not exceeding six calendar months.

Going on shore in foreign ports is prohibited except by permission of the master.

The vessel arrived in Manila August 20, 1923, and on August 21, 1923, the crew was paid to and including August 20, 1923. The same day (August 21, 1923) orders were issued to prepare the *Merritt* for voyage to Zamboanga, P. I., sailing date being fixed at 12 o'clock noon, August 24, 1923, and the crew advised of that fact.

It appears that a large number of the crew (33) protested and refused to sail, claiming under the ship's articles "signed in San Francisco July 14, 1923," that when the ship was made fast to pier at Manila, their part of the contract was completed. This misunderstanding seems to have been brought about by a rumor in San Francisco about the time these seamen signed up for the voyage that the vessel would probably remain in Philippine waters. Nothing of the kind, however, appears in the articles of agreement.

The ship sailed for Zamboanga on August 24, 1923, returning September 4, 1923, and on September 6, 1923, sailed for Yokohama, Japan, returning October 5, 1923.

Capt. W. H. McHenry, Quartermaster Corps, United States Army, was requested January 15, 1924, to report as to the following items:

a. Statement of facts leading up to signing by some of the crew of waiver of all claim for pay and subsistence in consideration of leave of absence from date of arrival at Manila until departure of first available transport for San Francisco.

b. Was the waiver initiated by the men themselves or by someone in charge of transport matters?

c. Was the waiver initiated before or after arrival of the *Merritt* at Manila?

d. Was it signed in the presence of the shipping commissioner? If not, when and where was he made acquainted with the execution of the same, and did any of the signers represent to him that they signed same involuntarily?

e. What representations, if any, were made to these men about their being obliged to vacate the ship, and any alternative as to quarters for them?

f. Did other members of the crew have like opportunity for joining the waiver, or of making similar waivers?

Under date of January 18, 1924, Captain McHenry reported to the general superintendent, Army transport service, as follows:

(a) A few days before the arrival of the transport *Merritt* at Manila, two Filipino members of the crew applied for a leave of absence on arrival in Manila. They stated that they were willing to forfeit all pay and allowances during the time while on leave, and that several other members of the crew desired a similar leave. On arrival at Manila a waiver certificate was drawn up and presented to all the members of the crew.

(b) The original proposal to go on leave without pay came from the men themselves. The certificate was drawn up by the undersigned.

(c) The proposal was made by the men before the arrival of the *Merritt* at Manila, but the waiver was not presented to them for signature until after arrival.

(d) The waiver was not signed in the presence of the shipping commissioner, but it was presented to him when he witnessed payment of the crew. At this time he read the waiver and questioned the signers thereof as to the validity of their signatures and whether or not they signed voluntarily. No representations of having signed involuntarily were made at the time.

(e) It was explained to the men and presumedly understood by them that upon signing the waiver all claim for pay and allowances was released by them until the departure of the next available transportation for the States.

(f) All members of the crew were given an opportunity to sign the waiver.

The waiver referred to reads as follows:

U. S. A. T. "MERRITT,"
MANILA, P. I.,
August 21, 1923.

We, the undersigned crew of the transport *Merritt*, who have signed on the ships articles at San Francisco, Calif., for a return voyage with pay do hereby agree that for and in consideration of a leave of absence granted from the date of arrival of the *Merritt* at Manila until the departure of the first available transportation to San Francisco, do herewith waive and relinquish all claim for pay and subsistence during the period of this leave of absence.

Signed.

Oemitry Nikolaievitch Moshkaloff.
xBronislaw Nikoloievitch Solovsky
xAlexander Evdokim Gerazimetz.
xGeorge Pyeatt.
Semom Kalinin.
Agomop I. Mishel.
xIgnatieff Andrew.
xMakum Akim Dragovaz.
xAnatol Smirnoff.
Alexander Jigouleff.
xH. C. Benedict.
xJ. S. Williams.
xRobert Hall.
xElmer Robinson.
xHoward Foster.
Alvino Brash.
Mariano Samonte.
Deogracias Demetrio.
Pantaleon B. Ylagan.
Francisco Abarido.
Silverio Calma.
Aurelio Calma.
Cirilo Salvador.
Servillano Gregorio.
C. Guevara.
S. Mistiola.
Benny Miguel.
Pablo Villahermosa.
xClifford Jorgensen.
xW. C. Perry.
xF. J. Griffin.
xJack Brown.
xG. Clark.
Erik Froberg.

Noted at Manila 8/23/23.

V. ALDANESE,
Insular Collector of Customs,
by (sgd) EMILIO VELEZ,
Deputy Collector in charge of Marine Division.

Exhibit No. 1.
xFurnished quarters and subsistence at Manila.

The Headquarters, Philippine Department, O. Q. M., reported to the Quartermaster General, Washington, D. C., under date of March 27, 1924, as follows:

4. (a) No floating equipment of the Army transport service in Manila Bay during the period August 21st to October 23rd inclusive, to quarter or subsist these men on.

(b). The men whose names appear on Exhibit No. 1 with a check mark thus "X" opposite their names, were furnished quarters and subsistence at Manila pending sailing of transport. The others appearing on Exhibit No. 1 were not furnished either quarters or subsistence from noon meal August 31st to date they went on board ship enroute to San Francisco. No services were required of these men.

The statement is made that the claimant was put on board the United States Army transport *Grant*, September 17, 1923, for return to San Francisco, and that the others were returned on different dates as transportation was available.

The officer in charge admits that he prepared the waiver for the claimant's signature, but states that the idea of leave of absence without pay and subsistence, originated with the claimant, and no evidence has been submitted to the contrary. As the claimant failed to serve on the vessel in accordance with the terms of his contract he is not entitled to the same benefits that would have accrued to him had he complied with its terms.

Upon review the disallowance of this claim is sustained.

(A–4608)

COMPENSATION AND RENTAL OF QUARTERS—MATRONS OF THE INDIAN SERVICE

The compensation and rental of quarters for field matrons of the Indian Service are chargeable to the Interior Department appropriation "Industrial work and care of timber (field matrons)."

The compensation of outing matrons of the Indian Service is chargeable to the Interior Department appropriation "Indian schools support," while the rental of quarters is chargeable to the appropriation "Indian school and agency buildings."

When the duties of field matron and outing matron of the Indian Service are performed by one person, the practice of apportioning the expenses of compensation and rental of quarters between the respective appropriations of the Interior Department is proper. 4 Comp. Gen. 327 modified.

Comptroller General McCarl to the Secretary of the Interior, December 20, 1924:

I have your request of November 14, 1924, for reconsideration of decision of this office of September 25, 1924, 4 Comp. Gen. 327, regarding the appropriations available for the salaries and rental of quarters for outing and filed matrons of the Indian Service. My decision of September 25, 1924, as stated in the last paragraph thereof, was predicated upon the assumption that the results sought to be accomplished by the two classes of matrons were practically identical, no definite statement of the duties of the respective classes having been previously furnished this office. With your request for reconsideration, however, you submit detailed statements of the duties of outing matrons and of field matrons, respectively, from which it appears that their duties are in fact widely different. The field matrons' duties might be summarized as general welfare work for the benefit of all the Indians within their respective districts, while the duties of outing matrons are confined to education work in conjunction with established Indian boarding schools and consist in the supervision of Indian boys and girls placed with white families for practical instruction in domestic arts and agriculture.

The appropriation "Industrial work and care of timber (field matrons)" specifically provides for salary and rental of quarters for field matrons and is exclusive so far as field matrons are concerned. There is no specific appropriation for outing matrons as such, but their work is so closely allied to that of Indian schools that the appropriations for such schools may be considered available for their expenses. Upon reconsideration, therefore, in the light of the evidence now before this office, I have to advise that the practice of charging the salary and rental of quarters of field matrons to the appropriation "Industrial work and care of timber (field matrons)," the salary of outing matrons to "Indian schools support," and the rental of quarters for outing matrons to "Indian school and agency buildings," appears to be proper, as was also the practice of apportioning such expenses between the respective appropriations when one person performed both duties. My decision of September 25, 1924, is modified accordingly.

(A-6207)

TRANSPORTATION—RAILROAD FARE—COMMUTATION TICKETS

Where a United States marshal in traveling from his headquarters to the place of service and return used railroad commutation tickets and charged the Government in his accounts with the full railroad fare, he is entitled only to reimbursement in the amount actually expended by him for transportation.

Comptroller General McCarl to the Attorney General, December 20, 1924:

There has been received your letter of November 3, 1924, inclosing a report of Examiners Marcus and Hedges on the office of Walter S. Money, United States marshal for the district of Delaware, together with Exhibit E of said report covering the period from July 1, 1921, to March 31, 1924, and requesting that the accounts be reopened and that certain items charged therein representing excess railroad fare in the amount of $74.16 for travel from Wilmington to place of service and return be recharged to the marshal if the facts warrant such action.

It appears that the marshal purchased commutation tickets for use in travel from Wilmington to the place of service and return and charged the full railroad fare in his accounts against the Government instead of the actual amounts paid.

The marshal, under date of June 23, 1924, in reply to a letter from the examiner under date of June 16, 1924, inclosing a list of the excess payments appearing in his accounts, and requesting him to verify the list and advise him as to their correctness, stated that "The statement as prepared is correct," and that while he used a

commutation ticket between Wilmington and Townsend, he considered that a personal privilege and felt that he was justified in charging the full amount of railroad fare, but that he is prepared to reimburse the Government for these differences if it is held that he is liable for same.

There can be no doubt that the marshal was entitled to charge and receive reimbursement for only the amounts actually expended by him. Accordingly the amount in question will be recharged to him.

(A–5372)

LEAVE OF ABSENCE—TEMPORARY PER DIEM EMPLOYEES OF THE DISTRICT OF COLUMBIA

Per diem employees of the District of Columbia temporarily employed or paid from appropriations expressly and exclusively available for temporary personal services, are not entitled to leave of absence with pay under the act of February 22, 1921, 41 Stat. 1144, notwithstanding the fact that the periods of their temporary employment may have been continuous. 4 Comp. Gen. 511, affirmed.

Pay rolls covering personal services payable from the appropriations of the District of Columbia expressly and exclusively available for temporary personal services must be supported, beginning with the quarter ending March 31, 1925, by a certificate of the Commissioners of the District of Columbia that the funds in question were used exclusively for temporary personal services.

Comptroller General McCarl to the President, Board of Commissioners, District of Columbia, December 20, 1924:

I have your letter of December 17, 1924, requesting reconsideration of decision of December 3, 1924, holding that A. C. Oliver, a per diem employee of the District of Columbia, whose salary is paid under section 4 of the act of June 7, 1924, 43 Stat. 577, was not entitled to leave of absence with pay under the act of February 22, 1921, 41 Stat. 1144.

You have submitted certain records and copies of hearings held before the Subcommittee on Appropriations of the House and Senate having charge of the District appropriation bill for the fiscal year 1922, in which appeared, as enacted into law, the provision of the act of February 22, 1921, *supra*, authorizing 15 days' leave of absence with pay each year to certain per diem employees. You urge that because the data gathered from the various branches of the District government and placed before the subcommittee for consideration contained statements showing the total number of per diem employees who would be entitled to the leave privilege, including those employed under sections 2 and 4 providing funds for temporary personal services, that the statute finally enacted has reference to all "per diem employees of the District of Columbia who have been employed for 10 consecutive months or more."

Funds appropriated by Congress for personal services are available only for services actually rendered, unless Congress itself makes an exception. Leave of absence with pay is an exception. Employees of the Government may be classed in connection with the leave privilege as permanent and temporary, and the right to leave—i. e., the authority to use funds for the payment of employees while on leave of absence—refers only to permanent employment. This would be true without any restrictions in the statute limiting the leave privilege to permanent employees, but in addition to this fundamental rule, Congress has in the present instance further showed its intention to restrict the leave privilege to those permanently employed by use of the words "employees of the District of Columbia who have been employed for 10 consecutive months or more."

Whether an employee is a permanent or temporary employee is not for determination solely on the length of time the employee may happen to serve, but other conditions are for consideration, such as the character of the appointment, purposes for which employed, and particularly the express terms of the appropriation under which the employees are paid.

The annual appropriations for the District of Columbia are divided under the various activities of the district government. Under these headings are provided funds for personal services, which are intended to provide for the regular force of employees based on the estimates submitted. The appropriation for the water department, here involved, for the present fiscal year, is found in the act of June 7, 1924, 43 Stat. 575, and contains items for "personal services in accordance with the classification act of 1923" and "employment of all labor necessary for the proper execution of this work." At the end of the appropriation act there are sections 2 and 4 appropriating funds for certain classes of personal services, "temporarily required" in connection with sewer, street, street cleaning, road work, etc., and in connection with the water department. In the second paragraphs of both sections, the commissioners are authorized to "employ temporarily" certain classes of personal services in connection with the same work. Accordingly, the appropriations provided under these two sections and the authority granted the commissioners are expressly and exclusively applicable to employment of temporary employees, and the appropriations are not available to pay the compensation of the permanent force of the District of Columbia as supplemental to the regular appropriations otherwise provided. Therefore, persons employed under the authority of and in accordance with sections 2 and 4 may not be considered as permanent employees of the District of Columbia

entitled to leave of absence with pay. While the data which you have submitted may disclose what the District authorities intended when requesting the leave legislation, it can not be considered as influencing the construction of the plain terms of the statute. Decision of December 3, 1924, is affirmed.

Heretofore the disbursing officer of the District of Columbia in his accounts has not supported his disbursements for personal services under sections 2 and 4, *supra*, with evidence as to the temporary character of the employment. Beginning with the quarter ending March 31, 1925, there will be required to be submitted with the accounts a certificate of the Commissioners of the District of Columbia on the pay rolls that all the funds represented as expended by the pay rolls were exclusively for temporary personal services.

(A–1148)

GRATUITIES, SIX MONTHS' DEATH—NAVY AND MARINE CORPS

Under the act of June 4, 1920, 41 Stat. 824, an amount equal to six months' pay of an officer, enlisted man, or nurse who died while in the Regular Navy or Marine Corps, not the result of their own misconduct, may be paid to the widow, minor unmarried child or children of such officer, enlisted man or nurse, without evidence of dependency, but payment of such amount to beneficiaries other than the widow, minor unmarried child or children may be made only when previously designated by the officer, enlisted man or nurse, and upon a showing of dependency upon the deceased to some degree, though not necessarily for their chief or actual support, except that, in cases of aunts, uncles, and other relatives previously designated who stood *in loco parentis* to the deceased, actual dependency upon the deceased must be shown.

Comptroller General McCarl to the Secretary of the Navy, December 22, 1924:

There is before this office the matter of six months' death gratuity, involving a number of pending claims and items suspended in the accounts of paymasters, payable to designated beneficiaries under the supervision of the Paymaster General of the Navy.

The act of June 4, 1920, 41 Stat. 824, provides that the Paymaster General of the Navy shall cause to be paid to the widow, child, or children, or any other dependent relative previously designated by the officer, enlisted man, or nurse, an amount equal to six months' pay received by an officer, enlisted man, or nurse dying while in the Regular Navy or Marine Corps whose death was not the result of his or her own misconduct. No difficulty is encountered with reference to the beneficiary widow, child or children, but with reference to the class of beneficiaries defined as "any other dependent relative of such officer, enlisted man, or nurse previously designated by him or her," the intent of the Congress as to who are entitled presents

many questions, particularly in view of statutes *in pari materia*, the Army act of December 17, 1919, 41 Stat. 367, as amended by the act of March 2, 1923, 42 Stat. 1385, the dependency allowance acts of April 16, 1918, 40 Stat. 530, and June 10, 1922, 42 Stat. 628, and the acts authorizing distribution of the estates of decedents to certain relatives, *per stirpes*.

Enactments with reference to both military departments are not identical but it seems clear that uniformity of procedure was intended by the Congress so that beneficiaries through both services would be accorded like treatment in their several classes. That is to say, the requirements as to beneficiaries under the Army and Navy acts should be the same according to degree of relationship and dependency.

With reference to the degree and presumptiveness of dependency the laws contemplate two major classes: First, widow and unmarried minor child (or children), presumed in law to be dependent and, second, any other dependent relatives previously designated, as to which there is no legal presumption of dependency. The very nature of the law and the end sought to be accomplished thereby discloses the intent that the degree of dependency while material in each case is not necessarily the controlling element. The words "dependent relatives" were used not to restrict payments to a relative dependent in fact upon the deceased or as to whom the deceased was necessarily the chief support but among other things, to limit the class of relatives eligible for designation and to receive payments, and such class would naturally include only those bearing such intimate relationship to the deceased as would involve at least a moral obligation to assist in the event of need. Those who would therefore be considered as beneficiaries are a widow or unmarried minor child (or children); dependent mother, father, brother or sister of the whole and half blood, upon a showing of needy condition, or aunts, uncles and other relative standing *in loco parentis* shown to be actually dependent upon deceased.

That dependency in some degree must exist in each case is clear and as stated the dependency of a widow or unmarried minor child (or children) may be presumed, but in cases involving some "other dependent relative" previously designated no such presumption exists and the condition of dependency must be established by a reasonable showing of existing or possible future need at time of designation to be established in the event of death in the service by a showing of verified fact including that of periodical assistance from the deceased in keeping with his or her income from all sources. Dependency should appear in each case of those remote relatives in such degree as will permit a reasonable conclusion from

the facts of record that there is or may be actual dependency of more or less permanency, but not necessarily for chief or immediate support, except in cases of aunts, uncles and others *in loco parentis.* It is possible that moral responsibility for future support would support the designation but that may be rebutted by the circumstances of dependency existing at date of death. The fact of contribution is always material and would be deserving of special consideration in cases of regular contribution of a fair part of decedent's income, the extent thereof being proper for consideration in drafting the regulations for issuance by you.

While it is impossible to prescribe just what facts must appear to support a conclusion of dependency, the foregoing is stated as indicative of the view of this office for use in the examination and settlement of claims and accounts involving the six months' death gratuity and until more effective regulations can be promulgated throughout the remainder of the fiscal year, if necessary, payments and settlements may be made accordingly.

The foregoing is to expedite the relief granted by law to meet immediate needs, but the views expressed may be useful in establishing the regulations required by law, as follows:

> * * * The Secretary of the Navy shall establish regulations requiring each officer and enlisted man or nurse having no wife or child to designate the proper dependent relative to whom this amount shall be paid in case of his or her death. * * *

This provision contemplates the issuance of such regulations as may be necessary to a uniform administration of the law, and it is suggested that regulation be prepared in accordance with the statute. Should you so desire this office will be pleased to cooperate and furnish such assistance as is possible. In such connection there would seem for consideration the advisability and practicability of identical regulations by the War and the Navy Department.

It would seem the better practice to secure as complete a record as possible during the lifetime of the officer, enlisted man, or nurse, so that the matters of relationship and dependency can be more readily determined from the facts appearing in the application or voucher required of the beneficiary, the form of which application or voucher could be identical for all services. To aid in such a procedure the idea of having all designations made periodically or previous designations corroborated from time to time at once suggests itself as desirable.

In order that regulations may be promulgated in ample time to become effective by July 1, 1925, if the assistance of this office is to be availed of, it is suggested the matter be so administratively proceeded with that submission to this office be before March 1, 1925.

(A-6104)

OFFICERS AND EMPLOYEES—LIMITATION ON COMPENSATION

Where the salaries that may be paid to scientific investigators, or other employees engaged in scientific work for the Department of Agriculture, are limited by a provision in the act making appropriation therefor, the maximum rate per annum so specified may not be legally increased by means of contracts for personal services providing for the payment of compensation at a rate in excess of that provided in the appropriation.

Decision by Comptroller General McCarl, December 22, 1924:

There has been presented for decision the question whether certain payments made to Walter L. Fisher of Chicago, Ill., by A. Zappone, disbursing clerk, Department of Agriculture, on vouchers No. 9569, July, 1923, No. 29965, August, 1923, No. 62947, October, 1923, No. 85023, November, 1923, and No. 99032, December, 1923, for services rendered under a contractual agreement dated June 5, 1923, were authorized. The vouchers in question are stated as being "For legal services rendered" and also cover railroad and Pullman transportation, and credit therefor has been suspended in the disbursing clerk's accounts for the reason that the appropriation under which made does not specifically provide for the employment of special counsel and that section 189, Revised Statutes, prohibits heads of departments from employing attorneys or counsel but requires them, when in need of counsel or advice, to call upon the Department of Justice whose officers are required to attend to same.

The contract under which the services were rendered, reads as follows:

An investigation has been instituted by the Secretary of Agriculture to ascertain the facts and determine and publish the probable effect upon the livestock and meat packing industry and the public welfare of a transaction by which Armour & Co., of Illinois and others have undertaken to acquire the livestock slaughtering and meat packing properties, business, and other assets of Morris & Company, during the course of which there has developed urgent and immediate necessity for special expert assistance and advice to enable the Secretary of Agriculture to reach proper conclusions.

In these circumstances, under the authority of the annual appropriation for the Department of Agriculture hereinafter mentioned, negotiations have been entered into between Mr. Chester Morrill, assistant to the Secretary of Agriculture, and Mr. Walter L. Fisher, of Chicago, Ill., for the purpose of securing such assistance and advice from Mr. Fisher who has acquired special knowledge of and familiarity with the livestock and meat packing industry, and, pursuant thereto, it is understood and agreed between Mr. Fisher and the Secretary of Agriculture:

1. That Mr. Fisher will personally investigate and study the facts and issues as far as they have been developed up to this time and make plans for the future progress of the investigation; he will examine and consult with officers and employees of the Department of Agriculture and other persons who may be concerned; he will participate in any hearings that may be held in connection with the matter, and he will analyze, interpret, and summarize the facts and questions involved, to the end that the Secretary of Agriculture may be assisted and advised properly in reaching any determination that may be justified in the matter.

2. The Secretary of Agriculture will cause to be paid to Mr. Fisher, out of the appropriations for the Department of Agriculture for the fiscal years ending June 30, 1923, and June 30, 1924, entitled "Marketing and distributing farm

products," and such other appropriations as may be available for the purpose, compensation at the rate of $150 per day for time actually employed in Chicago, Ill., and at the rate of $175 per day for time actually employed elsewhere than in Chicago, Ill., together with the actual cost of railroad and Pullman fares when required in connection with travel away from the city of Chicago under this contract. The rate of compensation hereinabove provided shall apply to the customary office or court day. In addition thereto compensation shall be paid to Mr. Fisher for all services rendered outside of and in addition to such customary office or court days at the rate of $30 per hour.

3. The Secretary of Agriculture will cause to be made available to Mr. Fisher adequate assistance of employees of the Department of Agriculture and any statistical or other information possessed by the Department of Agriculture that may be useful for such purposes.

4. This agreement, unless amended or supplemented, shall terminate when the Secretary of Agriculture issues his findings of fact or order to cease and desist or otherwise concludes the inquiry to which this contract relates, and in any event whenever the compensation paid aggregates $12,000.

In explanation of the nature of the duties that were performed by Mr. Fisher under this contract the Acting Secretary of Agriculture, in letter dated October 29, 1924, said:

* * * In this contract, among other things, it will be noted that Mr. Fisher will personally investigate and study the facts and issues involved in the transaction by which Armour & Co. of Illinois and other corporations have undertaken to acquire the livestock slaughtering and meat packing properties, business and other assets of Morris & Co., as far as such facts and issues have been developed; make plans for the future progress of the investigation; examine and consult with officers and employees of the Department of Agriculture and other persons who may be concerned; participate in any hearings that may be held in connection with the matter; and analyze, interpret, and summarize the questions and facts involved, to the end that the Secretary of Agriculture may be assisted and advised properly in reaching any determination that may be justified in the matter. Mr. Walter L. Fisher has, through years of association with livestock producers' organizations and investigations of the packing industry, acquired a special knowledge and familiarity with that industry, and particularly with questions connected with costs of doing business and other controversial matters that have been a subject of Government investigation in the past. The matters under investigation involve mixed economic and legal questions. The concerns named are the largest buyers of livestock in the United States and their operations are highly influential factors in determining prices paid at public stockyard markets to producers.

The assistant to the Secretary of Agriculture in charge of the Packers and Stockyards Administration and the general attorney for the Packers and Stockyards Administration have been from the beginning in personal charge and responsible for the legal aspects of the investigation and have participated in it throughout. The resources of that organization have been used to the fullest extent.

In addition, one of the assistants of the Solicitor of the Department of Agriculture was assigned to represent his office in the legal aspects of the matter.

Finally, in order that no aspect of the matter might be overlooked a contract was made with Walter L. Fisher for the purpose of bringing to bear his advice, assistance, and viewpoint on the matter.

A large amount of statistical and other information contained in the records of the Bureau of Agricultural Economics and obtained by its employees has been used in the investigation of this matter. The utilization of resources of the department has not been confined to this bureau but has included also a considerable mass of information in the possession of the Bureau of Animal Industry.

In the investigation in which Mr. Fisher is participating accurate information is being sought and obtained under oath with respect to the many varied problems involved in the marketing of livestock and the disposition thereof as meat and meat food products. A mass of information has been secured with respect to the various factors of the livestock and packing industry and the relation of the various factors to each other has been fully developed. This

information thoroughly covers the economics involved in the subject under investigation. This information is what the Bureau of Agricultural Economics of this department desires and seeks to obtain in its livestock marketing investigations and will be of great value to the department. The information which has been and is being acquired deals fully with every aspect concerning the marketing, handling, utilization, transportation, and distribution of livestock and the meat and meat food products derived therefrom and all of this information concerning these matters is available to the Bureau of Agricultural Economics and the entire Department of Agriculture for diffusion among the people of the United States.

Owing to the fact that Mr. Fisher has an intimate and personal knowledge of the livestock and meat packing industry gained through extended personal experience with problems involving these subjects, he is an expert in regard to matters dealing with the marketing and distribution of livestock and the products derived therefrom, and is of course peculiarly well qualified for participation in the investigation in question. For these reasons a substantial part of the work of Mr. Fisher in this investigation has been that of a specialist and he has acted and will continue to act as an adviser of the Secretary of Agriculture with respect to every phase of the investigation.

After quoting the act making the appropriations from which payments for Mr. Fisher's services were made, the acting secretary further said:

It is obvious from what has been said that the vouchers in question did not fully and correctly state the character of the work and duties of Mr. Fisher and that these should have read, "for services rendered in accordance with the attached contract with him."

Under section 189, Revised Statutes, the employment of attorneys or counsel by the head of a department and under section 365, Revised Statutes, the payment of compensation for services of an attorney or counsellor, other than to district attorneys and assistant district attorneys, are prohibited, but in view of the above explanations offered by the acting secretary as to the duties that had been performed under the contract, it would seem that the services described are not of the nature of services contemplated to be prohibited by the provisions of the cited sections of the Revised Statutes, but rather seem to be advisory services of an expert character.

The appropriations for "General expenses, Bureau of Agricultural Economics (marketing and distributing farm products)" for the fiscal years 1923 and 1924, made by the acts of May 11, 1922, and February 26, 1923, 42 Stat. 531, 1313, from which payments for the services in question were made, provide:

For salaries and * * * traveling expenses * * * and all other expenses necessary in conducting investigations, experiments, and demonstrations, as follows:

* * * * * * *

For acquiring and diffusing among the people of the United States useful information on subjects connected with the marketing, handling, utilization, grading, transportation, and distributing of farm and nonmanufactured food products and the purchasing of farm supplies, including the demonstration and promotion of the use of uniform standards of classification of American farm products throughout the world, independently and in cooperation with other branches of the department, State agencies, purchasing and consuming organizations, and persons engaged in the marketing, handling, utilization, grading, transportation, and distributing of farm and food products * * *.

The act of May 11, 1922, *supra*, on page 539, contains a provision under the heading "Maximum salaries" which reads:

During the fiscal year 1923 the maximum salary of any scientific investigator, or other employee engaged in scientific work and paid from the general appropriation of the Department of Agriculture, shall not exceed at the rate of $6,500 per annum * * *.

An identical provision, except that the fiscal year 1924 is specified, is contained in the act of February 26, 1923, *supra*, on page 1320, making appropriation for the fiscal year 1924.

Section 523, Revised Statutes, authorizes the Secretary of Agriculture, as Congress may from time to time provide, to employ persons other than regular employees for such time as their services may be needed, including chemists, botanists, entomologists, and persons skilled in the natural sciences pertaining to agriculture, but the compensation of such persons, unless elsewhere specifically provided for, is limited by the appropriation under which employed. Except in those cases where specifically authorized there is no authority to increase by contract or otherwise the amount of compensation to be paid such employees and the compensation of employees whose services are secured by means of contracts, as well as those secured in the regular manner, is subject to the limitation in the appropriation. See 25 Comp. Dec. 655.

The limitation as to the amount of compensation to be paid employees, contained in the appropriation acts cited above, could not legally be exceeded in the instant case and the amount paid as compensation to Mr. Fisher in excess of the rate of $6,500 per annum of 313 working days, 7 hours per day, was contrary to law and credit for payments made to him in excess of that rate by the day or hour will accordingly be disallowed, for the reasons herein stated, in the next settlement of the disbursing clerk's accounts.

(A-6661)

NAVY PAY, LONGEVITY INCREASE—ENLISTED MEN

As section 3 of the act of May 31, 1924, 43 Stat. 251, amending section 10 of the act of June 10, 1922, 42 Stat. 630, provides that all enlisted men of the military or naval service who served actively as warrant or commissioned officers during the period from April 6, 1917, to December 31, 1921, shall be credited with such service in the computation of their enlisted service for longevity pay purposes, an enlisted man of the Navy whose prior enlisted service, together with that served as an officer between April 6, 1917, and December 31, 1921, is over 16 years, is entitled to receive as a permanent addition to his base pay a total increase of 25 per cent, retroactively effective from July 1, 1922.

Decision by Comptroller General McCarl, December 22, 1924:

Chester N. White, chief yeoman, United States Navy, requested review of settlement No. 157436-N, dated October 25, 1923, wherein

was disallowed his claim for difference between pay at rate of $151.20 and $157.50 per month for the period July 1, 1922, to June 30, 1923.

The claim was disallowed under section 10 of the act of June 10, 1922, 42 Stat. 630, for the reason that he had not completed 16 years' enlisted service as required therein as a prerequisite to 25 per cent increase of base pay.

Section 10 of the act of June 10, 1922, as amended by section 3 of the act of May 31, 1924, 43 Stat. 251, and made retroactive, effective from July 1, 1922, provides that all enlisted men who served as warrant or commissioned officers, shall be credited with all active service so performed during the period from April 6, 1917, to December 31, 1921, in computation of their enlisted service for longevity pay purposes, and shall be paid accordingly.

The records show that claimant had completed service, as an enlisted man during the period May 5, 1905, to October 3, 1917, and as an officer during the period October 4, 1917, to December 31, 1921, of over 16 years, thereby entitling him to 25 per cent increase of his base pay from July 1, 1922. During the period July 1, 1922, to June 30, 1924, he was credited pay in the rating of chief yeoman with over 12 years' service, or $151.20 per month. He is therefore entitled to the difference between $157.50 and $151.20 per month, for the above period, 24 months at $6.30, or $151.20. See 39 MS. Comp. Gen. 304, dated November 12, 1924.

Upon review $151.20 is certified due claimant.

(A-5866)

NAVY PAY, ADVANCE—CHANGE OF STATION

Where an officer of the Navy, detached from duty on board the U. S. S. *Savannah* and ordered to duty on the U. S. S. *Argonne* for further transfer to the Philippine Islands, was advanced two months' pay by the disbursing officer, in accordance with the act of March 4, 1917, 39 Stat. 1181, and Article 1803, Navy Regulations, 1920, the disbursing officer is entitled to credit in his accounts for such payment notwithstanding the officer to whom the payment was made did not report as directed and was subsequently declared a deserter.

Decision by Comptroller General McCarl, December 23, 1924:

Lieut. James D. G. Wognum (S. C.) United States Navy, applied February 21, 1924, through official channels, for review of settlement No. M-2875-N, dated February 13, 1924, wherein was disallowed $378, being two months' pay advanced by him to Gunner John V. Hockman, United States Navy, under orders issued by the Bureau of Navigation, dated April 30, 1923, as follows:

1. You will regard yourself detached from duty on board the U. S. S. *Savannah*, and from such other duty as may have been assigned you at such time as will enable you to proceed to Philadelphia, Pa., and on 8 June, 1923, report to the commandant, fourth naval district, and the commanding officer of the U. S. S. *Argonne* for duty.

2. Upon the arrival of the U. S. S. *Argonne* at Cavite, P. I., you will regard yourself detached from duty on board that vessel; will report to the commandant sixteenth naval district, and by letter to the commander in chief, Asiatic Fleet for such duty as may be assigned you.

The records show that Gunner Hockman was detached from duty on board the U. S. S. *Savannah* at New York, N. Y., May 11, 1923, and that he did not report on board the U. S. *Argonne* on June 8, 1923, as ordered. On September 8, 1923, he was declared a deserter from the United States naval service from June 8, 1923, in the absence of specific information as to his whereabouts.

The act of March 4, 1917, 39 Stat. 1181, provides:

* * * hereafter advances of pay not to exceed three months' pay in any one case may be made to officers ordered to and from sea duty and to and from shore duty beyond the seas, under such regulations as the Secretary of the Navy may prescribe.

Article 1803, Navy Regulations, 1920, promulgated in pursuance of this law, provides:

(1) All officers of the Navy and Marine Corps, when ordered to or from duty at sea on the Atlantic and Pacific stations, shall be entitled to an advance of not over one month's pay, provided they are not in debt to the Government for an advance previously paid them. All such officers ordered to or from duty at sea or on shore on a foreign station or in Alaska shall be entitled to an advance of not over two months' pay. Officers transferred from one ship to another, both ships being in commission on the same station, are not thereby entitled to such advance.

Gunner Hockman having been ordered to shore duty beyond the seas was entitled to an advance of two months' pay in accordance with the provisions of law and regulations quoted above.

As the purpose of the law was to authorize payment in advance of its accrual and to relieve a disbursing officer in case the officer to whom the advance was made should not earn the pay advanced to him, it is obvious the disbursing officer is entitled to credit if the payment as made was otherwise correct when made.

Upon review the disallowance of $378 is certified for credit in claimant's disbursing account.

(A–5604)

TRANSPORTATION—FREIGHT CHARGES—SHORTAGE IN DELIVERY

A steamship line transporting household goods of a naval officer from New York, N. Y. to Valparaiso, Chile, on a Government bill of lading, which required delivery to a specified addressee at destination, is only entitled to freight charges for the goods actually delivered to the addressee, notwithstanding the entire shipment was delivered by the steamship line to lighters at the port of destination and a portion of the goods was desroyed by storm.

Decision by Comptroller General McCarl, December 24, 1924:

The Grace Line (Inc.) applied per letter of September 30, 1924, for review of settlement T–10086–N, September 17, 1924, in disallow-

ing $451.20 on its claim for $518.40 for transportation from New York, N. Y., to Valparaiso, Chile, per bill of lading N–226493, June 14, 1923, of 57 packages, 864 cubic feet of household goods weighing 8,286 pounds received by the Grace Line steamer *Santa Luisa* at New York for forwarding to Commander A. W. Sears, U. S. N., naval attaché, Santiago, Chile, care of United States consul, Valparaiso, Chile. This shipment arrived at Valparaiso, Chile, about the 4th or 5th of July, 1923.

Commander Sears certifies as follows:

* * * This shipment was unloaded from the ship into lighters for further transfer to the customshouse.

Forty-seven (47) packages were placed in Grace Line lighter *No. 19*. The remaining ten (10) packages were placed in a second lighter; number unknown. These lighters were then moored out in the Valparaiso harbor. In one of the winter storms, which broke about the 6th or 7th of July, 1923, lighter *No. 19* was damaged by the *Taltal*, a Chilean steamship, which dragged her anchor in the storm and in getting under way damaged lighter *19* so that it commenced to take water. The lighter was apparently taken alongside of the dock to remove some of its cargo, but my goods were not removed due to continuing bad weather. The lighter was again moored out in Valparaiso harbor. In a second storm which blew up the 14th and 15th of July, this damaged lighter, still containing my goods, sank in 40 fathoms of water and goods were lost.

The 47 packages lost measured 752 cubic feet, weighing 7,370 pounds. The 10 packages delivered measured 112 cubic feet, weighing 916 pounds. The company claimed $0.60 a cubic foot for 864 cubic feet embraced in the shipment. The allowance was made on the basis of the goods actually delivered, 112 cubic feet at $0.60 per cubic foot.

The company in its application for review contends as follows:

* * * the vessel reports complete delivery at Valparaiso with the following exceptions, 2 cases No. 29/30, 1 bale No. 52, broken, part contents lost overboard.

We are further advised that this breakage was caused by heavy seas, rolling the ship and lighters in Valparaiso harbor. A marine protest was extended by the master at Iquique, Chile, July 14th, 1923.

You are aware that the steamship company is not responsible for losses under such circumstances, and any loss incurred should be collected from the insurance company carrying the marine risk.

As this entire shipment was carried to destination and freight earned, we would thank you to send us additional warrant for $451.20 to cover the balance due.

The claimant in response to request of this office of November 15, 1924, for the original bill of lading issued for this shipment advised that the original signed and completed bill of lading, Government number 226493, had been forwarded to the Bureau of Supplies and Accounts, Navy Department, Washington, D. C. The said bill of lading filed with the account now before this office being the contract of carriage in this case, stipulated delivery to Commander A. W. Sears, United States naval attaché, Santiago, Chile, care of United States consul, Valparaiso, Chile. The placing of the goods on the lighters was not delivery contemplated by the bill of lading.

It is the general proposition that the ship's owner has the right to receive payment of freight when the goods have been carried to the port of destination and there ready to be delivered. However, when the undertaking of a ship owner is to deliver goods to certain indicated persons he can not discharge that obligation in any way short of delivering the goods to the persons indicated. See Carver on "Carriage of goods by sea," sections 467 and 483. This delivery was not effected except as to the portion of goods for which allowance of freight has been made, *supra*, being the full amount earned according to the contract. There is nothing due as freight on goods not delivered.

The question of responsibility of the carrier for the loss is not now before this office and is not considered.

The settlement is affirmed.

(A-6235)

GRATUITIES—UNIFORM—WAR SERVICE—NAVAL RESERVE FORCE

An officer of the Naval Reserve Force is entitled, on reporting for any active duty in time of peace, to the credit of $50 for uniform gratuity authorized by the act of August 29, 1916, 39 Stat. 589, as amended by the act of July 1, 1918, 40 Stat. 711. 1 Comp. Gen. 452, overruled.

An officer of the Naval Reserve Force, whose enrollment expired while on active duty in time of peace other than for training, may be considered automatically released from active service by the expiration of his enrollment, and if otherwise entitled, may be paid the war-service gratuity of $60, provided by the act of February 24, 1919, 40 Stat. 1151, notwithstanding he immediately reenrolled and continued on active duty. 1 Comp. Gen. 383, modified.

Decision by Comptroller General McCarl, December 26, 1924:

There is before this office for consideration settlement M-252503-N, September 11, 1923, in which was disallowed the claim of Lieut. Com. Henry Sherman Chase, United States Naval Reserve Force, for uniform gratuity of $50 claimed to have accrued upon reporting for active duty in time of peace under his enrollment of March 28, 1921.

It appears that the amount was credited in claimant's account on the rolls of the U. S. S. *Solace* by paymaster R. J. H. Oldegeering during the period April 1 to 21, 1921, and in the settlement now under consideration, claim for the gratuity was disallowed and Lieutenant Commander Chase was charged with the item as improperly credited, and also was charged with $60 war-service payment credited in his account at the same time by reason of the expiration of enrollment, March 27, 1921, after active service during the war. The action in the settlement as to the first item was under 1 Comp. Gen. 452, and the other under 1 Comp. Gen. 383.

The naval history of claimant is reported as follows:

28 March, 1917, lieutenant U. S. N. R. F.-3.
15 April, 1917, reported active duty.
18 September, 1918, lieutenant commander U. S. N. R. F.-3.
1 October, 1919, confirmed lieutenant commander U. S. N. R. F.-3. (Confirmation board reported 1 October, 1919.)
27 March, 1921, enrollment expired.
28 March, 1921, reenrolled as confirmed lieutenant commander, class 3, and continued on active duty.
30 June, 1922, relieved active duty.
1 July, 1922, transferred to class 6, U. S. N. R. F.
19 January, 1923, transferred to class 3, U. S. N. R. F. as confirmed lieutenant commander.

As to the first item in question, the act of August 29, 1916, 39 Stat. 589, authorized uniform gratuity for officers of the Naval Reserve Force as follows:

Members of the Naval Reserve Force shall, upon first reporting for active service for training during each period of enrollment, be credited with a uniform gratuity of $50 for officers and of $30 for men.

The act of July 1, 1918, 40 Stat. 711, increased the right of enrolled members in enlisted ratings in the matter of uniform gratuity but made no change with respect to officers. This act of 1918 also amended the Naval Reserve Force law to provide for active duty for members of the Naval Reserve Force in time of peace for purposes other than training. The act of 1916 apparently limited the uniform gratuity to where the active duty was training, and in 27 Comp. Dec. 689 it was concluded that the uniform gratuity was authorized to be credited on reporting for drills under the view that drills were a form of training and that the purpose of the law was to aid members in providing necessary uniforms. But in 1 Comp. Gen. 452, credit of the clothing gratuity was denied when reporting for active duty for purposes other than training in time of peace on the ground that such credit was authorized only when reporting for active duty for training.

The 1916 enactment was not primarily the fixing of the service to be rendered upon which uniform gratuity was authorized to be credited, but mainly stipulated the uniform gratuity in a lesser amount for peace-time active duty than the amount authorized for war service. The law had at that time provided only for active duty for training in time of peace. By the amendment of July 1, 1918, provision was made for active duty for purposes other than training and crediting the uniform gratuity on reporting for such active duty may broadly be considered as within the intent and purpose of the law. The decision, 1 Comp. Gen. 452, will not be followed hereafter.

There appears also the question of the right to a bonus of $60 under the act of February 24, 1919, 40 Stat. 1151.

In 1 Comp. Gen. 383, it was held:

Since a member on active duty is subject to orders and not free to go where he pleases, it follows that a discharge from the Naval Reserve Force that privileges a member to go where he pleases is a release from active duty with the naval forces within the meaning of the war bonus act and therefore entitles the member to the $60 gratuity. However, such right accrues by reason of the release from active duty and not by reason of expiration of enrollment alone, and therefore this conclusion is but an application of the same principle announced in the decision of October 12, 1921, which principle is adhered to.

The facts in the instant case are that the officer was called to active duty under war conditions and does not appear to have been specifically released therefrom at the time the enrollment otherwise would have expired, March 27, 1921. Under such conditions it would be the better practice to specifically release so that there may be no question of thereafter being on active duty because of the war emergency. The reenrollment March 28, 1921, may be considered in the present case as following the ending of active duty because of war conditions.

Settlement of Col.–296 of January 7, 1924, is reversed, and the charge raised against claimant is removed.

(A–6591)

RENTAL ALLOWANCE—NAVAL OFFICER ON TEMPORARY ADDITIONAL DUTY

An officer of the Navy (without dependents) who was ordered from his permanent station at the naval medical school, Washington, D. C., to Quantico, Va., for additional temporary duty in connection with the field maneuvers of the marines, is not in a "field duty" status within the meaning of Executive order of August 13, 1924, and, not having been assigned public quarters at his permanent station, is entitled, under section 6 of the act of June 10, 1922, 42 Stat. 628, as amended by section 2 of the act of May 31, 1924, 43 Stat. 250, to rental allowance while serving on such additional temporary duty.

Decision by Comptroller General McCarl, December 26, 1924:

Lieut. Frank K. Soukup (M. C.), United States Navy, applied July 24, 1924, for review of settlement No. 031864–N, dated June 5, 1924, wherein he was allowed rental allowance in his own right for the periods August 18 to 26, 1923, and October 8 to 31, 1923, amounting to $42.66, and wherein was disallowed his claim for rental allowance for the period from August 27, 1923, to October 7, 1923, in the sum of $54.67.

Under date of August 7, 1923, the Bureau of Navigation issued orders to claimant, who was on duty at the naval medical school, Washington, D. C., to proceed to Quantico, Va., for temporary duty, in addition to his present duties, and report to the commanding general, marine barracks, in connection with the maneuvers of the marines. He reported as directed August 18, 1923, completed said

additional temporary duty, October 31, 1923, returned to Washington, D. C., and reported for duty at the naval medical school on the same date.

It appears that claimant was not assigned public quarters at his permanent station and was in receipt of rental allowance when he was ordered to said temporary duty.

Claimant was paid rental allowance (without dependents), from August 18 to 26, 1923, and from October 8 to 31, 1923, while on additional temporary duty at Quantico, Va. However, rental allowance was disallowed while he was in attendance at actual field maneuvers covering the period from August 27 to October 7, 1923, for the reason that such duty was considered field duty.

Section 6 of the act of June 10, 1922, 42 Stat. 628, as amended by section 2 of the act of May 31, 1924, 43 Stat. 250, provides:

> Except as otherwise provided in the fourth paragraph of this section, each commissioned officer below the grade of brigadier general or its equivalent, in any of the services mentioned in the title of this Act, while either on active duty or entitled to active duty pay shall be entitled at all times to a money allowance for rental of quarters. * * *

Paragraph 4 of the act provides:

> No rental allowance shall accrue to an officer, having no dependents, while he is on field or sea duty, * * *.
>
> Sec. 7. That the provisions of this Act shall be effective from and after July 1, 1922.

By Executive Order No. 4063 of August 13, 1924, the term "field duty" was construed to mean service, under orders, with troops operating against an enemy, actual or potential.

It is evident that duty with an organization participating in field maneuvers in time of peace and in the home country is not field duty for the purposes of rental allowance. It is therefore concluded that claimant's duty in connection with the maneuvers of the Marines from August 27 to October 7, 1923, can not be considered as field duty.

Claimant having been on active duty and entitled to active duty pay and public quarters not having been assigned to him at his permanent station it is concluded that he is entitled to rental allowance (without dependents) for the period August 27 to October 7, 1923, amounting to $54.67.

With a view to avoidance of duplication of payment under the amendment of section 6 by act of May 31, 1924, and the Executive order of August 13, 1924, and in view of the provisions of the Executive order for payment of claims for periods prior to May 31, 1924, by disbursing officers, the claim is dismissed to the files. Should claimant file a certificate by his pay officer that he has not and will not pay the items here involved, upon receipt thereof, settlement will issue in due form.

(A-5327)

PURCHASES—BICYCLES—ADVERTISING

A bicycle used primarily for the carrying of mail and parcels is not a passenger vehicle within the intent and meaning of section 4 of the act of February 3, 1905, 33 Stat. 687, prohibiting the purchase or operation of any carriage or vehicle for the personal or official use of any officer or employee of any of the executive departments or establishments at Washington, unless specifically authorized by law.

The appropriation "United States Tariff Commission, 1923," act of June 12, 1922, 42 Stat. 646, is available for the purchase of a bicycle used primarily for the carrying of mail and parcels of the commission.

Purchase made on the basis of oral solicitation of prices from a reasonable number of dealers may be regarded as sufficient to meet the requirements of section 3709, Revised Statutes, when the facts presented show that other means of advertising were not practicable. The offer of the most satisfactory bidder should, however, be confirmed in writing by that bidder and the resultant agreement filed as required by section 3743, Revised Statutes, as amended, and where the accepted oral bid is other than the lowest bid, the reasons for accepting such bid should be shown.

Decision by Comptroller General McCarl, December 27, 1924:

John F. Bethune, disbursing officer, United States Tariff Commission, applied September 5, 1924, for review of settlement No. C-11910-Ms, wherein $41 was disallowed, the said amount covering the charges for one "New Dayton" bicycle with parcel packet, voucher No. 814, first quarter, 1924, the disallowance being for the reason that the appropriation, "United States Tariff Commission, 1923," act of June 12, 1922, 42 Stat. 646, did not provide in terms for passenger vehicles and because their purchase was not otherwise specifically authorized by law, as required by section 4 of the act of February 3, 1905, 33 Stat. 687, 688, which provides:

> No part of any money appropriated by this or any other Act shall be used for purchasing, maintaining, driving, or operating any carriage or vehicle (other than those for the use of the President of the United States, the heads of the Executive Departments, and the Secretary to the President, and other than those used for transportation of property belonging to or in the custody of the United States), for the personal or official use of any officer or employee of any of the Executive Departments or other Government establishments at Washington, District of Columbia, unless the same shall be specifically authorized by law or provided for in terms by appropriation of money, and all such carriages and vehicles so procured and used for official purposes shall have conspicuously painted thereon at all times the full name of the Executive Department or other branch of the public service to which the same belong and in the service of which the same are used.

By letter of September 17, 1924, supplementing the application for review, claimant stated:

> In reply to your inquiry you are informed that the tariff commission does not own or maintain a motor-propelled light delivery wagon or any other type of motor-propelled vehicle. My letter was intended to explain that as a means of economy the commission had refrained from the purchase of the more expensive type of vehicle employed by most departments and independent establishments and had bought instead the bicycle to which this correspondence relates. It was understood by the commission that it had authority to purchase a motor-propelled truck, but it was desirous of avoiding that much expense. It is hoped still to avoid such expense until the incurrence of it seems advisable to this office.
>
> * * * * * * *
>
> This bicycle has been of great service and economy in both time and money and its loss would necessitate greater expense for its replacement. It comes

clearly within the terms of the decision of the Comptroller of the Treasury (18 Comp. Dec., 13) on this very question, wherein the comptroller held that a bicycle used primarily for transportation of property of the United States was a vehicle excepted from the provisions of the act of February 3, 1905. It was upon this decision confirming our understanding of the law that the bicycle in question was purchased.

In decision of July 12, 1911, 18 Comp. Dec. 13, it was said, quoting from page 15, that:

Bicycles and motor cycles are vehicles within the meaning of the foregoing enactments, but if they are primarily used for transportation of property belonging to or in the custody of the United States, then they would seem to be excepted, to that extent, from the operations of the act of February 3, 1905, *supra*, and their purchase and maintenance would be permissible provided there is an appropriation available for that purpose.

In the decision just quoted it was held that the maintenance of the bicycles there in question was not authorized, not because they were classed as passenger vehicles but because the appropriation sought to be charged with the cost of such maintenance was not available for the purchase or maintenance of bicycles whether they were for use for passenger transportation primarily or otherwise. The substance of that decision was that the specific enumeration in the appropriation of horses and wagons negatived the purchase and maintenance of other vehicles, including bicycles.

The information furnished that the tariff commission requires some manner of vehicles for transporting mail and parcels and that the bicycle in question is used primarily for that purpose will be accepted and it is accordingly held that said bicycle is not a passenger vehicle within the intent and meaning of section 4 of the act of February 3, 1905, 33 Stat. 687, 688, so as to require its being "specifically authorized by law or provided for in terms by appropriation of money."

Title VII, section 700, of the act of September 8, 1916, 39 Stat. 795, entitled "An act to increase the revenue, and for other purposes," created and established a commission to be known as the United States Tariff Commission. Section 701 of the act, same title, fixed the salaries of the tariff commissioners and its secretary, authorized the employment of clerical and other employees, and provided with respect to the payment of expenses that:

All of the expenses of the commission, including all necessary expenses for transportation incurred by the commissioners or by their employees under their orders in making any investigation or upon official business in any other places than at their respective headquarters, shall be allowed and paid on the presentation of itemized vouchers therefor approved by the commission. Unless otherwise provided by law, the commission may rent suitable offices for its use, and purchase such furniture, equipment, and supplies as may be necessary.

The appropriation under which the cost of the bicycle here in question was charged, to wit, "United States Tariff Commission, 1923," act of June 12, 1922, 42 Stat. 646, provided:

For salaries and expenses of the United States Tariff Commission, including purchase and exchange of labor-saving devices, the purchase of professional and scientific books, law books, books of reference, and periodicals

as may be necessary, as authorized under Title VII of the act entitled "An act to increase the revenue, and for other purposes," approved September 8, 1916, $325,000.

There is no general inhibition against the purchase of freight-carrying vehicles, or bicycles used primarily for the transportation of mail and parcels as distinguished from those purchased and used primarily for personal transportation such as, for instance, the bicycles involved in the decision of August 13, 1912, 19 Comp. Dec. 82, and April 28, 1913, 19 Comp. Dec. 679. The act creating the tariff commission, quoted, *supra*, provided that the commission may purchase "such * * * equipment, and supplies as may be necessary," and the appropriation charged is not restricted by implication to the purchase of any particular class of vehicles, such appropriation providing generally for such expenses of the tariff commission as may be necessary, "as authorized under Title VII of the act entitled 'An act to increase the revenue, and for other purposes,' approved September 8, 1916." It is accordingly held that the appropriation charged was available for the purchase and maintenance of a bicycle used primarily for other than passenger transportation.

It is stated on the voucher supporting the payment made that the bicycle was "secured in accordance with No. 2 of the method of advertising and under the form of agreement lettered C, as shown on the reverse hereof." On the reverse of the voucher the symbols "2" and "C" are explained as follows:

2. After advertising by telephoning to 3 dealers.
* * * * * * *
Basket, exigency purchase.
* * * * * * *
C. Under less formal agreement.

In decision of April 8, 1924, which is equally applicable here, it was said:

Section 3743 of the Revised Statutes, as amended by section 18 of the act of July 31, 1894, 28 Stat. 210, and section 304 of the act of June 10, 1921, 42 Stat. 24, requires that all contracts to be made, by virtue of any law, and requiring the advance of money, or in any manner connected with the settlement of public accounts, shall be deposited promptly in this office.

All contracts made are not necessarily required to be formally executed; however, contracts for continuing nonpersonal services, such as leasings for extended periods, or agreements binding the United States to expend large sums of money should be so executed; the less formal agreements—proposal and acceptance—whether combined in one or several writings, may answer for the smaller purchases or procurements. * * * However, whatever the form, the agreements are required to be in writing and such written agreements are required to be deposited promptly in this office.

In decision of May 16, 1924, 3 Comp. Gen. 862, quoting from page 864, it was said:

Section 3709, Revised Statutes, was intended to protect the interests of the United States as well as the public, and the measure of its effectiveness in those respects is largely controlled by the administrative office, which frequently is in possession of controverting facts, or the means of obtaining the same, not apparent in such of the papers as accompany the accounts for settlement. Said section prescribes no particular method of advertising;

see 1 Comp. Gen. 232, decisions therein cited, and others that have been published from time to time. Hence any advertising that gives reasonable publicity to the needs of the Government and results in obtaining the benefit of all available competition under the circumstances of the particular case generally will be accepted by the accounting offices as a compliance with the requirements of the statute. Even oral solicitation of prices may be regarded as sufficient when the facts presented show that other means of advertising were not practicable.

In this connection your attention is invited to decision of March 8, 1924, 3 Comp. Gen. 606, as to the requirement for accepting the lowest bid, etc., or furnishing a detailed statement of the reasons for accepting other than the lowest bid.

Oral advertising for bids should not be resorted to unless "other means of advertising were not practicable" and in those instances where oral advertising is necessary and proper, the offer of the most satisfactory bidder should be confirmed in writing by that bidder so that the resultant agreement may be filed as required by section 3743, Revised Statutes, as amended. In addition, if the accepted oral bid is other than the lowest bid, the reasons for accepting such bid should be shown. These requirements should be observed as to all transactions.

Upon review of the settlement, $41 is certified for credit in the disbursing officer's accounts.

(A-6262)

RENTAL ALLOWANCE—OFFICERS OF THE NATIONAL GUARD AND RESERVE CORPS

Officers of the National Guard and Reserve Corps undergoing training are, under section 6 of the act of June 10, 1922, 42 Stat. 628, as amended by section 2 of the act of May 31, 1924, 43 Stat. 250, and the Executive order of August 13, 1924, pursuant thereto, entitled to rental allowance under the following conditions, the station to which assigned for the training period not being a permanent station:

Officers of the National Guard attending encampments under section 94, or camps of instruction under section 97 of the act of June 3, 1916, 39 Stat. 206 and 207, for periods of 30 days or less, or attending service schools for periods of three months or less under section 99 of the act of June 3, 1916, as amended by the act of September 22, 1922, 42 Stat. 1035. (Modified and amplified by 4 Comp. Gen. 661; *id.* 784.)

Members of the Officers' Reserve Corps on active duty for training for a period of 60 days or less under section 37-a of the act of June 3, 1916, as added by section 32 of the act of June 4, 1920, 41 Stat. 776.

Comptroller General McCarl to the Secretary of War, December 27, 1924:

There has been received your letter of November 8, 1924, requesting decision of a question stated as follows:

* * * whether in the case of a National Guard or reserve officer the fact that he has no permanent station will, when duly certified in his pay voucher, be a sufficient basis for the payment of rental allowance to such an officer when temporarily on active duty or entitled to active duty pay under the provisions of sections 37a, 94, 97 or 99 of the national defense act as amended.

The legality of the payment will depend upon the facts of the case and not matters certified to by the officer unless the certificates

conform to the facts. It is apprehended that what is desired is decision whether members of the Officers' Reserve Corps on active duty for training under section 37–a of the national defense act for short periods not exceeding 60 days, and members of the National Guard attending encampments for periods of approximately 15 days, or attending camps of instruction of limited duration under section 97, or attending service schools for a course of instruction of definite and limited duration under section 99 of the national defense act as amended, may be paid rental allowance as not having been assigned adequate quarters at a permanent station. The reason for the inquiry is prompted by the fact that it has been held the home of the officer is not a military station, 2 Comp. Gen. 243, and the duty at the training camp or school being temporary in that the order in terms fixes its duration the officer thus does not have a permanent station from which he is temporarily absent while attending training or instruction camp, or service school.

Section 37–a of the national defense act, added by section 32 of the act of June 4, 1920, 41 Stat. 776, authorized active duty for officers of the reserve corps "at any time and for any period" to the extent provided for from time to time by appropriations for this specific purpose with the qualification that "except in time of a national emergency expressly declared by Congress, no reserve officer shall be employed on active duty for more than 15 days in any calendar year without his own consent."

So, also, the periods of training or instruction under sections 94 and 97 of the act of June 3, 1916, 39 Stat. 206 and 207 and section 99 as amended by the act of September 22, 1922, 42 Stat. 1035, are not in terms limited by these sections. Obviously, while periods of training and instruction are contemplated for limited periods only and the appropriations have in the past effectively limited the period, the statutes do not in terms limit the period of instruction. What is said herein must therefore be understood as having reference to definitely limited periods of training or instruction.

Section 6 of the act of June 10, 1922, 42 Stat. 628, as amended and reenacted by section 2 of the act of May 31, 1924, 43 Stat. 250, so far as here material provides.

> Except as otherwise provided in the fourth paragraph of this section, each commissioned officer below the grade of brigadier general or its equivalent, in any of the services mentioned in the title of this Act, while either on active duty or entitled to active duty pay shall be entitled at all times to a money allowance for rental of quarters. The amount of such money allowance for the rental of quarters shall be determined by the rate for one room to be fixed by the President for each fiscal year in accordance with a certificate furnished by the Secretary of Labor showing the cost of rents in the United States for the preceding calendar year as compared with rents for the calendar year 1922. Such rate for one room is hereby fixed at $20 per month for the fiscal year 1923, and this rate shall be the maximum and shall be used by the President as the standard in fixing the same or lower rates for subsequent years.
>
> * * * * * * *

No rental allowance shall accrue to an officer, having no dependents, while he is on field or sea duty, nor while an officer with or without dependents is assigned as quarters at his permanent station the number of rooms provided by law for an officer of his rank or a less number of rooms in any particular case wherein, in the judgment of competent superior authority of the service concerned, a less number of rooms would be adequate for the occupancy of the officer and his dependents.

Paragraph 1 (e) of the Executive order of August 13, 1924, provides:

The term "permanent station" as used in this act shall be construed to mean the place on shore where an officer is assigned to duty, or the home yard or the home port of a vessel on board which an officer is required to perform duty, under orders in each case which do not in terms provide for the termination thereof; and any station on shore or any receiving ship where an officer in fact occupies with his dependents public quarters assigned to him without charge shall also be deemed during such occupancy to be his permanent station within the meaning of this act.

Section 14 of the act of June 10, 1922, 42 Stat. 631, provides:

That officers of the National Guard receiving Federal pay, except for armory drill, and reserve officers of any of the services mentioned in the title of this Act while on active duty shall receive the allowances herein prescribed for officers of the regular services in sections 5 and 6 of this Act. * * *

The fact that the terms of an order assigning an officer to a station do not provide for termination thereof is not necessarily conclusive of the permanency of the station, as might seem to be the definition set forth in the Executive order. For example, by the act of March 4, 1915, 38 Stat. 1078, no officer or enlisted man shall, except upon his own request, be required to serve in a single tour of duty for more than two years in the Philippine Islands nor more than three years in the Panama Canal Zone. Obviously, an order to duty at either of the places named must be understood as limited in duration by this statute. So, also, mere clerical failure to indicate the termination of an assignment obviously temporary in its nature, or the inadvertent inclusion of a limiting date in an order designed to assign an officer permanently, would not constitute the station temporary or permanent. The definition could well be amplified if confusion and conflict between the law and the regulation are to be avoided. For the purpose of this decision it will be understood that in no case will the order fix a period of active duty in excess of 60 days under section 37–a, a period of training or instruction in excess of 30 days under section 94 or 97, nor in excess of 3 months under section 99.

It might be suggested that as the officers are in the status entitling to pay for a limited period and the station fixed is to continue during that entire period it is as permanent a station in a military sense as they can have, the order merely fixing the duration of duty, training, or instruction. This, however, would be narrower than the law contemplates, as the amended law clearly fixed the rental allowance to enable the officer to arrange his permanent living conditions, either on the basis of rental allowance or the assignment of adequate public quarters. Reserve officers or National Guard officers must maintain their permanent living arrangements,

and the duty to which assigned is both in fact and under the law temporary, the station assigned for the purpose of that duty not being a permanent station within the meaning of the law. Rental allowance is properly payable in such cases.

Your question is answered accordingly.

(A–5557)

PERSONAL FURNISHINGS—RUBBER GLOVES

One pair of rubber gloves purchased for the use of any employee of the Yosemite National Park, who may be called upon, when the occasion arises, to leave his regular work and operate a mimeograph machine, there being no regular mimeograph operator at the park, is not a personal furnishing and credit for such purchase from public funds may be allowed.

Special lineman's rubber gloves for the use and protection of electricians working in emergency cases on lines of high voltage, the gloves being returned to stock immediately after such use and accounted for as Government property, are not personal furnishings which the employees could reasonably be expected to furnish in connection with their regular duties and their purchase from public funds is authorized.

Decision by Comptroller General McCarl, December 30, 1924:

L. L. Cumberland, special disbursing agent, Yosemite National Park, applied September 3, 1924, for a review of settlement No. C–13361–I, dated July 26, 1924, of his account for the quarter ended March 31, 1924, wherein there was disallowed $1 on voucher 120 covering purchase of one pair of rubber gloves for use of employees operating mimeograph machine and $9.50 on voucher 146 covering purchase of several pairs of rubber gloves for use of electricians in repairing electric lines, the appropriation charged being, "Yosemite National Park, 1924."

Disallowance was upon the ground that the articles were for the benefit and protection of employees and were not chargeable to the appropriation because it did not specifically authorize the purchase of such articles.

With reference to the rubber gloves, voucher 120, the evidence discloses that the office does not employ a regular mimeograph operator, any one of the employees being called upon when occasion arises to leave his regular work which does not require rubber gloves to operate the mimeograph for a short time; that the mimeograph machine could not be operated as rapidly and efficiently without the use of the gloves; and that they are accounted for as Government property, being returned to stock after each use of them by an employee.

With reference to voucher 146, it is stated that:

These gloves were purchased for the use of the electrical division of the Yosemite National Park, which includes maintenance, repair, operation, improvement, and construction work on telephone lines, telegraph lines, and electrical lines. The employees in this department vary from 5 or 6 employees to 12 or 15 employees, depending on the season of the year and the work to be done. The positions include chief electrician, the head of the department, assistant chief electrician, foremen linemen, power-house operators, laborers, teamsters, packers, drillers, etc. Approximately 95 per cent or more of the work of these employees is on telephone and telegraph lines where the amount

of current carried is small, and in the repair or rebuilding of our electrical transmission lines the power plant is shut down so that in practically all cases these employees are working on safe lines. They are required to furnish, and do furnish, the ordinary workman's or lineman's gloves of cloth or leather for their ordinary protection, but occasions will arise when it is necessary to have the employees work on lines that carry 2,200 volts. This necessity generally arises through some trouble on the line that occurs when it is impracticable to shut down the plant. In such cases regular lineman's gloves of rubber that are proof against these high voltages are furnished by the Government as a matter of safety just as the line hose and the line blanket are furnished in such cases for the same reason. When such emergencies arise, the gloves are issued from the Government stock to the employee designated to take care of this trouble, and immediately after the work is completed, they are returned to stock and accounted for as Government property. It would be manifestly unfair and unjust to require all of the employees in the electrical department to furnish themselves with lineman's rubber gloves of this character, which are made to withstand heavy voltage. The gloves are in the nature of safety appliances which all electrical and power companies in the State of California are required to furnish to their employees under the regulations of the safety department of the workman's compensation insurance and safety laws. These regulations are adopted and enforced by the industrial accident commission of the State.

When these emergencies arise, the most available, competent employee is selected for repairing this trouble or cutting off the section of the line on which the trouble is found, and it is only emergency and occasional use that is made of these gloves. Because practically all of the work of these employees is on lines of low voltage or none at all, there is practically no danger, and it is not necessary for them to provide themselves with gloves of this character in their regular work, and it is unfair to require employees to provide a protection that is not regularly needed and is not a condition of their employment. * * *

In view of the facts now appearing credit for the payments in question is allowable under the general principles announced in 3 Comp. Gen. 433. See 3 Comp. Gen. 848.

Upon review a difference of $10.50 is certified for credit in the special disbursing agent's account.

(A–4531)

LEAVE OF ABSENCE—PERMANENT AND TEMPORARY EMPLOYEES OF NAVY YARDS AND NAVAL STATIONS

Where an employee of a navy yard or naval station serves continuously under successive permanent, temporary, and permanent appointments during two consecutive years, the entire period of service may be counted for leave purposes, under the act of August 29, 1916, 39 Stat. 617, but that leave accrued for the first service year may not be granted during the second service year until sufficient service has been rendered under the permanent appointment in the second service year.

The decision of December 19, 1923, 3 Comp. Gen. 382, holding that employees of navy yards and naval stations serving under temporary appointments are not entitled to leave of absence with pay under the provisions of the act of August 29, 1916, 36 Stat. 617, will not be applied so as to require a checkage of payments made prior thereto for leave of absence granted for service under temporary appointments, if otherwise proper.

Decision by Comptroller General McCarl, December 31, 1924:

Henry V. Tydings has requested review of settlement No. 040467, dated July 29, 1924, in which was disallowed his claim for $59.92, amount checked against his pay as a naval station employee, Annapolis, Md., representing pay previously paid him for days while on leave of absence during his first service year. The checkage was

made by the Navy Department under its construction of the decision of this office dated December 19, 1923. 3 Comp. Gen., 382.

The Navy Department has forwarded the following report of the Superintendent, United States Naval Academy, showing the service of claimant:

1. In reply to reference (b), the bureau is advised that H. V. Tydings was employed at engineering experiment station as laboratory helper (permanent appointment), 14 November, 1922. He served in this capacity until 18 July, 1923, when he received temporary appointment as laboratorian. He received probational appointment in the latter position 11 April, 1924, and is now employed under this appointment. * * *

The amount checked represents pay for January 2, March 10, 17, 31, May 31, June 16, July 28, September 1, October 3, 4, 8, 10, 15, 17, 22, 24, 27, and 31, 1923.

The decision of December 19, 1923, held that employees of the navy yards and naval stations serving under a temporary appointment are not entitled to accrued leave of absence with pay under the provisions of the act of August 29, 1916, 39 Stat., 617. The decision of July 5, 1924, 4 Comp. Gen., 18, affirmed the prior decision and in addition the following questions submitted by the Secretary of the Navy were answered in the affirmative:

Are employees serving under temporary appointments, who are subsequently permanently appointed without break in the continuity of service, entitled to accrued leave with pay from the date of their temporary appointment after 12 consecutive months of service in both temporary and permanent status?

Are shop employees serving under permanent appointments who are given temporary appointments in office ratings and later permanent appointments as such or, after termination of temporary appointments as office employees, returned to their shops in a permanent status, entitled to accrued leave with pay at the expiration of 12 consecutive months' service?

There was approved also the definition of "permanent" appointment submitted by the Secretary of the Navy which included "probational" appointment.

In the present case there has been continuous service from November 14, 1922, to the present time under, first, a permanent appointment, second, a temporary appointment, and, third, a permanent appointment, during two consecutive years. The leave was taken without pay during the first service year expiring November 13, 1923, and paid for on the December 1 to 15, 1923, pay roll substituting the same number of days' leave assumed to be due during the second service year. See 4 Comp. Gen., 104, and cases therein cited.

As it is shown that at the time payment was made for the leave, December, 1923, claimant was serving under a temporary appointment which entitled to no leave, claimant should not then have been paid for the leave taken without pay during the first service year. However, on April 11, 1924, prior to the expiration of the second year of service, claimant was again appointed permanently and has served a sufficient time under such permanent appointment in the second year of service to be entitled to the full 30 days' leave

accrued for the first service year. The service under the three appointments may be considered as analogous to the service shown in the second question above quoted from the decision of July 5, 1924.

Accordingly it may be held that where an employee of a navy yard or naval station serves continuously under a permanent, temporary, and permanent appointment during two consecutive years of service, that the entire period of the service may be counted for leave purposes under the act of August 29, 1916, but that the leave accrued for the first service year may not be granted during the second service year until sufficient service has been rendered under the permanent appointment in the second service year.

The Navy Department has also submitted the question in this case and the case of J. A. Ridout, whose service record is similar, whether the decision of December 19, 1923, should be given effect retroactively. Prior thereto it had been the practice to grant leave of absence under the act of August 29, 1916, based on service under temporary appointments. The decision of December 19, 1923, will not be applied so as to require the checkage of payments made prior thereto for leave of absence granted for service under temporary appointments, if otherwise proper.

(A–4307)

NAVY PAY, PROMOTION—WARRANT OFFICER APPOINTED ENSIGN

Where the appointment of a warrant officer of the Navy to ensign entails a reduction in pay, the act of March 4, 1913, 37 Stat. 892, which provides that officers of the Navy promoted shall receive the pay and allowances of the higher rank from the date stated in their commission, does not require the refund of the higher pay received as warrant officer from the date stated in the commission as ensign to the date of acceptance of said commission.

Decision by Comptroller General McCarl, January 2, 1925:

There is for consideration the rate of pay to which George Washington Allen, ensign, United States Navy, is entitled for the period from February 9 to May 27, 1924.

The facts of the case are stated as follows:

* * * On May 27, 1924, while holding rank as warrant officer, Allen accepted commission dated May 5, 1924, as ensign to rank from February 9, 1924. It has been held that Ensign Allen, after being commissioned as ensign, is entitled to pay only as ensign in first pay period after three years (Comptroller General A–4307 dated August 29, 1924). His pay was changed on May 5, 1924, from warrant officer after twelve years to ensign after three years, and he is thereby suffered a reduction in pay from $189 per month to $131.25 per month.

In this connection reference is made to the act of March 4, 1913, 37 Stat. 892, which provides:

That all officers of the Navy who * * * have been advanced or who may hereafter be advanced in grade or rank pursuant to law shall be allowed the pay and allowances of the higher grade or rank from the date stated in their commissions.

In 25 Comp. Dec. 852, the above act is held to apply to warrant officers promoted to commissioned grades.

The question for determination is whether in view of the above provisions of law, Ensign Allen should have been paid as ensign, over three years, from February 9, 1924, date of rank of his commission, or whether he is entitled to the higher pay received by him as a warrant officer, over twelve years, from that date to May 5, 1924.

The enactment is beneficial legislation. Its general operation is to give a retroactive effect to a higher rate of pay, an advance or increase of pay being normally consequent upon an advance of rank or grade. Broadly considered, the question is, should the provision be held to operate retroactively in such a case so as to enforce a reduction or forfeiture of pay over the period from date of rank stated in commission to date of acceptance thereof.

During the period from February 9, 1924, date of rank in his commission as ensign, to May 27, 1924, date he accepted the commission, Ensign Allen served as a gunner with over twelve years' service, and was entitled to pay as of that rank and length of service as provided by statute. He did not hold the office of ensign until he accepted the appointment May 27, 1924, and the act of March 4, 1913, can not therefore operate to exact a forfeiture of the pay legally received as a warrant officer. 8 Comp. Dec. 386.

The amount paid Ensign Allen as a gunner with over twelve years' service from February 9 to May 5, 1924, will not be disturbed.

(A-6441).

CONTRACTS—WAIVER OF LIQUIDATED DAMAGES

The insertion in a contract, providing for liquidated damages for delays not due to certain specified causes, of an additional provision that the liquidated damages may be waived in whole or in part by the head of the department, does not convert the liquidated damage clause into one for a penalty, and liquidated damages must be exacted for all delays unless resulting from causes specified. In view of the doubtful legality of a provision in a contract (other than public building contracts) for the waiver of liquidated damages by the head of the department or by the contracting officer and in the interest of good administration, such provision should be omitted from all future contracts in which its insertion is not authorized by statute.

Comptroller General McCarl to the Secretary of the Treasury, January 3, 1925:

I have your letter of November 18, 1924, relative to the purchase of furniture and other supplies and equipment for Federal buildings under the control of the Treasury Department and presenting certain matters and question as to suspensions and disallowances in the accounts of J. L. Summers, disbursing clerk Treasury Department, for failure to deduct liquidated damages for delays in deliveries of articles contracted to be delivered within a specified time.

It is stated that—

The disbursing clerk of the Treasury Department has now requested that no more vouchers similar to those that have been suspended be sent to him for payment until there has been secured from the Comptroller General an expression setting forth the procedure that should be followed in handling such payments.

The department will therefore appreciate advice from you as to whether its practice as outlined above meets with the requirements of the General Accounting Office; whether its interpretation of the contracts referred to is in harmony with your views; and whether, in view of the explanation submitted, the General Accounting Office will lift the suspensions outstanding against the vouchers described herein.

It is stated that the greater portion of the furniture and equipment is purchased under annual contracts entered into by the Secretary of the Treasury and that said contracts contain the following provisions:

If a time for completion is stipulated, such time shall be the essence of this contract on the part of the contractor. For the cost of all extra inspections and other expenses caused the Government by delay in completing each order under this contract, this contractor shall pay to the United States, as liquidated damages, and not as a penalty, five dollars ($5), for each day of such delay not caused by the United States. The Secretary of the Treasury may waive such damages wholly or partly.

and that other purchases are made under the General Supply Committee contracts (see General Schedule of Supplies, fiscal year 1925, pp. 14 and 15), which provide:

* * * Upon the failure of a bidder, whose proposal has been accepted, to make delivery of articles or materials within the time stated in the proposal or, where no time is stated, within 10 days, upon orders regularly issued, the right is reserved to the United States, if, in the judgment of the ordering officer, the needs of the service so require, to purchase in the open market the quantity of material or number of articles covered by such orders, or, in the judgment of the ordering officer, their equivalent and answering the same purpose, and, if a greater price than that named in the proposal is paid therefor, the amount of such excess shall be charged to said contractor and his sureties. In case the delivery of any article, the sale of which is controlled exclusively by the contractor and which can not, therefore, be purchased in the open market, is delayed beyond the period stated therefor in the contract, it is understood and agreed that two-tenths of 1 per cent of the contract price shall be deducted as liquidated damages, in lieu of actual damages, for each and every day's delay in the delivery thereof, should the interest of the Government, in the opinion of the head of the ordering office, sustain any damage by reason of such delay. Provided, that no liquidated damages in any case shall be deducted for such period, after the expiration of the time or times prescribed for delivery or performance, as, in the judgment of the ordering officer, shall equal the time that, either in the beginning or in the prosecution of the deliveries or services contracted for, shall have been lost on account of any cause for which the United States is responsible, or delays in transit, or delivery on the part of transportation companies.

In the submission it is stated:

While these * * * liquidated damage clauses were incorporated in the annual furniture contracts of the Treasury Department and the General Supply Committee contracts during former years, apparently no suspensions were made by the auditing offices for failure to deliver the furniture in the contract period until about April, 1923.

* * * * * * *

The liquidated damage clause in the contracts made by the General Supply Committee applies only to items the sale of which is controlled by the contractor. If articles ordered or practically their equivalent and answering

the same purpose, can be purchased in the open market, the only penalty provided, is, if in the opinion of the ordering office, the exigencies of the service so require, to purchase in the open market against the contractor and charge the excess cost, if there be any, to the contractor and his sureties.

* * * * * * *

Since April, 1923, suspensions and disallowances have been made in the accounts of disbursing clerk J. L. Summers for practically all purchases made by the Bureau of Supply of this department under General Supply Committee contracts where there have been delays in delivery and the liquidated damage clause in the contracts has been applied though it would appear that, with very few exceptions, the only legal and proper recourse for the Government, when in the opinion of the head of the ordering office the exigencies of the service so require, is to buy the articles ordered or their equivalent, and answering the same purpose, in the open market and charge the excess cost to the contractors and their sureties.

The department is in entire agreement with the view of the General Accounting Office that better service on the part of contractors in making shipments of supplies should be insisted upon and to that end, where delays in delivery do occur, the matter is now taken up with the contractors, their attention called to the delays, and information requested as to the causes therefor and what steps they will take to prevent future troubles of the kind. Each contractor usually replies promptly (his reply or a copy thereof being sent to the civil division of your office), giving reasons for occasional delays and assuring the department that every effort is and will be made to keep such delays to a minimum.

* * * * * * *

While it is the opinion of this department that no liquidated damages may be deducted for the suspensions made by the civil division of your office for delays in delivery of purchases under the above described contracts, every effort is being made to secure prompt deliveries. Vouchers for articles delayed in delivery are held by the Bureau of Supply until the contractors furnish satisfactory explanation for failure to make shipments in accordance with time limits specified in their contracts. Where a reasonable explanation is submitted, it is attached to the contractor's voucher and the voucher forwarded to the disbursing clerk for payment.

In decision of March 18, 1924, 3 Comp. Gen. 656, it was said:

The charging of the appropriation for "Furniture and repairs for public buildings, 1923," for material ordered on August 18, 1922, under the contract for the fiscal year 1923, appears proper. See 27 Comp. Dec. 640, and decisions there cited on the question of availability of appropriations.

The failure to deduct liquidated damages presents a different question. The contract required delivery of each order within 60 calendar days after the date of the order, with the provision that time would be of the essence and with the further provision that for the cost of all extra inspections and other expenses caused the Government by delay in completing each order, liquidated damages at the rate of $5 a day would be deducted from each order for each day's delay not due to the United States or to unusual transportation difficulties.

This is not a contract for the construction or repair of public buildings within the meaning of the act of June 6, 1902, 32 Stat. 326, authorizing and empowering the Secretary of the Treasury to remit in whole or in part liquidated damages for delays in construction.

It is a contract for supplies for public buildings, and said statute has no application. The fact that the liquidated damage clause here contains a provision to the effect that the Secretary of the Treasury may waive liquidated damages, does not operate to convert the clause into one for a penalty. See *Pacific Railway Company* v. *United States*, 49 Ct. Cls. 327.

* * * Liquidated damages should, and must, be exacted unless the delays resulted from acts of the United States or transportation difficulties or have been waived by the Secretary of the Treasury for good cause shown. The question whether there has been an exercise of "an honest judgment in deciding that the deductions be not made" will be for consideration by this office when there have been shown the causes of delay, if it be found there has been a waiver of liquidated damages.

Credit for the payments will be suspended for a statement of the causes of delay in each of these instances, and whether the Secretary of the Treasury has waived liquidated damages for all or any part of the delays. If there

were no delays resulting from acts of the United States or transportation difficulties, or if the Secretary of the Treasury has not waived delays or parts thereof for good cause shown, liquidated damages should be computed for the delays in delivery and credit therefor disallowed in the accounts of the disbursing officer.

In decision of September 18, 1924, 4 Comp. Gen. 306, it was held, quoting the syllabus:

The act of June 6, 1902, 32 Stat. 326, requiring the insertion of a liquidated damage stipulation in public building contracts under the control of the Treasury Department declares general principles of law in making such stipulation binding on both parties and the authority therein given to the Secretary of the Treasury to remit liquidated damages "as in his discretion may be just and equitable" contemplates the exercise of legal discretion and authorizes the remission of liquidated damages only for causes specified in the contract, or for delays which under general principles of contract law authorize remission of liquidated damages, or for delays for which it would be inequitable and unjust to hold the contractor responsible.

The liquidated damage provision contained in General Supply Committee contracts covers only delays in "delivery of any article the sale of which is controlled exclusively by the contractor and which can not, therefore, be purchased in the open market." As to delay of other supplies actual damages are chargeable.

All vouchers covering payments made to contractors should show the dates of the deliveries as well as the dates of the orders, and if that information discloses that deliveries were not made within the contract time such delays as there may have been should be explained and the explanation should include a statement of the actual or liquidated damages suffered or accruing to the United States, if any. This applies to the contracts referred to as "annual contracts" as well as the General Supply Committee contracts. The explanations should indicate whether or not the delays resulted from acts of the United States, etc., with a showing as to the acts of the United States, etc., which caused the delays if they were so caused. If the delays were caused otherwise than by the United States, etc., or if the purchases under the General Supply Committee contracts were of articles other than those "controlled exclusively by the contractor and which can not therefore be purchased in the open market," that should be explained as well as the reasons for the waiver of any delays.

Items now suspended in the accounts of J. L. Summers, if any, should be explained and if such explanations are deemed satisfactory, in accordance with the foregoing, the suspensions will be removed.

The provision in the annual contracts that "The Secretary of the Treasury may waive such damages wholly or partly" requires of the Secretary the exercise of a legal discretion difficult, if not impossible, of just and equitable determination as to both the contractor and the United States, the United States necessarily having sustained damage by reason of any delay. Without discussing or

determining the degree of certainty necessary to support the exercise of the legal discretion contemplated so that the act may itself be lawful it would seem that such a provision is not in the interest of good administration and certainly not supported by a valuable consideration, the Government having purchased the right to contract the measure of damages, any remission of which savors of a double gratuity. In anticipation of the difficult questions that will doubtless arise thereunder, it is recommended that provisions in such contracts for the waiver of damages be omitted therefrom.

(A-7035)

CLASSIFICATION OF CIVILIAN EMPLOYEES—FIELD SERVICE—RETROACTIVE ADJUSTMENT OF COMPENSATION RATES

The rates of pay, specifically fixed by other law, of civilian employees holding the positions of headquarters messenger and superintendent of national cemeteries in the field service of the War Department, may be adjusted retroactively to July 1, 1924, in accordance with the act of December 6, 1924, 43 Stat. 704, to correspond to the rates of pay established by the classification act of March 4, 1923, 42 Stat. 1488.

Comptroller General McCarl to the Secretary of War, January 3, 1925:

I have your letter of December 6, 1924, requesting decision whether the rates of pay of employees holding the positions of headquarters messenger and superintendent of national cemeteries in the field service of the War Department may be adjusted retroactively to July 1, 1924, under the provisions of the act of December 6, 1924, 43 Stat. 704.

The rate of pay of headquarters messengers was fixed at $720 per annum in the annual appropriation acts under the heading "Pay and so forth of the Army." See act of June 7, 1924, 43 Stat. 482, for the fiscal year 1925. The minimum and maximum rates of pay of superintendents of national cemeteries were fixed by section 4875, Revised Statutes.

The act of December 6, 1924, which as H. R. 9561 passed all stages of legislative completion during the last session of Congress with the exception of the signatures of the Speaker of the House of Representatives and the President of the Senate and approval of the Executive, contains an appropriation item on page 711, "Finance Department: For the pay of the Army, $16,680; * * *" and an appropriation item on page 712, "Cemeterial activities, Quartermaster Corps: * * * for pay of superintendents, $19,305 * * *." The act contains general provisions as follows:

* * * That to enable the heads of the several departments and independent establishments to adjust the compensation of civilian employees in certain field services to correspond, so far as may be practicable, to the rates established by the Classification Act of 1923 for positions in the departmental

services in the District of Columbia the following sums are appropriated, out of any money in the Treasury, not otherwise appropriated, for the service of the fiscal year ending June 30, 1925, namely:

* * * * * * *

The appropriations herein made may be utilized by the heads of the several departments and independent establishments to accomplish the purposes of this act notwithstanding the specific rates of compensation and the salary restrictions contained in the regular annual appropriation acts for the fiscal year 1925 or the salary restrictions in other Acts which limit salaries to rates in conflict with the rates fixed by the Classification Act of 1923 for the departmental service.

The schedule of salaries provided in the Classification Act of 1923 was made applicable only to personal services in the District of Columbia. The quoted provisions of the act of December 6, 1924, do not have the effect of extending the provisions of the classification act absolutely and permanently to the field force, but enables, for the fiscal year 1925 only, the adjustment in rates of compensation of employees in certain field services to correspond to the rates fixed by the Classification Act so far as may be practicable.

It would appear that the adjustment of rates provided for was intended to relieve the situation in the field service caused by the expiration on June 30, 1924, of the annual legislation authorizing payment of the $240 bonus to civilian employees, pending the establishment by legislative action of rates of compensation for the field service as contemplated by section 5 of the Classification Act.

The act specifically fixes no effective date, but is expressly made applicable to the fiscal year 1925, and there can be no doubt that the rates of compensation to be fixed under authority thereof were intended to apply for the entire fiscal year. And there would appear to be no reason why effect should not be given to that intent. The appropriation made in the act is in effect an additional appropriation for the entire fiscal year.

Ordinarily legislation is effective only from the date of its enactment unless otherwise expressly provided; but having in mind the purpose and intent of this act and the circumstances causing its failure to become a law prior to July 1, 1924, it is believed that the express provision making it applicable "for the service of the fiscal year ending June 30, 1925," is sufficient to give effect to the salary adjustment made in pursuance thereof from July 1, 1924.

Accordingly, you are authorized to adjust the compensation of headquarters messengers and superintendents of national cemeteries in accordance with the act of December 6, 1924, effective from July 1, 1924, including those who have been separated from the service since July 1, 1924.

(A-1919)

PER DIEM IN LIEU OF SUBSISTENCE WHILE ON DUTY AT WASHINGTON

An employee appointed as clerk to a trade commissioner in the Bureau of Foreign and Domestic Commerce who reported for and entered upon duty at Washington where he remained for 18 days before proceeding to other places for duty under orders directing him to return to Washington upon completion of duty at said places, is not in a travel status during the period of such stay in Washington and is not entitled to a per diem in lieu of subsistence for such period.

Comptroller General McCarl to the Secretary of Commerce, January 5, 1925:

I have your letter dated March 21, 1924, forwarding letter of explanation of Daniel Waters, former special disbursing agent, Bureau of Foreign and Domestic Commerce, relative to certain items in his accounts, in which you request review of so much of settlement No. C-2930-C, dated October 23, 1923, as concerns voucher No. 2, July, 1920, which represents payment to Richard T. Turner, clerk to trade commissioner, of per diem for July 26 to 30, inclusive, five days at $4, credit for which was disallowed.

Your request for review is stated to be based upon 26 Comp. Dec. 451, involving a case which is represented to be analogous in all respects to the case here presented, and it is submitted in addition that Mr. Turner was appointed as clerk to trade commissioner effective July 26, 1920, that Lima, Peru, was designated as his official station, and that while in Washington, D. C., five days, for which per diem in lieu of subsistence was paid to him, he was receiving instructions relative to his duties in the Peru office.

The letter of appointment dated July 7, 1920, is directed to Mr. Richard T. Turner, through the Director, Bureau of Foreign and Domestic Commerce, and states, so far as pertinent:

> You have been appointed subject to taking the oath of office, clerk to trade commissioner in the Bureau of Foreign and Domestic Commerce at a salary of Two Thousand Two Hundred and Fifty dollars per annum, effective on the date on which you enter upon duty in the above mentioned position.

Under date of July 26, 1920, a travel order was issued which provided in part as follows:

> You are hereby authorized to travel by the shortest and most direct route from Washington, D. C. to New Orleans and Lima, Peru, and such points in the immediate vicinity thereof as may be necessary in the pursuit of an investigation under the direction of this bureau; and upon the completion of this service you will return to Washington, D. C., by the shortest and most direct route, unless otherwise directed.

The voucher No. 2, referred to, shows he entered upon duty at Washington, D. C., July 26, and there is charged thereon for the period beginning on that date to July 30, inclusive, the per diem for five days at $4, totaling $20, which is in question. It is also noted

in reviewing voucher No. 4, August, of the same account and settlement that this same employee is shown to have continued on the same duty from August 1 until 10.45 p. m. August 13, when he departed for New Orleans upon the first leg of the travel directed, and a charge is made for per diem for thirty-one days in that month at $4, thus including an additional thirteen days for which per diem was charged covering the period while on duty in Washington before departure in pursuance of the travel order cited, *supra*.

This per diem represents a commutation of actual travel expenses and the claiming of such per diem must be upon the presumption of a travel status, and the question for determination therefore is whether there was such a status.

The acts authorizing travel allowance stipulate for actual expenses, that is, expenses of actual travel incurred while away from home or headquarters, and the right to per diem is conditioned upon this basic requirement. While the appointment to the position as clerk to trade commissioner, Bureau of Foreign and Domestic Commerce, was dated July 7, 1920, it appears that the employee did not enter upon duty under said appointment until July 26, on which day he reported at Washington and was given travel orders which are quoted *supra*.

Following this order it is asserted that the employee remained in this city five days receiving instructions, though as a matter of fact he charged and received a per diem for eighteen days while remaining here. It is asserted that Lima, Peru, was the employee's designated headquarters, but it is not so stated in the appointment, *supra*, and while the post of duty may for a time have been that city, said appointment and the directions in the travel orders to return to Washington indicate the headquarters to have been this city.

The act authorizing travel expenses, act of March 3, 1875, 18 Stat. 452, provides that only actual traveling expenses, i. e., only expenses on actual travel status, shall be allowed to any person holding employment or appointment under the United States; and what is in effect an amendment thereto, section 13 of the act of August 1, 1914, 38 Stat. 680, provides:

> That the heads of executive departments and other Government establishments are authorized to prescribe per diem rates of allowance not exceeding $4 in lieu of subsistence to persons engaged in field work or traveling on official business outside of the District of Columbia and away from their designated posts of duty, when not otherwise fixed by law * * *.

The situation here presented appears to be that the employee reported for and entered upon duty at Washington July 26, 1920, and continued on duty at said place until August 13, 1920, when he started to comply with the travel orders directing him to proceed from Washington to certain other places and to return to Washing-

ton. Therefore, he did not enter upon a travel status within the meaning of the statutes above quoted until August 13, 1920. Such facts were not disclosed in the case decided in 26 Comp. Dec. 451, referred to as a precedent for such payment, and furthermore the decision in that case was overruled by the decision in 1 Comp. Gen. 426. See also decision of December 15, 1923, Review 4070.

Upon the facts disclosed it must be held that the payment of per diem in lieu of subsistence covering the period while remaining in Washington was unauthorized, and accordingly not only is the disallowance of $20, covering a part of such time affirmed, but upon review a further sum of $52 is recharged to recover the amount erroneously paid for the balance of the period while in Washington.

As the special agent is disclosed to be no longer serving in that capacity, the amount of $72 on account of the item herein considered, together with the other amounts still charged in his accounts, should be promptly deposited into the Treasury, otherwise it will be necessary to proceed in the usual manner to recover the amount of the balance from him or the surety on his bond.

(A-5773)

MEDICAL TREATMENT IN CONTRACT HOSPITALS—VETERANS OF SPANISH-AMERICAN WAR, PHILIPPINE INSURRECTION, AND BOXER REBELLION

Contract hospitals are not "under the control and jurisdiction" of the Veterans' Bureau within the meaning of paragraph 10, section 202 of the World War veterans' act of June 7, 1924, 43 Stat. 620, and may not generally be used for the hospital treatment of honorably discharged veterans of the Spanish-American War, the Philippine Insurrection, and the Boxer Rebellion suffering from certain specified diseases, but in those jurisdictions outside the United States where none but contract hospital facilities are available for the treatment of the main body of beneficiaries of the bureau, such veterans may be treated therein as an exceptional action.

Decision by Comptroller General McCarl, January 5, 1925:

There is for consideration and decision the question as to whether under the provisions of law that authorize the hospitalization and treatment of beneficiaries of the United States Veterans' Bureau, the hospitalization and treatment of veterans of the Spanish-American War, the Philippine Insurrection, and the Boxer Rebellion, suffering from neuropsychiatric and tubercular ailments and diseases specified in the law, payment is authorized for treatment furnished Spanish-American War veterans in private hospitals under contract with the Veterans' Bureau.

The particular case now involved is that of a payment made to the Philippine Islands Anti-Tuberculosis Society for hospitalizing and treating two veterans of the Spanish-American War under contract of December 6, 1923, who were admitted to that hospital on June 30, 1924.

The first provision of law that was enacted, making available the hospital facilities of the Veterans' Bureau to the veterans of the Spanish-American War, was section 4 of the act of April 20, 1922, 42 Stat. 497, which provides:

That all hospital facilities under the control and jurisdiction of the United States Veterans' Bureau shall be available for veterans of the Spanish-American War, the Philippine Insurrection, and the Boxer Rebellion, suffering from neuropsychiatric and tubercular ailments and diseases.

After decision of this office of September 30, 1922, 2 Comp. Gen. 251, holding, among other things, that neither this law nor the act making appropriations for carrying out its provisions authorized the payment of any expenses for transportation of such veterans to and from such hospitals, the law was amended by section 4 of the act of March 4, 1923, 42 Stat. 1524, by adding thereto the phrase "including transportation as granted to those receiving compensation and hospitalization under the War Risk Insurance Act."

As reenacted as paragraph 10, section 202, of the World War veterans' act of June 7, 1924, 43 Stat. 620, this provision now reads:

That all hospital facilities under the control and jurisdition of the bureau shall be available for every honorably discharged veteran of the Spanish-American War, the Philippine Insurrection, the Boxer rebellion, or the World War suffering from neuropsychiatric or tubercular ailments and diseases paralysis agitans, encephalitis lethargica or amoebic dysentery, or the loss of sight of both eyes regardless whether such ailments or diseases are due to military service or otherwise, including traveling expenses as granted to those receiving compensation and hospitalization under this act. * * *

Section 9 of the act of August 9, 1921, 42 Stat. 149, imposed upon the Director of the Veterans' Bureau the duty and responsibility of providing hospitalization and medical treatment to beneficiaries of the bureau, and authorized him to utilize for that purpose the then existing and future facilities of the Public Health Service, the War, Navy, and Interior Departments, the National Home for Disabled Volunteer Soldiers, and such other Government facilities as might be made available for the purposes of that act. He was further authorized to secure additional hospital facilities when necessary and it was provided that:

In the event Government hospital facilities and other facilities are not thus available or are not sufficient, the director may contract with State, municipal, or private hospitals for such medical, surgical, and hospital services and supplies as may be required * * *.

This provision was reenacted in the World War veterans' act, *supra*, in the identical language quoted. See section 10, act of June 7, 1924, 43 Stat. 610.

Section 9111 of the regulations of the United States Veterans' Bureau promulgated May 8, 1923, canceling and superseding regulations of October 10, 1922, is as follows:

Veterans of the Spanish-American War, Philippine insurrection, and Boxer rebellion, except those persons whose discharge from the service was dis-

honorable, may receive treatment at hospitals under the control and jurisdiction of the United States Veterans' Bureau for neuropsychiatric and tuberculous ailments and diseases. No treatment shall be given in contract hospitals.

This regulation, in so far as the treatment in contract hospitals in the Philippine Islands of the veterans of the particular wars named is concerned, was modified by the Director of the Veterans' Bureau April 2, 1924, in view of the fact that Government facilities for the treatment of the specified diseases were not available in those islands.

The law makes the hospital facilities "under the control and jurisdiction" of the bureau available for the class of veterans in question. There are, broadly, two classes of hospital facilities used by the bureau—the normal one of "control and jurisdiction," where the operation, including ownership or rental of the hospital, is wholly with the Government; the other, the exceptional one where the hospital facilities are obtained by the bureau by contract on the basis of rates for a specified number of patients or beds. In this latter class true "control and jurisdiction" of the hospital facilities is not in fact with the bureau or Government authorities, but with the private authorities. Having this in mind, a conclusion might well be reached that the law intended in its specification of "control and jurisdiction," the hospital facilities where operation was with the Government. It must undoubtedly be concluded that the law gives no authority to increase or obtain hospital facilities by contract or otherwise for the purpose of furnishing such treatment of the class of veterans in question. There may be a condition, as appears to be the instant case, and particularly outside of the United States, of only contract hospital facilities for the main beneficiaries of the bureau into which may be placed one of the class in question as an exceptional action and not as providing or a use generally of such facilities for such class.

The treatment in the contract hospitals in the Philippine Islands being so understood, payment is authorized accordingly.

(A-6876)

PURCHASES, ARTIFICIAL LIMBS—ADVERTISING

The purchase of artficial limbs for employees of the Panama Canal who are entitled to receive the same, without compliance with the provisions of section 3709, Revised Statutes, requiring advertising, is not authorized where it is evident that there are a number of manufacturers who are competent to furnish and fit suitable appliances in accordance with the specifications.

The Panama Canal has authority to make proprietary purchases, without compliance with the provisions of section 3709, Revised Statutes, of artificial limbs for actual resale to individuals or others, where no obligation of the United States or its instrumentalities is incurred thereby.

Comptroller General McCarl to the Governor, The Panama Canal, January 5, 1925:

I have by your directions a letter from the chief of the purchasing department, dated December 9, 1924, in which my decision is requested as to the extent to which the Panama Canal may purchase artificial limbs for those of its employees who are entitled to receive the same, without competitive bidding among manufacturers and dealers in artificial limbs.

Artificial limbs are stated to be purchased for three classes of employees as follows:

1. Indigent employees injured prior to September 7, 1916, so classed by the health officer.
2. Employees coming under United States Employees' Compensation Act.
3. Employees injured prior to September 7, 1916, and at other times not in line of duty, paying for their own artificial appliances.

It is further said that:

Formerly artificial limbs were purchased by The Panama Canal without competitive bidding for individual orders. Quotations of prices from leading manufacturers were obtained from time to time, without reference to individual orders, and individual orders were placed for the limb deemed by the health department to be suitable to the particular case and satisfactory as to price. Doubt having arisen as to whether that procedure meets the requirements of section 3709 of the Revised Statutes and decisions thereunder, the practice was changed and competition on individual orders was invited. The change has resulted in much dissatisfaction and complaint of limbs purchased from the lowest bidders. The matter, therefore, is submitted for your decision.

It is peculiarly within the province of the health department to determine what make of limb is suitable to a particular case. The several makes have special features which the medical officers may properly consider in selecting limbs for the different beneficiaries. For this reason and because of the isolation of the Isthmus, which ordinarily precludes the fitting of limbs on the beneficiaries and adds greatly to delay and inconvenience in replacing or altering unsatisfactory limbs, it is very desirable that proprietary purchases be made of the limb deemed by the health department to be suitable to the particular case, without competitive bidding on each order.

As regards class 3, the limbs being for resale, it is understood that proprietary purchases may be made of such limb as may be chosen without regard to the price. 1 Comp. Gen. 134.

As regards purchases of artificial limbs not for resale, decision is requested whether proprietary purchases may be made without competitive bidding, other than the general quotation of prices hereinbefore referred to, upon requisition for a particular make of limb deemed by the health department to be the limb most suitable to the case.

If decision is in the negative, may proprietary purchases be made in cases where a limb purchased is to replace an unserviceable limb of the same make?

The purchase price of artficial limbs is payable in any event out of appropriations of public moneys for either the Panama Canal or to meet the expenses under the Employees' Compensation Act, regardless of the classes of employees for whom such limbs are purchased, as described in the submission.

The Revised Statutes provide:

SEC. 3709. All purchases and contracts for supplies or services, in any of the departments of the Government, except for personal services, shall be made by advertising a sufficient time previously for proposals respecting the same, when the public exigencies do not require the immediate delivery of the articles, or performance of the service. * * *

In the absence of some exigency of fact or of one properly determinable by the officer charged with the procurement, or of one that can be judicially inferred, the provision of this section requiring advertising for supplies is mandatory, and contracts made in violation thereof are void. *Schneider* v. *United States*, 19 Ct. Cls. 547. The effect of the statute strikes at the root of a transaction and pervades from the inception every engagement in its entirety covering the purchase or contract for supplies or services, and where the procedure is otherwise the disability imposed by the statute attaches to the appropriation sought to be charged and it may not be used for the liquidation of obligations so invalidated. That it is applicable to the Panama Canal is settled—Executive order—April 1, 1905, 11 Comp. Dec. 39.

There is no authority to waive the operation of the statute but there are certain exceptions thereto other than that provided in its terms, which occur not arbitrarily but rather by force of circumstances, such as in the case of patented or other articles procurable only from one person or firm.

According to the statement, an order for an artificial limb for an individual was formerly placed discriminately with some manufacturer based upon noncompetitive quotations but the legality of such procedure being considered doubtful, orders were subsequently placed upon competitive bids. Now, however, on the assertion that the results are not as satisfactory, it is desired to revert to the former practice of purchasing without compliance with the requirements of section 3709, and the reasons given are that the several makes have special features which the medical officers may properly consider in selecting limbs for the different beneficiaries, and because of the isolation of the Isthmus, which ordinarily precludes the fitting of limbs on the beneficiaries and adds greatly to delay and inconvenience in replacing or altering unsatisfactory limbs. The question is whether these reasons constitute such conditions as would except the contemplated procedure from compliance with the act by force of circumstances.

It may be said that all artificial limbs conform in a general way to essential basic features. The question of a satisfactory fit would appear to be one that is peculiar to the individual and presents only the usual difficulties which all manufacturers of such appliances commonly meet. Eliminating, therefore, the matter of fitting which must, from the nature of such articles, be an inseparable condition to the furnishing of such appliances by any contractor, there remains to be considered whether the determination of the medical officer that only a certain make of appliance is suitable to a particular case will sufficiently establish a condition which precludes the operation of the statute.

There appears to be no reason why in the present advanced state of perfection in such appliances that proper specifications can not obtain proposals from reliable parties to construct a satisfactory limb. Such proposals are subject to consideration by the proper officer as to the merits of the various devices proposed to be furnished, with the right of rejection of any that are inherently unsuitable, and acceptance of the lowest bid of those approved would impose the obligation to furnish a well-constructed and satisfactorily-fitted device.

Considering the situation as presented and having in view the fact that such articles have been and are now generally purchased by and for the Government through the medium of competitive bids, the circumstances do not show such conditions as would of themselves exempt such purchases from being made without compliance with the provisions of section 3709 of the Revised Statutes, and you are advised accordingly.

Regarding the question whether proprietary purchases may be made in cases where a limb is to be purchased to replace an unserviceable one, it is not seen how the need of such purchase presents any different situation from that existing as to other purchases, provided other equally suitable limbs are procurable. As to the purchase of artificial limbs for resale, there being involved no question of economy such as section 3709 of the Revised Statutes contemplates, proprietary purchases of artificial limbs for actual resale to individuals or others, as to the furnishing of which there arises no obligation of the United States or its instrumentalities, may be made as contemplated by the authorization in the former decision. 1 Comp. Gen. 134.

(A-7277)

RENTAL ALLOWANCE—LEAVE OF ABSENCE—TEMPORARY DUTY—ARMY FIELD CLERK

An Army field clerk, who, while attached to a permanent station and in occupancy of public quarters thereat, was granted a leave of absence without termination of his assignment at the station is not entitled, under section 6 of the act of June 10, 1922, 42 Stat. 628, as amended by section 2 of the act of May 31, 1924, 43 Stat. 250, to rental allowance while on such leave, nor while assigned to temporary duty at the expiration of such leave and prior to his return to the permanent station.

Decision by Comptroller General McCarl, January 6, 1925:

Charles C. McAfee, Army field clerk, requested April 21, 1924, reconsideration of decision of November 20, 1923, in which was sustained disallowance of his claim for rental allowance for the periods July 1 to October 15, and November 1 to 7, 1922. Claimant's

permanent station during the period was at Fort Amador, Canal Zone, which station he left on leave of absence for three months June 21, 1922, subsequently extended fifteen days with direction to report to the Commanding General, Second Corps Area, Governors Island, New York, for assignment to temporary duty pending sailing of the transport on or about October 26, 1922. He left New York November 1, and arrived in the Panama Canal Zone November 7, 1922. He was paid rental allowance while on temporary duty at Governors Island and claims the rental allowance for the periods indicated while on leave of absence and en route to the Panama Canal Zone.

Section 1 of the act of June 10, 1922, 42 Stat. 627, contains the following provision:

* * * Army field clerks and field clerks, Quartermaster Corps, shall have the allowances for subsistence and rental authorized for officers receiving the pay of the first period.

In filing his claim claimant made the following statement as to his situation respecting quarters prior to going on leave:

On February 1, 1922, at which date I was serving under my present appointment as Army field clerk and was stationed at Fort Amador, Canal Zone, I was required to vacate quarters at Fort Amador to make room for commissioned officers.

Shelter was then furnished me in a building in Balboa, Canal Zone, belonging to the Panama Canal but suitable quarters were denied, as was also a request to be placed on commutation status under the regulations then in force.

About March 10, 1922, quarters in Balboa, Canal Zone, belonging to the Panama Canal were assigned to Warrant Officer Frank Lang, A. M. P. S., who shared his quarters with me until my departure on leave of absence June 21, 1922, at which date I unconditionally relinquished same. Mr. Lang departed from the Isthmus in September, 1922, and the quarters were then relinquished by the Army and turned back to the Panama Canal.

Claimant has filed the following certificate in connection with his claim:

HEADQUARTERS COAST DEFENSES OF BALBOA,
FORT AMADOR, CANAL ZONE,
December 28, 1922.

I certify that there were no public quarters vacant for the accommodation of Army Field Clerk Charles C. McAfee between February 1 and November 7, 1922, by reason of all quarters at this station being assigned to those authorized to occupy the same.

Signed: JOHN T. GEARY,
Colonel, Coast Artillery Corps, Commanding.

The first, fourth, and fifth paragraphs of section 6 of the act of June 10, 1922, as amended retroactively to July 1, 1922, by section 2 of the act of May 31, 1924, 43 Stat. 250, provide:

Section 6, except as otherwise provided in the fourth paragraph of this section, each commissioned officer below the grade of brigadier general or its equivalent, in any of the services mentioned in the title of this act, while either on active duty or entitled to active duty pay shall be entitled at all times to a money allowance for rental of quarters. * * *

* * * * * * *

No rental allowance shall accrue to an officer, having no dependents, while he is on field or sea duty, nor while an officer with or without dependents is

assigned as quarters at his permanent station the number of rooms provided by law for an officer of his rank or a less number of rooms in any particular case wherein, in the judgment of competent superior authority of the service concerned, a less number of rooms would be adequate for the occupancy of the officer and his dependents.

Regulations in execution of the provisions of this section in peace and in war shall be made by the President and shall, whenever practicable in his judgment, be uniform for all of the services concerned, including adjunct forces thereof.

The Executive order of August 13, 1924, issued pursuant to paragraph 5 of the law quoted, provides:

II. Assignment of quarters.—(*a*) The assignment of quarters to an officer shall consist of the designation in accordance with regulations of the department concerned of quarters controlled by the Government for occupancy without charge by the officer and his dependents, if any.

(*b*) Every officer permanently stationed at a post, yard, or station where public quarters are available, will be assigned thereat as quarters the number of rooms prescribed by law for an officer of his rank, or a less number of rooms determined by competent superior authority, in accordance with regulations of the department concerned, to be adequate in the particular case for the occupancy of the officer and his dependents, if any; which regulations shall provide among other things that quarters voluntarily occupied by an officer with his dependents shall be conclusively presumed to be adequate and shall be assigned accordingly. * * *

The War Department regulations are contained in circular 66 of October 17, 1924, and paragraphs 2 (*a*) and 3 are in part as follows:

2. Termination of assignments.—(*a*) An officer's assignment of quarters at his permanent station shall be terminated by the officer chargeable with making assignments of quarters thereat under the following conditions, and, except as provided in paragraph 3*c* below, under no other conditions, unless upon specific order of The Adjutant General:

* * * * * * *

(3) On his departure from the permanent station on field or sea duty, on temporary duty, to hospital for observation or treatment, on leave of absence or on sick leave, under orders which relieve him from duty at his permanent station during or at the termination of his absence, unless the officer files request to the contrary.

(4) When orders are received for an officer absent from his permanent station on field or sea duty, on temporary duty, in hospital, on leave of absence, or on sick leave, relieving him from duty at his permanent station, during or at the termination of his absence, unless the officer, or his authorized agent, files request to the contrary.

3. Adequacy of quarters.—

(*a*) In determining the adequacy of quarters, the officer charged with making assignment of quarters, who is competent superior authority for that purpose, will give due consideration to the rank of the officer and to the number, age, and sex of dependents, if any.

(*b*) Any quarters at his permanent station voluntarily accepted and occupied by an officer who has no dependents or by an officer with his dependents shall be conclusively presumed to be adequate.

(*c*) Any quarters at the permanent station of the officers involved voluntarily occupied jointly by two or more officers having no dependents; * * * shall be conclusively presumed to be adequate for the occupancy of such officers or of such officers and their dependents. If the quarters so jointly occupied were previously assigned to one of the officers, the assignment to the one officer will be terminated and a joint assignment made. A joint assignment of quarters shall be terminated in so far as any particular officer is concerned when that officer (with his dependents, if any) ceases to participate in the joint occupancy of such quarters.

While the language of these regulations is prospective they are applicable to the facts of a case arising at any time between July 1, 1922, and the date of their issuance. As applied to the facts of this case the claimant was in the joint occupancy of public quarters with a warrant officer when he went on leave, that constituted an assignment of adequate quarters at his permanent station; and the regulations contain no authority for the termination of that assignment on his departure on leave of absence as his orders did not relieve him from duty there and he actually returned to the same station and resumed his duties. Both by the President's order and the War Department regulations the officer was assigned adequate public quarters during the period of his leave and he is not entitled to rental allowance while so absent on leave.

Claimant was paid rental allowance October 16 to 31, 1922, by the finance officer at Governors Island, N. Y., while on temporary duty there under paragraph 12 of Special Orders, 219, dated War Department, September 18, 1922, while awaiting departure of transport. As shown above, during this period he was assigned adequate public quarters at his permanent station. Such payment was contrary to the terms of the law, the Executive order of August 13, 1924, and the War Department regulations contained in Circular 66 of October 17, 1924. He has been overpaid the sum of $20 and that amount is certified due the United States. Remittance should be made to this office without delay. Otherwise settlement is adhered to, the change in the law not having increased the rights of officers on the state of facts here presented.

(A–5619)

STORAGE CHARGES ON AUTOMOBILE SEIZED, FORFEITED, AND SOLD UNDER SECTION 3450, REVISED STATUTES

Where two violators of the Narcotic Act of December 17, 1914, 38 Stat. 785, as amended, were apprehended by agents of the Bureau of Internal Revenue, tried and convicted, and their vehicle seized for the unlawful removal and concealment of unstamped narcotic drugs, the seizure, forfeiture, and sale of such vehicle, though growing our of enforcement of the Narcotic Act, was a separate and distinct matter giving rise to a proceeding *in rem* against the offender, to wit, the vehicle, under section 3450, Revised Statutes, and the storage charges on such vehicle, pending institution and culmination of action against the vehicle, are chargeable against the appropriation of the Department of Justice for "Salaries, fees, and expenses of marshals, United States courts."

The appropriations of the Bureau of Internal Revenue for enforcement of the National Prohibition and Narcotic Acts are not available for the payment of storage charges on vehicles seized, forfeited, and sold under and pursuant to section 3450, Revised Statutes.

Decision by Comptroller General McCarl, January 8, 1925:

There is for decision of this office the question as to which, if any, of the appropriations of the Bureau of Internal Revenue or of the

Department of Justice are chargeable with the cost of storing one Ford sedan automobile seized on January 18, 1921, in Kansas City, Mo., by Bureau of Internal Revenue narcotic agents, the matter of the seizure, etc., being explained by the officer in charge of the Narcotic Division, Bureau of Internal Revenue, Washington, D. C., in his letter of June 21, 1924, as follows:

On January 18, 1924 [1921], a narcotic agent seized a Ford sedan automobile, motor No. 2108588, occupied by Isadore Green and Ben Lichtor of Kansas City, Missouri, on account of said machine having been used in the unlawful removal, deposit, and concealment of unstamped narcotic drugs in violation of section 3450, R. S. The automobile was stored in the garage of E. A. Helsel, of Kansas City, Missouri, and the seizure together with facts showing a violation of the Harrison narcotic law upon the part of Green and Lichtor was reported to the United States attorney for further action.

On June 4, 1921, defendants Green and Lichtor were found guilty of a violation of the Harrison narcotic law, as amended, and later received a sentence of imprisonment for one year in jail. Both defendants appealed their cases to the circuit court of appeals.

On August 15, 1921, in reply to an inquiry from the narcotic agent in charge, the United States attorney in Kansas City wrote that the car claimed by Green and Lichtor was still held because the defendants had appealed from their conviction in the district court, the United States attorney evidently being of the opinion that the forfeiture of the machine depended upon the successful termination of the prosecution against the occupants thereof. On July 20, 1923, a mandate from the circuit court of appeals confirming the conviction in the lower court was filed and libel proceedings were instituted against the car which, on July 1, 1923, had formally been taken into custody by the United States marshal. Libel proceedings resulted on May 28, 1924, in a court order for the sale of the automobile and it was duly sold by the marshal at public auction for $10. Under the act of May 27, 1908, as amended by the act of May 10, 1916, the sale price of this automobile when turned over to the collector of internal revenue must be deposited without any deduction having been made.

The narcotic agent in charge of the Kansas City, Missouri, Division has transmitted to me a claim submitted to him by Mr. E. A. Helsel, of 1815 Troost Avenue, Kansas City, Missouri, for storage of the automobile in question from January 18, 1921, to July 1, 1923, at the rate of $6 per month, totaling $147.11. The office of the Attorney General has notified the United States marshal at Kansas City, Missouri, that no part of the said claim may properly be paid from an appropriation under the control of his department, because the automobile was in the custody of narcotic agents during the entire period of storage referred to. It is true that the automobile was not formally placed in the custody of the United States marshal until July 1, 1923, but you will note the matter was promptly brought to the attention of the United States attorney after the seizure had been made, and the resulting delay in the disposition of the automobile was due to the failure of the United States attorney to institute libel proceedings due, it is understood, to his impression that it was necessary to await the final result of criminal proceedings against Green and Lichtor, who were occupying the machine at the time it was seized. The question, therefore, is whether the claim for storage charges as submitted may properly be settled from appropriations pertaining to the Department of Justice, or whether such settlement should be made from the appropriation "Enforcement of the Narcotic and National Prohibition Acts (Internal Revenue)" or any other appropriation pertaining to the Bureau of Internal Revenue. * * *.

In response to the request for decision just quoted, the officer in charge of the narcotic division, by letter of July 11, 1924, was advised as follows:

Disbursing officers are not authorized under section 8 of the act of July 31, 1894, 28 Stat. 207, as amended by the act of June 10, 1921, 42 Stat. 23, 27,

to submit to this office for decision general questions of law properly for the presentation of the head of the department or establishment concerned, but only as to the legality of any payment they may be called upon to make on a properly certified and approved voucher presented to them for payment and which voucher must accompany the request for decision. See 25 Comp. Dec. 653. No certified and approved voucher for the storage of the automobile from January 18, 1921, to July 1, 1923, accompanied the submission in this case, and so far as appears therein, you have not been called upon to pay such a voucher.

Furthermore, the claim for storage appears as one involving doubtful questions of law and fact which a disbursing officer is not called upon nor authorized to determine. Both for the protection of the Treasury and of the disbursing officer, vouchers involving doubtful questions of law and fact should be transmitted to this office with administrative report and recommendation for settlement as claims. See 22 Comp. Dec. 350.

The claim for storage in the instant case should be transmitted to this office with full administrative report and recommendation for direct settlement.

By letter of September 4, 1924, Deputy Commissioner of Internal Revenue H. F. Mires, "by direction of the commissioner," transmitted the claim of Helsel to this office for direct settlement, with the following comment:

There is forwarded herewith for your consideration a claim submitted for $147.11 by E. A. Helsel, 1816 Troost Avenue, Kansas City, Mo., to which memoranda from the prohibition commissioner and the assistant prohibition commissioner are attached.

The claim has not been approved by this office as there appears to be a question as to the availability of an internal revenue appropriation for its payment, the opinion of the prohibition commissioner being that the expense is a proper charge against a Department of Justice appropriation.

The matter was referred to the Attorney General on September 18, 1924, and in response to such reference this office was advised by letter of the Attorney General of September 22, 1924, as follows:

Referring to your indorsement of September 18, 1924, (045782 ATB-911), of the file in reference to the claim of E. A. Helsel, 1816 Troost Avenue, Kansas City, Missouri in the sum of $147.11, covering storage charges on an automobile seized by a norcotic agent, this department desires to submit the following:

It will be observed that during the period covered by said account, i. e., from June 18, 1921, to June 30, 1923, the machine was in the custody of the internal revenue officers—the same not having come into the marshal's custody until July 1, 1923. You invite attention to the decision of the comptroller in 1 Comp. Gen. 516, relative to the payment of storage "on automobiles seized by the Commissioner of Internal Revenue." This department does not consider that the decision above mentioned is applicable so far as any proposed payment of this expense from an appropriation under its control is concerned, for the reason that in this case it was the duty of the narcotic agent, under the law, to make the seizure and Congress has provided funds, to be disbursed under the direction of the Secretary of the Treasury for the purpose of carrying the provisions of the statute into effect. This should of course be distinguished from those cases where "arrests" are made by State or other local officers for and in behalf of this department and when it is not a part of their official duty to make same.

The comptroller apparently recognizes the availability of the appropriation under the control of the Secretary of the Treasury for the payment of storage charges on automobiles seized by Federal prohibition agents for violations of the National Prohibition Act. In his decision of December 13, 1922, 2 Comp. Gen. 377, 379, he stated that:

"Where it is necessary to advance from any appropriation, either of the judiciary or of the prohibition service, funds for payment of dead storage

charges the appropriation may be reimbursed from the proceeds of the after-sale of the automobile."

It may be added that the amount estimated for the appropriation for the purpose of carrying into effect the provisions of the Narcotic and National Prohibition Acts apparently covered storage charges during such periods as the machines were in the custody of the prohibition authorities, and the proceeds of the sales were not sufficient to cover same. The estimates of the department, on the other hand, were not prepared on the assumption that such payments would be made from any appropriation under its control, nor has it heretofore been the practice to make same. If all such charges were held to be payable by this department, the appropriation would immediately face a considerable deficit.

In view of the foregoing, this department desires to protest against the payment of this claim from the appropriation "Salaries, Fees and Expenses of Marshals, United States Courts," or from any other appropriation under its control.

Section 3450, Revised Statutes, provides:

Whenever any goods or commodities for or in respect whereof any tax is or shall be imposed, or any materials, utensils, or vessels proper or intended to be made use of for or in the making of such goods or commodities are removed, or are deposited or concealed in any place, with intent to defraud the United States of such tax, or any part thereof, all such goods and commodities, and all such materials, utensils, and vessels, respectively, shall be forfeited; and in every such case all the casks, vessels, cases, or other packages whatsoever, containing, or which shall have contained, such goods or commodities, respectively, and every vessel, boat, cart, carriage, or other conveyance whatsoever, and all horses or other animals, and all things used in the removal or for the deposit or concealment thereof, respectively, shall be forfeited. * * *

The appropriation for "Enforcement of the Narcotic and National Prohibition Acts (Internal Revenue) 1921," act of May 29, 1920, 41 Stat. 654, and the appropriations for the same objects for the fiscal year 1922, act of March 3, 1921, 41 Stat. 1274, and the fiscal year 1923, act of February 17, 1922, 42 Stat. 376, provided as follows:

For expenses to enforce the provisions of the "National Prohibition Act" and the act entitled "An act to provide for the registration of, with collectors of internal revenue, and to impose a special tax upon all persons who produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away opium or cocoa leaves, their salts, derivatives, or preparations, and for other purposes," approved December 17, 1914, as amended by the "Revenue Act of 1918," including the employment of executive officers, agents, inspectors, chemists, assistant chemists, supervisors, clerks, and messengers in the field and in the bureau of internal revenue in the District of Columbia, to be appointed as authorized by law; the securing of evidence of violations of the acts, and for the purchase of such supplies, equipment, mechanical devices, laboratory supplies, books, necessary printing and binding, and for other expenditures as may be necessary in the District of Columbia and several field offices and for rental of necessary quarters. * * *

The appropriation for "Salaries, fees, and expenses of marshals, United States courts, 1921," act of June 5, 1920, 41 Stat. 923, and the appropriations for the same objects for the fiscal year 1922, act of March 4, 1921, 41 Stat. 1412, and the fiscal year 1923, act of June 1, 1922, 42 Stat. 615, provide as follows:

For salaries, fees, and expenses of United States marshals and their deputies * * *.

In *J. W. Goldsmith, jr.—Grant Company* v. *United States*, 254 U. S. 505, it was held, quoting from the syllabus, that:

1. Under par. 3450, Rev. Stats., which declares, *inter alia*, that every carriage, or other conveyance whatsoever, used in the removal or for the deposit and concealment of goods removed, deposited, or concealed with intent to defraud the United States of any tax thereon, shall be forfeited, an automobile, so used by a person who had it on credit from an owner who retained the title, is subject to libel and forfeiture, although the owner was without notice of the forbidden use. The statute treats the thing as the offender. * * *

and in the same case, page 513, it was said:

* * * It is the illegal use that is the material consideration, it is that which works the forfeiture, the guilt, or innocence of its owner being accidental. If we should regard simply the adaptability of a particular form of property to an illegal purpose, we should have to ascribe facility to an automobile as an aid to the violation of the law. It is a "thing" that can be used in the removal of "goods and commodities" and the law is explicit in its condemnation of such things.

The apprehension of the defendants Green and Lichtor and their conviction resulted from the enforcement of the law as to narcotics, but the seizure, forfeiture, and sale of the vehicle in question, though growing out of such enforcement, was a separate and distinct matter giving rise to a proceeding *in rem* against the offender, to wit, the vehicle.

The appropriations of the Bureau of Internal Revenue quoted, *supra*, are specifically made available for enforcement of the national prohibition and narcotic acts, and being thus restricted they are not available for payment of the storage charges on the vehicle here in question, seized, forfeited, and sold under and pursuant to section 3450, Revised Statutes, and it is accordingly so held.

When the Department of Justice undertook to prosecute the offender, the vehicle, it assumed control, and such control related back to the date of the seizure so as to obligate its appropriations for such expenses as there may have been in connection with such seizure. 1 Comp. Gen. 516. It is accordingly held that the appropriations "Salaries, fees, and expenses of marshals, United States courts," for the fiscal years 1921, 1922, and 1923 are properly chargeable with the cost of storing the vehicle here in question in amounts of $27.11, $60, and $60, respectively.

When the narcotic agent notified the marshal or district attorney of the fact of seizure and the place of storage the duty and responsibility of seeing that the vehicle was promptly disposed of was upon the Department of Justice, and such duty and responsibility can not be avoided by delay in assuming actual custody or control of the vehicle.

(A-7180)

CLASSIFICATION OF CIVILIAN EMPLOYEES—RETROACTIVE ADJUSTMENT OF COMPENSATION RATES OF STOREKEEPER-GAUGERS OF THE INTERNAL REVENUE SERVICE

Under the provisions of the act of December 6, 1924, 43 Stat. 704, the rates of compensation of storekeepers-gaugers in the Internal Revenue Service may be adjusted in accordance with the rates established by the classification act of March 4, 1923, 42 Stat. 1488, retroactively effective from July 1, 1924.

Comptroller General McCarl to the Secretary of the Treasury, January 8, 1925:

I have your letter of December 26, 1924, requesting decision whether the compensation of storekeeper-gaugers in the Internal Revenue Service may be adjusted from a per diem to a per annum basis in accordance with the Classification Act of 1923, retroactively effective from July 1, 1924, under the provisions of the act of December 6, 1924, 43 Stat. 704.

The rate of pay of storekeeper-gaugers, was fixed at $4 per diem, and it was determined that such rates may not be changed in the absence of other statutory authority. See decision of July 19, 1924, 4 Comp. Gen. 93, and the statutes therein cited. The act of December 6, 1924, provides on page 712 as follows:

> The appropriations herein made may be utilized by the heads of the several departments and independent establishments to accomplish the purposes of this act notwithstanding the specific rates of compensation and the salary restrictions contained in the regular annual appropriation acts for the fiscal year 1925 or the salary restrictions in other acts which limit salaries to rates in conflict with the rates fixed by the Classification Act of 1923 for the departmental service.

The provision authorizes the adjustment of the compensation of the storekeeper-gaugers accordingly.

The further question is presented whether adjustment of compensation may be retroactive to July 1, 1924.

In decision of January 3, 1925, 4 Comp. Gen. 582, addressed to the Secretary of War, involving the adjustment of compensation of certain field employees of the War Department construing the provisions of the act of December 6, 1924, *supra*, which provided funds to enable the executive departments to adjust the rates of compensation of field employees to correspond so far as practicable to the rates established by the Classification Act, it was held that the funds were provided for the entire fiscal year 1925, and accordingly, that the adjustment in the rates of compensation of those employees whose rates of compensation had previously been specifically fixed by law, could be made retroactively effective from July 1, 1924.

You are advised therefore that the rates of compensation of storekeeper-gaugers in the Internal Revenue Service may be adjusted in accordance with the rates established by the Classification Act retroactively effective from July 1, 1924, in so far as the appropriation in question is concerned.

(A–6688)

VOUCHERS—TRAVELING EXPENSES

The formal certificate of an officer or employee to the travel expense voucher, standard form 1012, may not be regarded as supplying all the evidence that may in any case be deemed necessary to a proper audit of the account. In addition to such certificate, the voucher or accompanying papers should disclose such facts as are essential to a determination of the legality of the expenditures involved.

Comptroller General McCarl to the Secretary of Labor, January 14, 1925:

I have your request of December 4, 1924, for decision whether, in view of the completeness of the certificate to the standard travel expense voucher, Form 1012, it will be necessary for the employees submitting expense accounts on that form to make a separate certificate "as to street-car fares and statements that cash expenditures for emergency purchases were made by them because of cash payment demanded."

The certificate to the standard Form 1012 contains an express averment as to cash expenditures as follows: "that it was not, for reasons stated herein, feasible to have payment made for such expenditures by a disbursing officer." This renders unnecessary a separate certificate as to the necessity for the expenditure of cash instead of creating an obligation payable by a disbursing officer.

Your reference to a separate certificate as to street-car fares is not understood. However, it may be stated that the new form of general certificate was not intended to and does not dispense with the requirement that vouchers covering reimbursement of amounts expended for street-car fares be supported by a sufficient showing that the expenses were incurred on official business.

If the explanation on the face of the voucher of when, between what points, and for what purposes the street cars were used shows that they were necessarily used on official business, no separate certificate relative to the matter ordinarily would be necessary.

The formal certificate to the travel expense voucher is not to be regarded as supplying all evidence that may in any case be deemed necessary to a proper audit of the account. In addition to such certificate, the voucher or accompanying papers should disclose such facts as are essential to a determination of the legality of the expenditures involved.

(A-7144)

PURCHASES, FUEL—COLUMBIA INSTITUTION FOR THE DEAF

The Columbia Institution for the Deaf, while not strictly a part of the Federal service or the municipal government in the District of Columbia, is, from the fact that its support is almost exclusively derived from appropriations of Congress and because of the statutory control generally exercised over it by Congress, brought within the provisions of the act of July 1, 1918, 40 Stat. 673, requiring all branches of the Federal service to purchase fuel from the Government Fuel Yards, so far as its appropriated funds are concerned.

Comptroller General McCarl to the President, Columbia Institution for the Deaf, January 14, 1925:

I have your request of December 22, 1924, as follows:

The Comptroller of the Treasury, in a decision rendered July 23, 1918, held that the appropriations made by Congress for support of the Columbia Institution for the Deaf might not be used to purchase coal from private dealers.

For some years past, since the decided advance in the price of all kinds of regular fuel, this institution has been purchasing, in small quantities, from local dealers, out of its own funds, not appropriated by the Government, anthracite screenings at the rate of about $2 per ton, while bituminous coal purchased from the Government Fuel Yards has cost from about $6 a ton up. A mixture of one part of screenings and three parts of soft coal makes a fuel practically as good as pure soft coal, at a saving of about $4 a ton. The Government Fuel Yards do not handle anthracite screenings.

We would like to purchase a considerable quantity of anthracite screenings from private dealers whenever possible, for the sake of economy, and sometimes have not funds of our own on hand with which conveniently to make such purchase.

As the Government Fuel Yards do not handle this kind of fuel, will you not give your approval to the purchase of such screenings from our regular United States appropriations for maintenance?

The Columbia Institution for the Deaf was incorporated as the Columbia Institution for the Instruction of the Deaf and Dumb and Blind under act of February 16, 1857, 11 Stat. 161, as a private corporation. The present designation of the institution was made by the act of March 4, 1911, 36 Stat. 1422, the instruction of blind pupils having been provided for elsewhere by the act of February 23, 1865, 13 Stat. 436. The various provisions were carried into the Revised Statutes as sections 4859 to 4869, inclusive. Section 4867, Revised Statutes, required all expenditures from appropriated funds to be reported to Congress, while section 4868, Revised Statutes, required a report of the various activities to be made each year to the Secretary of the Interior.

The act of July 1, 1898, 30 Stat. 624, provided that directors of the institution should have control of the disbursement of all moneys appropriated by Congress for its benefit and directed that the accounts therefor be settled and adjusted as required under section 236, Revised Statutes. Each year, beginning with the year following the act of incorporation, Congress has provided funds for the support of the institution, and from time to time for the erection of build-

ings and their repair and upkeep. The appropriation for the fiscal year 1925 is in the following language, act of June 5, 1924, 43 Stat. 429:

> For support of the institution, including salaries and incidental expenses, books and illustrative apparatus, and general repairs and improvements, $100,000.
> For repairs to buildings of the institution, including plumbing and steam fitting, and for repairs to pavements within the grounds, $9,000.

The act of July 1, 1918, 40 Stat. 673, establishing the Government Fuel Yards, provided as follows:

> * * * All branches of the Federal service and the municipal government in the District of Columbia, from and after the establishment of the said fuel yards, shall purchase all fuel from the Secretary of the Interior and make payment therefor from applicable appropriations at the actual cost thereof to the United States, including all expenses connected therewith. * * *

Based upon the fact that the Columbia Institution for the Deaf was incorporated as a private corporation, the former Comptroller of the Treasury held that the employees of the Institution were not employees of the United States within the meaning of the various acts granting increase of compensation or bonus to civilian employees of the Government. 23 Comp. Dec. 767; 25 id. 153. It was further held that it was not an "executive department" or a "Government establishment" within the purview of the act of June 17, 1910, 36 Stat. 531, creating the General Supply Committee. 93 MS. Comp. Dec. 462.

In considering the purchase of fuel, however, the requirement is that "All branches of the Federal service and the municipal government in the District of Columbia" shall purchase all fuel from the Government Fuel Yards. While originally incorporated as a private corporation, the various acts requiring reports to Congress and to the Secretary of the Interior and an accounting of the appropriated funds under section 236, Revised Statutes, and the further fact that the institution is now largely if not entirely supported by congressional appropriations, lead to the conclusion that it is a branch of the Federal service within the purview of the act of July 1, 1918, *supra*, in so far as its appropriated funds are concerned. Accordingly it must be held that the use of its appropriated funds for the purchase of fuel from private dealers is not authorized. 25 Comp. Dec. 69.

Your submission is answered accordingly.

With reference to your statement that the Government Fuel Yards do not handle anthracite screenings, no reason appears why arrangements might not be made for the purchase of such fuel by the Secretary of the Interior for resale to the institution if the use thereof is shown to be in the interest of the Government.

(A-7233)

MEDICAL TREATMENT—NAVAL RESERVE FORCE MEMBERS IN AN INACTIVE STATUS

Members of the Naval Reserve Force are not entitled to medical care and treatment at the expense of the United States while in an inactive status.

Decision by Comptroller General McCarl, January 14, 1925:

Commander F. G. Pyne, Navy disbursing officer, as custodian of the retained records of Commander C. G. Mayo (S. C.), United States Navy, has applied for review of settlement No. M-1736-N, dated October 8, 1923, wherein credit was disallowed in the accounts of Commander Mayo for $164 paid to Aiken Earl Pound, ex-seaman, second class, U. S. N. R. F., as reimbursement for cost of medical and hospital treatment incurred while at home, stated as " for the convenience of the Government."

It is shown that the above-named man enrolled in the Naval Coast Defense Reserve of the Naval Reserve Force on May 23, 1918, at Columbia, S. C., to serve for four years, and that upon his enrollment he was sent home to await orders; that is, was not placed on active duty. While at home he was stricken with appendicitis and was operated upon in a private hospital in Columbia, S. C., where he remained for the period June 28 to July 14, 1918. On July 5, 1918, he received orders assigning him to active duty, but when it was learned that he was sick in hospital his orders were canceled, and on June 1, 1920, he was disenrolled by reason of never having been called to active duty. The illness was apparently never reported to the Bureau of Medicine and Surgery. On October 12, 1922, he made claim for reimbursement of his medical and hospital treatment, which was paid on November 3, 1922, by Commander Mayo.

The act of August 29, 1916, 39 Stat. 588, establishing the Naval Reserve Force, provides, in part, as follows:

> Enrolled members of the Naval Reserve Force shall be subject to the laws, regulations, and orders for the government of the Regular Navy only during such time as they may by law be required to serve in the Navy, in accordance with their obligations, and when on active service at their own request as herein provided, and when employed in authorized travel to and from such active service in the Navy. * * *
>
> All members of the Naval Reserve Force shall, when actively employed as set forth in this act, be entitled to the same pay, allowances, gratuities, and other emoluments as officers and enlisted men of the naval service on active duty of corresponding rank or rating and of the same length of service. When not actively employed in the Navy, members of the Naval Reserve Force shall not be entitled to any pay, bounty, gratuity, or pension except as expressly provided for members of the Naval Reserve Force by the provisions of this act.

Pound was never actively employed in the Navy. He was not enlisted in the regular Navy but enrolled in the Naval Reserve Force, and whatever the rights of an enlisted man in the Navy may have

been in the circumstances, Pound was entitled to receive only such emolument or reimbursement as is specifically provided in the act of August 29, 1916, and under the conditions there prescribed. The act establishing the Naval Reserve Force does not provide for reimbursement of the cost of medical and hospital treatment to members of the Naval Reserve Force on inactive status but specifically provides that when not on active duty they "shall not be entitled to any pay, bounty, gratuity, or pension," except as provided in the act, and the only provision applicable is for retainer pay.

Payment to him as reimbursement of cost of medical treatment was therefore unauthorized.

Upon review the settlement is sustained.

(A–6881)

TRAVELING EXPENSES—NAVAL OFFICER TRAVELING OUTSIDE THE LIMITS OF THE UNITED STATES IN NORTH AMERICA

An officer of the Navy detached from duty at Pensacola, Fla., and ordered to proceed and report to the commander in chief Battle Fleet at the Canal Zone for duty with the aircraft squadron of the Battle Fleet and who, upon reporting at the Canal Zone, was further directed to proceed and overtake the squadron at San Diego, Calif., was "traveling outside the limits of the United States in North America," within the meaning of section 12 of the act of June 10, 1922, 42 Stat. 631.

Decision by Comptroller General McCarl, January 15, 1925:

Lieutenant Kenneth C. Hawkins, United States Navy, applied September 27, 1924, for review of settlement No. 275677–N, dated May 19, 1924, wherein was disallowed his claim for mileage from Pensacola, Fla., to San Diego, Calif., under orders of March 18, 1924.

The orders of March 18, 1924, read as follows:

1. You will regard yourself detached from duty at the naval air station, Pensacola, Fla., and from such other duty as may have been assigned you at such time as will enable you to proceed to Jacksonville, Fla., and on March 30, 1924, report to the commanding officer of the U. S. S. *Bushnell* for passage.
2. Upon arrival at the Canal Zone you will report to the senior officer present afloat, Battle Fleet, for duty involving flying with the aircraft squadrons, Battle Fleet.
3. These orders constitute your assignment to duty in a part of the aeronautic organization of the Navy, and your existing detail to duty involving flying continues in effect.

These orders were modified on March 20, 1924, through direction to proceed to Mayport, Fla., instead of Jacksonville, Fla., for reporting on board the U. S. S. *Bushnell.*

It appears claimant was detached from duty at the naval air station, Pensacola, Fla., March 27, 1924; reported on the U. S. S. *Bushnell* at Mayport, Fla., March 30, 1924; and reported to the commander in chief, Battle Fleet, at Balboa, Canal Zone, April 5,

1924. By the commander in chief he was ordered to further report to commander, Destroyer Squadron, Battle Fleet, for passage; reported on the U. S. S. *Melville*, at Balboa, Canal Zone, April 6, 1924; was furnished transportation stated to have been via the U. S. S. *McCawley*, to San Diego, Calif.; and on April 24, 1924, reported to the commanding officer of VO Squadron One, Aircraft Squadrons, Battle Fleet.

The chief of naval operations replied to inquiry by this office that the Aircraft Squadrons, Battle Fleet, left the Canal Zone for San Diego, Calif., on March 31, 1924. This squadron movement accounts for claimant having been furnished transportation to, and his reporting for duty thereon at San Diego, Calif.

Section 12 of the act of June 10, 1922, 42 Stat. 631, provides, in part:

> That officers of any of the services mentioned in the title of this act, when traveling under competent orders without troops, shall receive a mileage allowance at the rate of 8 cents per mile, distance to be computed by the shortest usually traveled route and existing laws providing for the issue of transportation requests to officers of the Army traveling under competent orders, and for deduction to be made from mileage accounts when transportation is furnished by the United States, and hereby made applicable to all the services mentioned in the title of this act * * *. Actual expenses only shall be paid for travel under orders outside the limits of the United States in North America * * *.

Claimant contends that his orders were "For duty involving flying with Aircraft Squadrons, Battle Fleet"; that he did not report to the squadron until he arrived at San Diego, Calif.; and that he was in a travel status from the time he left Pensacola, Fla., until arrival at San Diego, Calif.

The unquestioned intent of the orders of March 18, 1924, was that travel should be performed to duty outside the limits of the United States, viz: For duty with a squadron then at the Canal Zone. The orders were not to proceed to San Diego and the travel from the Canal Zone was not pursuant thereto, but under independent orders issued after claimant had reported to the commander in chief in pursuance of the orders of March 18, 1924. The purpose in ordering claimant to proceed from the Canal Zone was that he might join the squadron, and the fact that the squadron was not overtaken until reaching San Diego, rather than at sea or at some intermediate foreign port, did not, because of such event, constitute the travel from Pensacola to San Diego other than "outside the limits of the United States in North America."

An officer is to be understood as traveling abroad when he goes to a foreign port or place under orders to proceed to that place, or from one foreign place to another, or from a foreign port to a home port. 3 Comp. Gen. 724.

In *United States* v. *Hutchins*, 151 U. S. 542, the Supreme Court has the following to say in differentiating between travel "in the United States" and travel "abroad":

> * * * It may be conceded * * * that, if the petitioner had been ordered to Panama, and upon arrival there had found orders awaiting him to proceed to New York, he would have been entitled only to his expenses; but where he is ordered from San Francisco to New York by way of Panama, he should be considered as making but a single journey, and that within the United States * * *.

The settlement is affirmed.

(A–6951)

PURCHASES—ARMS AND AMMUNITION

The act of March 3, 1879, 20 Stat. 412, authorizing and directing the Secretary of War to issue arms and ammunition at the request of the head of a department whenever required for the protection of public money and property, is exclusive in the absence of other specific legislative authority and the purchase of arms and ammunition from appropriations of the Department of Justice for use of penitentiary guards is, in the absence of such specific legislative authority, or the existence of an emergency which would not permit the delay necessary to acquire such arms and ammunition from the War Department, not authorized.

Decision by Comptroller General McCarl, January 15, 1925:

Finch R. Archer, special disbursing agent, United States Penitentiary, McNeil Island, Wash., applied December 8, 1924, for review of settlement C–17719–J, dated November 15, 1924, in which credit was disallowed for an item of $45.80, representing a payment made by him to the Kimball Sun Store (Inc.), for arms and ammunition purchased for the use of guards at the penitentiary.

The disallowance was on the grounds that the arms and ammunition should have been procured from the War Department in accordance with the provisions of the act of March 3, 1879, 20 Stat. 412, which authorizes and directs the Secretary of War to issue arms and ammunition at the request of the head of a department whenever required for the protection of public money and property.

The special disbursing agent contends that the statute cited does not apply because the arms and ammunition purchased were not for the protection of public money or property but to enforce discipline at the penitentiary and to prevent prisoners from escaping and for the use of guards when hunting escaped convicts.

In decision of February 15, 1923, 18 MS. Comp. Gen. 780, to the Attorney General, the question was whether the appropriation "Supplies, United States courts," or "Detection and prosecution of crimes" was available for the purchase of arms and ammunition for use of United States marshals and special agents of the Depart-

ment of Justice for the purpose of enforcing arrest or preventing the escape of prisoners. It was held that, strictly construed, the act of March 3, 1879, relates only to arms and ammunition for the protection of public money or property and does not cover the purchase there in question, but as a matter of general policy it would seem that such purchases are ordinarily within the spirit and intent of the act cited, reference being made to 27 Comp. Dec. 504, and 85 MS. Comp. Dec. 800.

In the decision of February 15, 1923, supra, the argument was advanced that the model of revolvers obtained from the War Department was not practicable for the purpose of enforcing arrest or preventing the escape of prisoners. In the decision it was pointed out that the War Department has an appropriation available for the purchase of any model of revolver on the market and whether a model different from that now issued would be purchased by the War Department was a matter within the discretion of the Secretary of War.

It has been held in the decisions that unless there is a showing of an emergency that would not permit the delay necessary to obtain arms and ammunition from the War Department and unless there is specific statutory authority for the purchase, the act of March 3, 1879, must be held applicable and arms and ammunition needed to carry on activities of the Federal Government must be obtained from the War Department.

In the instant case no showing has been made of an emergency requiring the acquisition of the arms and ammunition other than through the War Department, and there is no statutory authority for the payment for the items disallowed under the appropriation sought to be charged therewith.

Upon review the settlement is sustained.

(A–7322)

TRANSPORTATION OF HOUSEHOLD EFFECTS OF EMPLOYEES OF THE VETERANS' BUREAU

In the absence of specific legislative authority therefor, the cost of packing, crating, hauling, and transportation of household effects of employees of the Veterans' Bureau upon permanent change of station may not be paid from appropriated funds.

Comptroller General McCarl to the Director United States Veterans' Bureau, January 15, 1925:

I have your letter of January 2, 1925, requesting decision whether the personnel appointed and employed in the United States Veterans' Bureau under the Executive order of June 7, 1924, when trans-

ferred for the good of the service from one official station to another for permanent duty may, within the discretion and under the written instructions of the director, issued in advance, be allowed actual and necessary expenses for packing, crating, and boxing not to exceed $2 per hundred pounds of freight, and transportation charges for the transfer of their household effects and other personal property used in official work not to exceed 7,200 pounds.

Under the Executive order referred to certain physicians theretofore officers of the Public Health Service Reserve on active duty and under detail to the Veterans' Bureau were authorized to be employed under the Veterans' Bureau without regard to the provisions of the civil service law and regulations made thereunder.

By the act of March 4, 1923, 42 Stat. 1488, compensation was fixed for employees of the Government within the District of Columbia, see section 2, act of June 7, 1924, 43 Stat. 533, limiting the appropriation for the Veterans' Bureau, among others, to payment for personal services in the District of Columbia in accordance with the Classification Act. By the act of December 6, 1924, 43 Stat. 704, an appropriation was made "to enable the heads of the several departments and independent establishments to adjust the compensation of civilian employees in certain field services to correspond, so far as may be practicable, to the rates established by the Classification Act of 1923 for positions in the departmental services in the District of Columbia," including "For salaries and expenses, United States Veterans' Bureau, $1,225,000."

The salaries or compensation fixed pursuant to the Classification Act is fixed by law. Section 1765, Revised Statutes, provides:

> No officer in any branch of the public service, or any other person whose salary, pay, or emoluments are fixed by law or regulations, shall receive any additional pay, extra allowance, or compensation, in any form whatever, for the disbursement of public money, or for any other service or duty whatever, unless the same is authorized by law, and the appropriation therefor explicitly states that it is for such additional pay, extra allowance, or compensation.

Packing, crating, and shipment of household goods at the expense of the Government where authorized by law is an allowance and where not so authorized would be an "extra allowance" within the terms of section 1765, Revised Statutes. 15 Comp. Dec. 731; 19 *id.* 758. See also 3 Comp. Gen. 888 and 129; 1 *id.* 98.

The appropriation for the Veterans' Bureau for the current year, act of June 7, 1924, 43 Stat. 531, is available for "allowances, where applicable," so drawn to provide for allowances for officers of the Public Health Service reserve theretofore detailed to the Veterans' Bureau and the authority for whose detail was by the act of the same date, 43 Stat. 607, repealed. Upon their appointment under the Executive order of June 7, 1924, they became civilian employees and the appropriation provides only travel expenses for such employees.

You are therefore advised that an order or regulation such as suggested providing for the packing, crating, and shipment of household goods of civilian employees of the Veterans' Bureau, including those appointed under the Executive order of June 7, 1924, on change of station, would be contrary to law.

(A-4379)

ACCOUNTING—SET-OFF

Where liquidated damages deducted under a contract were erroneously refunded in settlement of the contract under the provisions of the Dent Act of March 2, 1919, 40 Stat. 1272, any sums due the contractor by the United States on account of other contracts may be set off against such erroneous refund.

Decision by Comptroller General McCarl, January 16, 1925:

The Eagle-Ottawa Leather Co. requested review of settlement No. 037916, dated July 18, 1924, wherein the sum of $534.74 due it for upholstering leather furnished the Navy Department under contract No. 110, dated January 24, 1924, was applied as a partial offset against a payment of $31,902.75 made to it in July, 1920, as refund of liquidated damages deducted by reason of delays in delivery under contracts EL-20-21, 28 and 48, dated November 7, 1917, and contract EL-84, dated March 5, 1918. Claimant contends that the refund of liquidated damages was proper and that the set-off should not have been made.

Pursuant to the terms of the contracts the company agreed to furnish and deliver to the United States on or before certain specified dates quantities of leather manufactured in accordance with specifications attached to and forming a part of the contracts. Each of the contracts was for war material and stipulated that time was of the essence. In event of delay in delivery, each contract similarly provided that the United States should deduct one-thirtieth of 1 per cent of the contract price for each and every day of delay in delivery of the material with the further stipulation that:

> In making settlements in which such charges are involved, the contractor shall receive credit for all delays which the contracting officer, or his successor, may determine to have been due to action of the United States, and for such other delays as the same authority may decide to have been due to such unavoidable causes, including fires, unseasonably severe storms, and labor strikes in the works of the contractor, as occurred before the date upon which final delivery is due * * *.

There were delays in delivery and Army disbursing officers deducted an aggregate of $31,902.75 as liquidated damages for the delays in delivery under the contracts. On March 27, 1919, claimant filed a claim with the War Department for refund of liquidated damages on the ground that the delays resulted from difficulties in complying with inspection requirements, because of shortage of

coal, and because of a shortage of hides. The contracting officer on or about July 2, 1919, found that delay of 225 days, from August 11, 1917, to February 15, 1918, had resulted from: Shortage of coal; shortage of hides of proper weight, and time used in experimenting to meet views of Ordnance Department.

However, no further action was taken in the matter at that time and on March 25, 1920, claimant filed a claim under the Dent Act of March 2, 1919, 40 Stat. 1272, for $67,209.33 as extra cost of manufacturing alleged to have been caused by inspection requirements different from the contract requirements and for damages due to the refusal of the United States to accept delivery of black strap leather manufactured under the contracts hereinbefore referred to. The War Department Claims Board acting for and in behalf of the Secretary of War denied liability on the United States for the alleged extra cost of $67,209.33 or any part thereof, but agreed to allow claimant $31,902.75 as the amount of liquidated damages deducted and formulated an award under the Dent Act for said account which claimant agreed to accept in full settlement, etc., of the contracts.

The contracts having been completed there was no authority conferred by the Dent Act of March 2, 1919, to settle either the claim for alleged extra cost or the claim for refund of liquidated damages and the action taken possesses no virtue because jurisdiction was asserted under said act. The questions remain whether the delays for which liquidated damages were deducted resulted from any of the causes specified in the contracts as entitling claimant to remission of liquidated damages and whether there was any sum payable by reason of the alleged extra cost.

The contracting officer found that delays of 225 days resulted from shortage of coal, shortage of proper hides, and experimentations to meet the requirements of the Ordnance Department. The period of delay resulting from each of the causes was not itemized; however, they are not of the causes of delay specified in the contracts as entitling claimant to remission of liquidated damages; the United States had the legal right to insist that the leather be manufactured in accordance with specifications without thereby becoming responsible for any delays resulting from claimant's experiments to make the leather conform to specifications. There appears no authority for remission of liquidated damages for delays in delivery of the leather.

The claim for extra cost appears to be wholly unfounded and was denied by the War Department on the ground that the alleged cost was incurred in making the leather conform to specifications, the rejected black strap harness leather not conforming to specifications.

Upon review the settlement applying $534.74 against the erroneous payment of $31,902.75 is sustained and the balance of $31,368.01 is certified due the United States.

(A-6439)

NAVY PAY—GOOD-CONDUCT MEDAL

An enlisted man of the Navy who had completed a four-year enlistment, but had not served the four years under a reenlistment necessary for the award of a good-conduct medal, does not become entitled to additional pay for a good-conduct medal which was awarded at the expiration of a two-year reenlistment.

Decision by Comptroller General McCarl, January 16, 1925:

Nicholas Carl Stommel, chief yeoman, United States Navy, applied September 6, 1924, for review of settlement No. 161124, dated September 4, 1924, wherein was disallowed his claim for pay for the period from September 19, 1921, to June 30, 1922, for good-conduct medal awarded him August 27, 1921.

It appears that claimant enlisted in the United States Navy October 2, 1913, and was honorably discharged September 5, 1917; reenlisted September 6, 1917, and was discharged February 20, 1919, with good discharge. He was appointed provisional ensign (S. C.) United States Naval Reserve Force, class 4, February 21, 1919, and reported for active duty on the same date; released from active duty September 30, 1919, and was discharged at his request November 27, 1919, to enlist in the United States Navy. He enlisted November 28, 1919, was honorably discharged August 27, 1921, and reenlisted September 19, 1921. He was awarded a good-conduct medal August 27, 1921, upon his discharge from a two-year enlistment, and the additional pay claimed is on account of such award.

The President under the authority of section 1569, Revised Statutes, by Executive order of September 4, 1902, authorized the payment of 75 cents per month in addition to the pay of his rating, to enlisted men of the Navy for each good-conduct medal, pin, or bar awarded the holder on discharge by reason of expiration of enlistment. By the act of May 13, 1908, 35 Stat. 128, the allowance was increased 10 per centum and such allowance remained in force until repealed by the act of June 10, 1922, 42 Stat. 630:

Article 1710, Navy Regulations 1920, provides:

(1) Any enlisted person in the Navy serving under continuous service, or in an enlistment subsequent to a previous enlistment terminated by reason of expiration of enlistment, who upon expiration, or within three months before the expiration of his term of enlistment, shall be recommended by his captain for obedience, sobriety, industry, courage, neatness, and proficiency shall receive a good conduct medal.

(2) Any such person who has received one medal will, if recommended at the expiration of any subsequent four-year term of enlistment, be given in place of a medal a clasp, which shall be worn above the medal on the same ribbon.

It has been held that this regulation contemplates that a good-conduct medal shall only be issued to an enlisted man after he has served a period under reenlistment, and that changes one and two of article D–7400, Bureau of Navigation Manual, 1921, did not change the above-quoted regulation, 2 Comp. Gen. 787; also that an award of a good-conduct pin upon the expiration of a two-year enlistment at a time when the regulations permitted such award only upon the expiration of a four-year enlistment was unauthorized and that no pay on account of such award may be allowed. 3 Comp. Gen. 367. Obviously the conditions as to length of service for the award of a medal were the same as for a clasp or pin.

Claimant served a four-year term of enlistment from October 2, 1915, and upon reenlistment he served from September 6, 1917, to February 20, 1919, or 1 year 5 months and 15 days. He again reenlisted November 28, 1919, and was discharged therefrom August 27, 1921, having served in this enlistment one year and nine months. His reenlistment for two years terminating August 27, 1921, was not sufficient to authorize the award of a good-conduct medal to him upon the expiration thereof. Such award being unauthorized, he is not entitled to the additional pay claimed.

Upon review the settlement is sustained.

(A–6962)

TRAVELING EXPENSES — CHANGE OF STATION WHILE ON LEAVE OF ABSENCE

An employee of the Interstate Commerce Commission whose official station was San Francisco, Calif., and who, while on a leave of absence, traveled from San Francisco to Memphis, Tenn., and from there to Taylorville, Ill., where, under instructions of his official superior, he reported for duty, is not entitled to reimbursement in an amount equal to the railroad and Pullman transportation charges from San Francisco to Taylorville via St. Louis, Mo., on account of his official station being subsequently changed from San Francisco to St. Louis.

Comptroller General McCarl to W. M. Lockwood, disbursing clerk, Interstate Commerce Commission, January 16, 1925:

There has been received your letter of December 11, 1924, submitting a voucher in favor of L. E. Stokes, an employee of the Interstate Commerce Commission, and requesting decision whether payment is authorized of items covering railroad and Pullman transportation charges from San Francisco, Calif., to St. Louis, Mo., and from St. Louis, Mo., to Taylorville, Ill., under circumstances hereinafter stated.

It appears that the employee in question was stationed at San Francisco, Calif.; that on July 12, 1924, he went on annual leave and left that day for Memphis, Tenn.; that at the expiration of his annual leave he was granted leave without pay; that just prior to

the expiration of the period of leave without pay he traveled from Memphis, Tenn., to Taylorville, Ill.; that he reported for and entered upon duty at Taylorville, October 20, 1924, in accordance with instructions issued to him by his official superior; and that on November 1, 1924, his official headquarters were changed from San Francisco, Calif., to St. Louis, Mo.

The employee claimed the right to be reimbursed what it would have cost the Government for his transportation if he had been at San Francisco at the time he was ordered to report at Taylorville, that is, his railroad fare and Pullman charges from San Francisco to St. Louis and from St. Louis to Taylorville.

The regulations governing travel of employees of the Interstate Commerce Commission on official business provide:

> The following items of expense in addition to per diem will be allowed only when such expenses have been actually incurred in the performance of official duties.
>
> * * * * * * *
>
> 4. Regular published fares for railroad and steamboat travel.

The travel from San Francisco to Taylorville was performed while the employee was on leave and while his designated post of duty was San Francisco. It does not appear whether he was in Taylorville or Memphis when he was directed or authorized to report for duty at Taylorville; but in either case, the effect of such direction or authorization was to place the employee in a duty status at Taylorville thereby relieving him of the expense of returning to San Francisco before reporting to duty. The transfer of his headquarters from San Francisco to St. Louis effective November 1, 1924, imposed no additional travel upon the employee, but merely changed the place to which he would be authorized to proceed at Government expense upon completion of the temporary duty at Taylorville, that is to say, upon completion of such duty, unless otherwise directed, he would proceed to St. Louis instead of to San Francisco.

You are advised that payment of the items in question is not authorized.

(A–6949)

TRAVELING EXPENSES—STEAMSHIP FARE—TAXICAB HIRE

In the absence of a showing that the minimum first-class rate was not available or that it was necessary to travel at the higher rate by a certain steamship, an employee of the Government may not be reimbursed in an amount in excess of the minimum first-class rate for official travel performed on a trans-Atlantic liner.

Reimbursement of taxicab fare at the termination of a trans-Atlantic voyage may be allowed an employee of the Government traveling on official business where such employee is necessarily accompanied by an unusual amount of baggage.

Decision by Comptroller General McCarl, January 17, 1925:

There is for consideration the request of H. B. Barton, special disbursing agent, Bureau of Foreign and Domestic Commerce, Department of Commerce, for review of certain items disallowed in a settlement of his accounts, certificate No. C–16809–C, dated October 21, 1924. The disallowances are set forth and considered as follows:

Voucher 102, H. Tatishvili, for salary as clerk December 1 to 14, 1923—14 days at $40 per month—$18.66. Receipt submitted in support of the charge not signed by payee.

A receipt is now submitted bearing signature of the payee, therefore credit for the item in the sum of $18.66 will now be allowed.

[Voucher] 133, H. B. Barton, June, 1923. Passage, Liverpool–New York, 1st cl. B. 15 Cunard *Franconia*, £50 converted at 4.64 equals $232. Note "E" explains charge as follows: "Special consideration was accorded by the Cunard Co. to me as a representative of the United States Government upon the maiden voyage of the steamship *Franconia*. The minimum first-class fare was £47. The company assigned to me a very beautiful room as a compliment, for which they made the special rate of £50.

The difference between the "special rate" charged £50 and the minimum first-class passage £47, or £3, equals $13.92, is not allowable, as it was for the personal convenience of the officer.

In addition to the note quoted, supra, the special agent states that the fare as charged was one by "special arrangement," implying, it is understood, that it was a reduction from a still higher regular rate. He states also, that he is aware of no regulation requiring United States Government servants to travel at the minimum first-class rate. Regarding this latter statement, the regulations of the Department of Commerce provide, paragraph 5, that:

All travel must be by the shortest usually traveled route. The fares in all such cases must not exceed the regular first-class limited fares charged the general public.

In addition to this the basic act controlling the payment of travel expenses, act of March 3, 1875, 18 Stat. 452, provides:

* * * That hereafter only actual travelling expenses shall be allowed to any person holding employment or appointment under the United States * * *

and the accounting officers have properly interpreted this to mean only such expenses as are necessary.

It is admitted that the minimum first-class passage was only £47, and as this would procure first-class transportation, such as is authorized under the regulations, *supra*, any additional sum paid would not, under the circumstances here shown, constitute a necessary or proper expense from the Government's standpoint. It not being shown that the minimum first-class rate of £47 was not available, or that it was necessary to travel by this vessel at the higher rate, the disallowance must be and is sustained.

[Voucher] 133 H. B. Barton July 4, taxi, hotel to station, with baggage, New York, $1.35. July 4, taxi, station to hotel, with baggage, Washington, $1.10.

The special agent explains as to this charge that he had accompanying him as baggage three pieces consisting of army locker, kit bag, and grip, and that it would cost as much or more to transport such articles by transfer companies.

The travel regulations of the Department of Commerce, paragraph 31, provide:

> Whenever official travel requires the use of street cars, omnibus, transfer coach, hack or taxicabs reasonable charges for their use will be allowed. Charges for conveyances of this class other than street cars must be accompanied by a statement showing the necessity for use.
> *Comment.*—* * * It should be borne in mind that the charges for the use of local conveyances other than street cars, must be accompanied by a statement giving the absolute official necessity for their use.

In 23 Comp. Dec. 303 it was said:

> It is well settled and universally recognized in the regulations of the various executive departments and other Government establishments that cab hire is not a necessary traveling expense when street cars are available. However, whether or not a necessity actually existed for the use of a cab is not a question to be determined absolutely by the application of any general rule, but is one of fact, for determination in each particular case.

In the case of a like charge under similar circumstances appearing in the accounts of Charles S. Wilson, minister to Bulgaria, decision of March 27, 1923, Review No. 3646, it was said that:

> Travelers to foreign posts are obliged to carry a larger amount of personal effects than for domestic travel, and because of the necessity of assuring connections between trains and steamers, and for a personal attention incident to depositing aboard ships, it is practically essential that there be no separation from baggage. Under such conditions where justified by the quantity of baggage, I think, it may be said that the charge for cab service can be regarded as primarily for the baggage, and the person permitted to accompany as a matter of course. For these reasons the explanation now made will be accepted to that effect, without a showing of the nonavailability of the usual public conveyances * * *. (See also 3 Comp. Gen. 918–919.)

Accordingly, as the instant travel was the termination of a trans-Atlantic trip, when the traveler was necessarily encumbered with an unusual amount of personal luggage, the use of a taxi under the circumstances appears justified, and the charge seeming reasonable, under the conditions involved, credit for the items in the sum of $2.45 heretofore disallowed will now be allowed.

(A–7114)

APPROPRIATIONS—POST OFFICE DEPARTMENT—PERSONAL SERVICES

The appropriation "Miscellaneous items, first and second class post offices, 1925," act of April 4, 1924, 43 Stat. 86, is available for the payment of compensation at the rates authorized by law of elevator operators and janitors for services rendered in quarters leased by the Post Office Department for parcel-post stations, where such service is necessary and is not required to be performed by the lessor of the premises.

Comptroller General McCarl to the Postmaster General, January 17, 1925:

I have your letter of December 20, 1924, requesting decision whether the appropriation "Miscellaneous items, first and second class post offices, 1925," act of April 4, 1924, 43 Stat. 86, is chargeable with the compensation of elevator operators and janitors hired to serve at a parcel-post station of the Cleveland post office at the rates of $1,020 and $960 per annum, respectively, the question having been raised whether the appropriation "Watchmen, messengers, and laborers, 1925," act of April 4, 1924, 43 Stat. 86, is not properly chargeable with the expense in question.

It is understood from your submission that the watchmen, messengers, and laborers provided for in the appropriation last named and whose rate of compensation was fixed by the act of February 14, 1923, 42 Stat. 1251, at $1,350 and $1,450 per annum, perform duties in connection with the actual work of the Postal Service, that is, in the actual handling and custody of mail; and that, on the other hand, the work of elevator conductors and janitors in leased quarters, which is the service here under consideration, is similar to the work performed by employees of the custodial service in Federal buildings under the control of the Treasury Department, and is of the character defined in the Classification Act of March 4, 1923, 42 Stat. 1496, under grade 2, custodial service, with compensation ranging from $900 to $1,140 per annum.

You state that the Civil Service Commission has also made distinction between the two classes of employees under consideration and requires a higher grade mental test in the case of watchmen, messengers, and laborers in the Postal Service than is required in the case of elevator conductors and janitors who come within the class of unskilled laborers.

You also state that it has been the uniform practice for many years to pay for such service from the appropriation for miscellaneous items at first and second class offices, and it is noted that the Budget, 1925, shows that more than one-half of the entire amount appropriated for such purpose heretofore has been used, and was intended to be used, for personal services.

In view of the matters herein set forth, you are advised that the appropriation "Miscellaneous items, first and second class post offices, 1925," is available for the compensation at rates authorized by law of elevator conductors and janitors for service in leased quarters where such service is necessary and is not required to be performed by lessor of the premises.

(A-7129)

PURCHASES, ELECTRIC CURRENT—"DEAD" METER

The amount of electric current consumed by the Government during the period the meter failed to register, under a contract not providing for such a contingency, may be estimated by taking the average daily consumption shown by meter readings during a period when the conditions as to consumption were substantially the same, and payment on that basis is authorized as an implied provision of the contract.

Comptroller General McCarl to Lieut. H. A. Hooton, United States Navy, January 17, 1925:

There was received December 23, 1924, by transmission of the Secretary of the Navy, under date of December 22, 1924, your letter of December 5, 1924 (MLW), transmitting with related papers public bill S. O. No. 1701, dated November 19, 1924, in favor of People's Gas & Electric Co. for $12.10 covering electric current furnished the Naval Reserve Force at Burlington, Iowa, from August 23 to October 21, 1924, with request for decision whether payment thereof by you is authorized.

From the public bill and the company's original invoice attached thereto it appears that the reading of "new meter" October 21, 1924, showed a consumption of 37 kw. h. from October 4, and that for the period August 23 to October 4, "old meter (dead)," the consumption is estimated at 2 kw. h. per day, total 84 kw. h. for the period, based, apparently, on the average daily consumption shown by the "new meter" for the period October 4 to 21, making the total consumption for the two periods 121 kw. h., amounting, at 10 cents per kw. h., to $12.10.

It appears also that under proposal dated July 1, 1924, the company is to furnish current during the fiscal year 1925 at an estimated cost of $350 for the year, based on specified sliding scale of rates, "first 175 kw. 10 cents." The proposal makes no provision for such a contingency as a meter failing to register.

It has been held, 97 MS. Comp. Dec. 429, in the case of a burned-out meter which did not register the electric current used and which had to be replaced by a new meter, that for the period the defective meter failed to register payment could be made of the charge for current based upon the average consumption as shown by the readings of the properly working meter, following the principle in a water case in 27 Comp. Dec. 800, where it was held, quoting from the syllabus:

The amount of water consumed by the Government during the period the meters fail to register, under a contract not providing for such a contingency, may be estimated by taking the average daily consumption shown by meter readings during a period when the conditions as to consumption were substantially the same, and payment on that basis is authorized as an implied provision of the contract.

Assuming from the certificate of the administrative officer to the public bill that electric current was furnished by the company to and used by the Government during the period from August 23, and assuming also that discovery that the "old meter" failed to register was made at the time of the usual monthly reading of the meter and that the "new meter" was installed soon thereafter, payment of the bill is authorized.

(A–6549)

COAST GUARD PAY—REENLISTMENT ALLOWANCE

An enlistment in the Coast Guard following an honorable discharge from an enlistment in the Navy is not a reenlistment within the meaning of sections 9 or 10 of the act of June 10, 1922, 42 Stat. 629, and does not entitle the person so enlisting to the reenlistment allowance provided by said act.

Comptroller General McCarl to the Secretary of the Treasury, January 20, 1925:

I have your letter of December 30, 1924, requesting reconsideration of decision A–6549, dated December 15, 1924, holding that an enlistment in the Coast Guard following honorable discharge from an enlistment in the Navy does not entitle a man to enlistment allowance.

In support of your request for a reconsideration of that decision you state:

5. In administering the provisions of section 10 of the act of June 10, 1922, with respect to payment of enlistment allowances, the Coast Guard has followed the intent of Congress precisely as such intent has been interpreted by you in your decision of October 18, 1922, namely:

"It would appear that in putting the enlisted men of these two services (Navy and Coast Guard) upon a common basis it was the intent of Congress that each should have the benefit of service in the other."

6. When a man honorably discharged from an enlistment period in the Navy enlists in the Coast Guard, all doubt as to his being entitled to the enlistment allowance would seem to be completely removed by the definite statement contained in your decision of October 18, 1922, that it was the intent of Congress that he "should have the benefit of service in the other (organization)." If such man enlists in the Navy he receives the enlistment allowance as one of his benefits of service; if, upon enlistment in the Coast Guard, he is deprived of his enlistment allowance, he certainly loses that "benefit of service in the other (organization)."

7. It seems to be the plain purpose of section 10 of the act of June 10, 1922, to place men of the Navy and of the Coast Guard "upon a common basis" with respect to this enlistment allowance. If it had been the intent of Congress that an enlistment in the Coast Guard following honorable discharge from an enlistment in the Navy does not entitle a man to enlistment allowance, surely section 10 of the act would have been enacted so as to read that the enlistment allowance "shall be paid to every honorably discharged enlisted man * * * who reenlists in the service from which discharged." On the contrary, the section provides for the payment of the allowance to every honorably discharged enlisted man of either of the two services "who reenlists."

8. Conforming to the action of Congress in authorizing the same enlisted ratings in the Coast Guard as in the Navy, in providing that enlisted men of the Coast Guard shall receive the same pay and allowances as enlisted men of similar ratings in the Navy, in prescribing that length of service in the one organization shall be counted for pay purposes in the other, it is believed that, as stated in your decision of October 18, 1922, it was the intent

of Congress to place enlisted men of the Navy and Coast Guard "upon a common basis" and that, with respect to enlistment allowances, men of the one service "should have the benefit of service in the other."

9. The enlistment allowance provided by section 10 of the act of June 10, 1922, is predicated upon length of service, and I invite your attention to the fact that the act of January 28, 1915 (38 Stat. 802) provides:

"That in computing length of service for any purpose all creditable service in the Navy * * * shall be included," and that this provision has never been rescinded or modified.

The decision of October 18, 1922, 2 Comp. Gen. 282, was on the question whether enlisted men in the Navy were entitled to credit for longevity pay purposes under section 10 of the act of June 10, 1922, 42 Stat. 630, for enlisted service in the Coast Guard. Section 9 of the act of June 10, 1922, expressly provides that service in any of the services mentioned in the title of the act shall be counted for longevity purposes in case of enlisted men of the Army and Marine Corps. The act contains no such express provision as to the enlisted men in the Navy and Coast Guard, and, based on the apparent intent of Congress to put the enlisted men of the Navy and Coast Guard upon a common basis with respect to both pay and services as was expressly done in case of the enlisted men of the Army and Marine Corps, the decision held that service in the Navy could be counted for longevity purposes in the Coast Guard.

The provision in the act of January 28, 1915, 38 Stat. 802, providing that in computing length of service in the Coast Guard for any purpose all creditable service in the Navy shall be included, and the provision in the act of June 4, 1920, 41 Stat. 835, relative to counting creditable service in the Coast Guard for purposes of longevity and retirement of enlisted men in the Navy were not overlooked in the decisions of this office relating to enlistment allowance under the act of June 10, 1922. Enlistment allowance as provided therein, as applied to the Navy, like the honorable discharge gratuity pay under the act of August 22, 1912, 37 Stat. 331, is not based on length of service alone. Although the measure of enlistment allowance is determined by the number of years served in the last enlistment period from which discharged, it is primarily based on reenlistment within three months following service in a prior enlistment from which the man was honorably discharged. The prior service must have been in the same branch of service. To hold otherwise would be contrary to the primary meaning of the word "reenlist." The prefix "re" is defined as "denoting back, especially back to an original or former state or position," and to "reenlist" means to return to duty in the same service. As stated in the decision of December 15, 1924, enlistment allowance was intended as an inducement to hold trained men in the service. There can be no reenlistment without a prior enlistment, and, therefore, a first enlistment in the Coast Guard is not a reenlistment in that service.

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The provision in the act of January 28, 1915, referred to in your letter, relative to counting service in the Army, Navy, or Marine Corps, in computing length of service in the Coast Guard, was considered in decision of the Comptroller of the Treasury, October 21, 1920, 27 Comp. Dec. 380, wherein it was held that enlisted men in the Coast Guard were not entitled to pay under General Order 34, based on prior service in the Navy. Also in 27 Comp. Dec. 457 it was held that honorable discharge gratuity is not authorized to be paid enlisted men of the Coast Guard based on prior enlistment in the Navy or Marine Corps. In fact the decisions have uniformly held that honorable discharge gratuity and enlistment allowance are based on a reenlistment following discharge from enlistment in the same branch of the service.

What was said in the decision of October 18, 1922, as to the intent of the law to put the enlisted men of the Navy on a "common basis" as to service credit is not contradicted by the decision of December 15, 1924. The intent of the law was to give to the Coast Guard men the same pay and allowance as provided for enlisted men of corresponding ratings and service in the Navy. Neither class is entitled to enlistment allowance for enlistment following discharge from another service and they are on a "common basis" as to such allowance. It is observed that argument is based on analogy to the holding as to longevity pay in decision of October 18, 1922, 2 Comp. Gen. 282; yet the precise question here considered was decided so far as the Army was concerned, and under section 9 of the act, in decision of August 31, 1922, 2 Comp. Gen. 162, 163. If after that decision the Coast Guard authorities considered a different rule was applicable in that service the question should have been submitted, and not acted upon, on their construction of the law.

Accordingly, the decision of December 15, 1924, is adhered to.

Paragraphs 5 and 6 of your letter indicate that it has been the practice to pay men of the Coast Guard enlistment allowance upon enlistment following discharge from the Navy. Such practice is also implied by article 35 of regulations governing pay and allowances in the Coast Guard, approved December 12, 1923. Prompt action should be taken to secure refundment of all such payments that have been made.

(A-5526)

NAVAL RESERVE FORCE—RETAINER PAY, LONGEVITY

A member of the Naval Reserve Force who fails to reenroll within four months from the date of the termination of his last term of enrollment is not entitled to any increase of retainer pay by reason of prior service in the Naval Reserve Force, but a break in continuity of his reserve service does not affect his right to a 25 per centum increase in his base retainer pay for each four years of legal active service in the Navy, Marine Corps, National Naval Volunteers, and Naval Militia.

Decision by Comptroller General McCarl, January 21, 1925:

Ralph L. Armstrong, yeoman, first class, United States Naval Reserve Force, requested December 13, 1924, reconsideration of the decision of November 22, 1924, 39 MS. Comp. Gen. 670–A, wherein it was held that he was not entitled to 50 per cent increase in retainer pay under reenrollment of May 28, 1923. It is contended that as he received an increase during his prior enrollment of August 7, 1918, he is entitled to an increase during the reenrollment period.

The act of August 29, 1916, 39 Stat. 588, provides:

> Members of the Naval Reserve Force who reenroll for a term of four years within four months from the date of the termination of their last term of enrollment, and who shall have performed the minimum amount of active service required during the preceding term of enrollment, shall, for each such reenrollment, receive an increase of twenty-five per centum of their base retainer pay * * *.

The act of July 1, 1918, 40 Stat. 710, provides:

> * * * Service in the Navy, Marine Corps, National Naval Volunteers, and Naval Militia, shall be counted as continuous service in the Naval Reserve Force, both for the purpose of retirement and of computing retainer pay. * * *

These two provisions have been construed to mean that all legal active service in the Navy, Marine Corps, National Naval Volunteers, and Naval Militia, regardless of continuity or character of discharge, is to be considered as served continuously in the Naval Reserve Force and that an increase of 25 per cent of their base retainer pay is to be allowed enrolled members of the Naval Reserve Force for each four years of such service, but that the total of such increase shall not exceed 100 per cent of the base retainer pay in any case. 25 Comp. Dec. 308, 504.

A member of the Naval Reserve Force who fails to reenroll within four months from the date of the termination of his last term of enrollment is not entitled to any increase of retainer pay by reason of prior service in the Naval Reserve Force during the period of reenrollment. However, the break in continuity of reserve service does not affect his right to an increase in retainer pay for each four years of legal active service in the Navy, Marine Corps, National Naval Volunteers, and Naval Militia. See 97 MS. Comp. Dec. 1092, June 27, 1921.

The record of service of claimant as furnished by the Bureau of Navigation shows that prior to his enrollment in the Naval Reserve Force on May 28, 1923, he had served more than four years in the United States Navy. He is therefore entitled during his current enrollment to a 25 per cent increase of his base retainer pay.

Having attended the required proportion of the 36 drills required annually of members of the Naval Reserve Force for the maintenance of their efficiency, he is entitled to retainer pay for the first

quarter (May 28, 1923, to August 27, 1923) of the first year of his current enrollment at the base rate of $168 per annum increased by 25 per cent, or at $210 per annum, amounting to $52.50.

He was allowed $42 in the decision of November 22, 1924, and an additional amount of $10.50 is now certified due him, the decision of November 22, 1924, being modified accordingly.

(A-6534)

LEASES, RENT—MERGING OF ESTATES

Upon transfer of the title to a tract of land to the United States, during the occupancy thereof by the United States as lessee, the leasehold estate is merged in the fee, and the former owner or lessor is not entitled to any rent falling due under the terms of the lease on a date subsequent to the transfer of title, the rent not being apportionable and following the reversion of the land.

Comptroller General McCarl to Lieut. W. H. Sutherland, United States Army, January 21, 1925:

There has been received by indorsement dated November 25, 1924, office of Chief of Finance, your request for decision as to the amount you are legally authorized to pay to the Dayton Air Service Incorporated Committee, on voucher submitted, stated in the sum of $875, covering rental of land for the period July 1 to August 12, 1924.

On July 1, 1924, claimant and the United States executed a lease to certain tracts of land near Dayton, Ohio, for use by the Government as an aviation field. Clause 9 of said lease reads as follows:

> The Government shall pay the lessor for the premises rent at the following rate: Seven thousand five hundred ($7,500) dollars per year. Payment shall be made at the end of each quarter.

The lease contains no provision relative to purchase of the land covered by the lease, and it does not appear that any contract for the purchase of the premises or for the conveyance thereof to the United States was ever entered into by the parties. The material facts are understood to be that the Government had been using the land for several years under prior leases, together with other contiguous lands, for an aviation field known as Wilbur Wright Field; that these lands formed a part of what is known in the laws of the State of Ohio as the Miami conservation district; that the numerous owners of different tracts of land covered by the lease incorporated in the name of the Dayton Air Service Incorporated Committee; and that this corporation secured title to several thousand acres of land and on August 9, 1924, executed a general warranty deed to the United States conveying the title to said lands for a recited consideration of $1, which deed was accepted and filed for record by the United States on August 12, 1924. It thus appears that con-

veyance of the land to the United States was in reality in the nature of a gift for the purposes mentioned. Among the covenants of warranty in the deed are the following:

* * * and all the estate, title, and interest of the said grantor, either in law or equity, of, in, and to the said premises; together with all the privileges and appurtenances to the same belonging, and all the rents, issues and profits thereof.

To have and to hold the same to the United States of America, its successors and assigns forever, as and for an aviation field and for such other service of the United States of America as may now or hereafter appear to it desirable, but upon abandonment or discontinuance of the use of the within described premises by the United States of America, title to said lands shall *ipso facto* revert to the grantor.

It is clear according to the plain and explicit terms of the lease, that the rent did not accrue under the terms thereof, or become due and payable, until the end of the first quarter which would have been September 30, 1924, and prior to that date, on August 12, 1924, the lands were conveyed by general warranty deed to the lessee thus merging the two estates in the lessee.

In discussing the question of ownership of rents after the merging of the whole estate in the lessee, the Court of Claims in *Cumming et al.* v. *United States*, decided December 6, 1922, 57 Ct. Cls. 551, 556, said:

Because the transaction was not closed until the latter part of December, the plaintiffs contend that they should be allowed rent up to the date in December when the defendant made its payment. Another principle intervenes, however, which prevents this. The December installment of rent could not accrue under the terms of the lease before the end of the month, and prior to that time the tenant holding under the lease had succeeded to the fee, by conveyances of title by the landlords. Rent follows the reversion, and before the rent became due the reversion had passed to the United States. In these circumstances, as was said by Chief Justice Richardson in *York* v. *Jones*, 2 N. H. 454, 456, "there is no doubt that the rent passed as incident to the reversion and became extinguished," or, as said in another case. "the term for years was drowned or merged in the fee-simple estate and became extinct," *Liebschutz* v. *Moore*, 70 Ind. 142, 147. There could not be a right of action until the installment of rent accrued according to the lease, and when that time arrived the plaintiffs had ceased to be owners. The court can not apportion the rent reserved.

The decisions on this question throughout the States appear to be uniform in holding that the rent follows the reversion of the land in the absence of an agreement to the contrary, and such is the holding of the appellate courts in Ohio, wherein the land involved under this lease in question is situated.

In *Wald et al* v. *Bien*, 14 N. P. N. S. (Ohio) 145, 150, decided April 9, 1913, wherein are cited numerous authorities from various States, the court said:

The law certainly is, in the absence of agreement to the contrary, rents belong to whoever is the owner of the reversion at the time they accrue, without reference as to whether they are payable in advance or not. The rule is thus stated, I. Tiffany on Landlord and Tenant, section 176:

"Rent is not, at common law, regarded as accruing from day to day as interest does, but it is only upon the day fixed for payment that any part

of it becomes due. The result of this principle is that, ordinarily the person who is on that day the owner of the reversion is entitled to the entire installment of rent due on that day, though he may have been the owner of the reversion or rent but a part of the time which has elapsed since the last rent day. Conversely, one who has been owner of the reversion or the rent during a part of such period can claim no portion of the installment unless he is such owner at the time at which the installment is payable by the terms of the lease. The general rule in this regard is ordinarily expressed by saying that rent can not be apportioned as to time."

In *Hughes* v. *Forsythe*, 26 C. C. N. S. 13, decided March term 1916, the Ohio Court of Appeals held:

It is a general principle of law that rents are not apportionable as to time except by virtue of contract to that effect, and that rents are the property of the owner of the reversion in the lands for which rent is due.

In view of these decisions, which conclusively establish and confirm that, in the absence of contrary provision in the contract or lease, the rents follow the reversion of the lands for which rent is claimed and can not be apportioned as to time, and it appearing that the rent was not due or payable to claimant under the lease in question until September 30, 1924, at which time the United States was the owner of the reversion in the land, it must be held that the right to the rents, reserved in the lease, passed to the United States under the deed of August 9, 1924, which by specific covenant granted "all rents, issues, and profits thereof" to the United States, and thus extinguished the right of claimant to demand or collect any rents which were not due and payable at the time of the execution and delivery of the deed.

Accordingly, you are advised that payment of any sum under said lease dated July 1, 1924, between the Dayton Air Service Incorporated Committee and the Government is not authorized.

(A-6992)

NAVY PAY, COURT-MARTIAL CHECKAGES—MINORITY ENLISTMENTS

An under-age discharge from the Navy, resulting from an enlistment made possible only by the fraud of the man and terminated upon discovery of the fraud, is not a discharge from the service under honorable conditions and pay conditionally withheld under Article 1877 (*d*), Navy Regulations, 1920, may not lawfully be refunded on separation from the service by such discharge.

Decision by Comptroller General McCarl, January 21, 1925:

There is for settlement the claim of Cletis Perry Stone for refund of one-half of loss of pay in the amount of $108 sustained by summary court-martial approved August 7, 1923, but conditionally remitted under the provisions of Article 1877 (*d*), Navy Regulations, 1920, alleged to be due upon his release from service in the Navy October 4, 1924, by reason of his under-age enlistment of February 1, 1923.

It is provided by the act of March 3, 1915, 38 Stat. 931, that when it is found upon evidence satisfactory to the Navy Department that a recruit has sworn falsely as to his age and is under 18 years of age at the time of enlistment, he shall, upon request of either parent or legal guardian, be "released" from service in the Navy upon payment of full cost of first outfit, unless in any given case the Secretary in his discretion shall relieve the recruit of such payment.

It has been held that, under this act, recruits who have enlisted by fraudulently misrepresenting their age and are released from such enlistment are entitled to be paid unpaid pay accrued to date of release or discharge, 26 Comp. Dec. 587. But the statute does not change the character of the enlistment, consummated only as a result of the fraudulent representation of the man as to his age, and his discharge on discovery of the fraud is not a discharge from the Navy under honorable conditions.

The travel pay law of September 22, 1922, 42 Stat. 1021, recognizes that such recruits are in a separate classification by authorizing transportation only and not travel pay, probably on the broad ground of public policy that a minor released but not returned to the place whence the Navy got him would in many cases be a burden to the parents, or guardian, who had requested his discharge.

To entitle to a refund of one-half of loss of pay adjudged by courts-martial under Article 1877 (*d*), Navy Regulations, 1920, it is necessary that the separation from the service shall be under honorable conditions. An under-age discharge resulting from an enlistment made possible only by the fraud of the man, and terminated upon discovery of the fraud is not a discharge from the service under honorable conditions and pay conditionally withheld under such article may not lawfully be refunded on separation from the service by such discharge.

Change No. 5 to Navy Regulations, 1920, dated June 15, 1923, effective immediately upon its receipt, amended Article 1877 so as to make no provision for conditional remission of loss of pay adjusted by courts-martial. Whether the remission as contained in the court-martial sentence in claimant's case, approved August 7, 1923, was effective, need not be determined in view of what has been stated.

(A–7306)

CLASSIFICATION OF CIVILIAN EMPLOYEES—PRESIDENTIAL APPOINTEES IN THE FIELD SERVICE

The provisions of the act of December 6, 1924, 43 Stat. 704, authorizing the adjustment of compensation of field employees to correspond to the rates fixed by the classification act of March 4, 1923, 42 Stat. 1488, are applicable to all civilian field employees, whether presidential appointees or otherwise.

Comptroller General McCarl to the Secretary of the Treasury, January 22, 1925:

I have your letter of December 31, 1924, requesting decision whether under the provisions of the act approved December 6, 1924, 43 Stat. 704, an increase in the salaries of presidential appointees in the Customs Service is authorized.

The act of December 6, 1924, provides additional appropriations for the fiscal year ending June 30, 1925, "to enable the heads of the several departments and independent establishments to adjust the compensation of civilian employees in certain field services to correspond, so far as may be practicable, to the rates established by the Classification Act of 1923 for positions in the departmental services in the District of Columbia." Among the services appropriated for is the field service engaged in collecting revenue from customs for which the sum of $3,150,000 is provided. The act specifically provides on page 712:

> The appropriations herein made may be utilized by the heads of the several departments and independent establishments to accomplish the purposes of this act notwithstanding the specific rates of compensation and the salary restrictions contained in the regular annual appropriation acts for the fiscal year 1925 or the salary restrictions in other acts which limit salaries to rates in conflict with the rates fixed by the Classification Act of 1923 for the departmental service.

The schedule of salaries provided in the Classification Act of 1923, prior to the passage of the act of December 6, 1924, was only applicable to personal services in the District of Columbia. The effect of the latter act is not to extend the provisions of the Classification Act absolutely and permanently to the field force, but to enable the heads of departments and independent establishments to adjust the rates of compensation in certain field services to correspond with the rates fixed by the Classification Act so far as practicable for the fiscal year 1925. This provision of law extending the Classification Act rates of compensation to the field services specifically mentioned in the act makes no distinction between presidential appointees and other employees and there is nothing in the Classification Act justifying such distinction. The term "employee" is defined by the Classification Act as meaning "any person temporarily or permanently in a position," and the term "position" as meaning "a specific civilian office or employment, whether occupied or vacant, in a department" with certain exceptions specifically stated. Section 2, Classification Act of 1923, 42 Stat. 1488.

The duties and responsibilities of a position will determine the class to which such position belongs and the grade to which it should be allocated, regardless of whether the position is to filled by presidential appointment or otherwise. 4 Comp. Gen. 326. After determining the corresponding grade under the Classification Act to which a given field service position should be allocated, the salary

of the person holding said position should then be fixed in accordance with the rules laid down in section 6 of the Classification Act. If the salary as thus fixed in the case of a presidential appointee is in excess of the salary otherwise fixed by law for said position the resulting increase in salary is authorized in so far as the present appropriation is concerned.

The question submitted is answered accordingly.

(A–6778)

TRAVELING EXPENSES—CHANGE OF STATION—CLERKS OF UNITED STATES COURTS

The change in the designated place of duty within the same district of a deputy clerk of a United States district court, when appointed under section 4 of the Federal Judicial code, act of March 3, 1911, 36 Stat. 1087, does not constitute a new appointment, and he may be reimbursed his actual and necessary traveling expenses incurred in such travel to the extent authorized by law and regulation.

Comptroller General McCarl to the Attorney General, January 23, 1925:

Reference is had to your request of December 3, 1924 (JDH 10 S 441–84), for decision whether reimbursement is authorized to deputy clerk of court, Charles L. Knowles, for traveling expenses incurred pursuant to his change of station from Key West to Miami, Fla. You state that the deputy clerk was not given a new appointment, but that the change was deemed advisable for the best interests of the service to fill the place of a deputy clerk who had resigned, and that the transfer was not made upon the application of the deputy.

Had the travel in question been due to a new appointment, no reimbursement would have been authorized for the expenses incurred by the employee in placing himself at his new station. 11 Comp. Dec. 442; 20 *id.* 73.

The appointment of deputy clerks of courts is authorized by section 4 of the Federal Judicial Code, 36 Stat. 1087, in the following language:

> Except as otherwise specially provided by law, the clerk of the district court for each district may, with the approval of the district judge thereof, appoint such number of deputy clerks as may be deemed necessary by such judge, who may be designated to reside and maintain offices at such places of holding court as the judge may determine * * *.

The phrase "Except as otherwise specially provided by law," refers to the appointment of deputy clerks in certain States who are required in chapter 5 of the Code to be appointed for duty at certain places of holding court. See paragraph 767 of the Instructions to United States Marshals, Attorneys, Clerks, and Commissioners.

Said chapter 5 makes no requirement that the offices of the clerks of the court in Florida be maintained at certain specified places as

is required by that chapter in certain other States and it is presumed therefore that deputies in Florida are appointed under section 4 of the Code for duty within a particular district and may be required to change their place of residence within the district at the discretion of the judge.

Both Key West and Miami, Fla., are in the Southern Judicial District of Florida and the change in the designated place of duty of the deputy clerk appears to be authorized by section 4 of the Judicial Code, *supra.*

The act of February 26, 1919, 40 Stat. 1182, provides:

When any such deputy or clerical assistant is necessarily absent from the place of his regular employment on official business he shall be allowed his actual traveling expenses only and his necessary and actual expenses for lodging and subsistence, the latter not to exceed $3 per day.

The act of June 1, 1922, 42 Stat. 616, provides:

For salaries of clerks * * * United States district courts, their deputies, and other assistants, expenses of travel and subsistence * * * in accordance with the provisions of the act approved February 26, 1919 * * *.

The act of May 28, 1924, 43 Stat. 220, appropriates:

For salaries of clerks of United States circuit courts of appeals and United States district courts, their deputies, and other assistants, expenses of travel and subsistence * * * in accordance with the provisions of the act approved February 26, 1919, and the act approved June 1, 1922 * * *.

If, therefore, Deputy Clerk of the Court Knowles was appointed under the general authority of section 4 of the Judicial Code for duty anywhere within the district, his actual and necessary expenses of travel between his old and new stations within the same judicial district as stated may be reimbursed to him to the extent authorized by law and the travel regulations applicable thereto.

(A–4328)

GRATUITIES, SIX MONTHS' DEATH—DEPENDENT FATHER OF NAVAL ENLISTED MAN

Where an enlisted man of the Navy with no wife or unmarried minor child had designated his mother to receive the six months' pay gratuity provided for in the act of June 4, 1920, 41 Stat. 824, in the event of his death and the mother's death had preceded the enlisted man's death, such gratuity may be paid to the father of the enlisted man, who had been designated as alternate beneficiary, upon the showing that the father was in needy condition at the time of the designation and was dependent upon the enlisted man at the date of the latter's death and had received regular and reasonable contributions from him prior thereto.

Decision by Comptroller General McCarl, January 26, 1925:

There is before this office for decision the claim of Joseph David Thornton, dated December 3, 1923, under the act of June 4, 1920, 41 Stat. 824, for six months' pay gratuity on account of the death of his son Dan Bradley Thornton, late yeoman, third class, United States Navy, who died at the United States Naval Hospital, Nor-

folk, Va., November 14, 1923, of endocarditis acute, in line of duty, and not due to his own misconduct.

The beneficiary slip executed and sworn to by the decedent, October 3, 1922, shows that he was not married, and he designated as his beneficiary under the said act as dependant relative, his mother, Minnie (Bryan) Thornton, and in the event of her death, he designated as his beneficiary his father, Joseph David Thornton.

The affidavit of two disinterested persons states that Mrs. Minnie Thornton died at Macon, Ga., on November 28, 1922.

The claimant avers in his affidavit of March 3, 1924, that he was partially dependent upon the contributions of his son for his support; that for the last several years he was unable to do any labor on account of chronic kidney trouble and bad health; that prior to the death of his wife, Mrs. Minnie Thornton, who died on November 28, 1922, their son, Dan Bradley Thornton, made contributions to his mother; that after the death of his mother his son contributed to his support, and during the six months preceding the time he was taken to the hospital in his last illness he contributed to the affiant's support the sum of $155.

The claimant also stated in his letter of March 1, 1924, to this office, that he has in his possession a house valued at $1,000, but the same is mortgaged in the sum of $865; that his daughters are married, and his other son, whom he has not seen since 1914, lives in London, England; that he relied upon his son Dan more than upon any of his children for support, because the former had no other dependents. In his application dated December 3, 1923, he states his age as 63 years.

It has been held that the dependency of a widow or unmarried minor child (or children) may be presumed; but in cases involving some "other dependent relative" previously designated no such presumption exists, and the condition of dependency in the case of near relatives, such as mother, father, brother, or sister, must be established by a reasonable showing of existing or possible future need at time of designation, and in the event of death in the service by a showing of verified facts, including that of periodical assistance from the deceased, in keeping with his income from all sources. 40 MS. Comp. Gen. 960, December 22, 1924.

As it is shown that prior to the death of the son he contributed to the support of his mother, and subsequent to the death of his mother he contributed regularly to the support of the claimant, and there is a reasonable showing of existing dependency at time of designation and at the time of death, it is concluded that the claimant is entitled to the six months' gratuity provided in the act of June 4, 1920, which in this case, at $60 a month, is $360.

(A-5612)

CONVENTIONS AND MEETINGS — TRANSPORTATION EXPENSES OF OFFICERS AND EMPLOYEES ATTENDING

As the act of June 26, 1912, 37 Stat. 184, prohibits the payment from public funds of expenses of attendance of an officer or employee of the United State at any convention or meeting, in the absence of a specific appropriation for such purpose or an express provision therefor in some general approriation, payment of the transportation exenses of an engineer of the Bureau of Mines incurred in attending a convention or meeting without such an appropriation or provision is unauthorized; but where such service has been rendered at convention rates by a carrier on a Government transportation request payment may be allowed the carrier and the amount thereof required to be reimbursed by the traveler. 4 Comp. Gen. 421 modified.

Decision by Comptroller General McCarl, January 27, 1925:

This office has for consideration the question as to the allowance of three bills presented by the Baltimore & Ohio Railroad Company, Nos. 70744 for $146.16, 70742 for $158.57, and 70745 for $150.06, approved administratively, for payment from various appropriations for the Bureau of Mines. These claims include the following transportation requests:

I-215287, May 12, 1924, bill 70744, transportation of J. E. Cranshaw, explosive engineer, Pittsburgh, Pa., to Cincinnati, Ohio, and return, charge $16.79.
I-215117, May 23, 1924, bill 70742, O. P. Hood, chief mechanical engineer, Washington, D. C., to Cleveland, Ohio charge $15.63.
I-215118, May 29, 1924, bill 70745, is for the return of Mr. Hood and the charge made is $7.82.

It appears that the travel of Mr. Cranshaw was for the purpose of attending the convention of National Coal Association and American Mining Congress, held in Cincinnati May 12–17, 1924, while Mr. Hood's travel was for the purpose of attending the joint meeting of the American Society of Mechanical Engineers, American Society of Refrigerating Engineers, and American Society for Testing Materials, held in Cleveland May 26–30, 1924.

The act of June 26, 1912, 37 Stat. 184, provides:

Sec. 8. No money appropriated by this or any other act shall be expended for membership fees or dues of any officer or employee of the United States or of the District of Columbia in any society or association or for expenses of attendance of any person at any meeting or convention of members of any society or association, unless such fees, dues, or expenses are authorized to be paid by specific appropriations for such purposes or are provided for in express terms in some general appropriation.

The Director of the Bureau of Mines reported to this office under date of October 2, 1924, as follows:

It is not believed that this travel expense violates the provisions of section 28 of the act of June 26, 1912, 37 Stat. 184, and the following information is submitted with the request that claims be paid and charged against the appropriation "Investigating mine accidents, 1924," and "Fuel testing, Bureau of Mines, 1924."

Mr. J. E. Cranshaw is an explosive engineer of the Bureau of Mines, stationed at Pittsburgh, Pa. He was ordered to be in Cincinnati, Ohio, on May 13, 1924, to confer with certain powder manufacturers, coal operators, mining engineers, and others interested in the use of explosive powder, on the subject of obtaining better methods of blasting. The conference met on May 13 and 14.

At the conclusion of the conference Mr. Cranshaw returned to the Pittsburgh station.

Mr. O. P. Hood is chief mechanical engineer of the Bureau of Mines. He was ordered to Cleveland to confer with representatives of certain public-service utilities on matters relating to a greater efficiency in the use of fuel and with a representative of the University of Michigan on the subject of fuel conservation. Because all of the parties with whom he was to confer were in Cleveland during the meeting of the associations referred to in your letter, a great deal of time and expense in travel was saved by having Mr. Hood confer with them in Cleveland at that time rather than individually and at other points throughout the country.

It would seem that the above comes under the duties imposed upon the Bureau of Mines by the act approved February 25, 1913, 37 Stat. 681, and your approval of the expenditures in question is accordingly requested.

The appropriations "Investigating mine accidents, 1924," and "Testing fuel, Bureau of Mines, 1924," 42 Stat. 1209, provide for carrying on the work of the Bureau of Mines as provided in the act of February 25, 1913, 37 Stat. 681, and for the actual necessary traveling expenses of employees engaged thereon while absent from their respective stations on official business, but do not provide in specific terms for attendance at meetings or conventions.

The carrier is claiming convention fares for the travel, as authorized in Special Fare Bulletin No. 40, Agent C. M. Burt's I. C. C. 89, effective April 26, 1924, in accordance with which the travelers to obtain that fare were required to present to carrier's agents certificates that they were bona fide members of the organization holding the convention. Section 8 of the act of June 26, 1912, *supra*, prohibits the expenditure of money appropriated by Congress for expenses of attendance of any person at any meeting or convention unless such expenses are authorized to be paid by the specific appropriations for such purpose, or are provided for in express terms in some general appropriation.

The Bureau of Education, Department of the Interior, has secured the required specific appropriation; 42 Stat. 1204. Also the Geological Survey; 42 Stat. 1208. The Post Office Department secured an exception in the act of August 24, 1912, 37 Stat. 560, applying to that act, but this exception appears to have been dropped in subsequent acts. The Department of Agriculture has a general exception; 37 Stat. 855. The Public Health Service carried a specific appropriation from year to year; 42 Stat. 1101, etc. The Bureau of Standards has also secured specific appropriations; 42 Stat. 1117. The Federal Board for Vocational Education secured a specific appropriation for such attendance; 41 Stat. 737.

There appears to be no specific provision for payment of such expenses out of the appropriations for the Bureau of Mines. It would therefore appear that such appropriations are not available for such expenditures.

However, the requests for this service having been in proper form and valid upon their face, without erasure or alteration, the carrier

should be paid for the service, the cost of which should be reimbursed by the travelers who secured such unauthorized transportation. The decision of November 1, 1924, 4 Comp. Gen. 421, is modified accordingly.

(A–6741)

SEAMEN, DESTITUTE AMERICAN—TRANSPORTATION TO THE UNITED STATES—UNITED STATES SHIPPING BOARD

The cost of transportation of destitute American seamen from foreign ports to the United States on the vessel on which they last served or on vessels belonging to the same company is not chargeable to the appropriation made by the act of January 3, 1923, 42 Stat. 1072, in the absence of evidence showing affirmatively that the owners of the vessel on which the seaman last served have been relieved from all duty, responsibility, and liability with respect to the seamen so transported.

The appropriation made by the act of January 3, 1923, 42 Stat. 1072, is not chargeable with the transportation of a destitute American seaman from a foreign port to the United States on a United States Shipping Board vessel operated by an agent, where said seaman had been discharged from another Shipping Board vessel operated by another agent, in the absence of evidence showing affirmatively that the Shipping Board, owner of the vessel on which the seaman last served, had been relieved of all duty, responsibility, and liability with respect to said seaman. Such expense, if any, as the agent may have incurred in fulfilling the obligation of its principal (the Shipping Board) is for adjustment between the agent and the principal.

Decision by Comptroller General McCarl, January 27, 1925:

The Munson Steamship Line, operating agent, has applied for review of settlement 017360 disallowing its claim for pay for the transportation of G. Landema, Bernard Capadona, and M. Yoffe from Montevideo, Uruguay, to New York, N. Y., June 20 to July 10, 1924, via the steamship *Southern Cross*, owned by the United States Shipping Board.

The act of January 3, 1923, 42 Stat. 1072, provides:

For relief and protection of American seamen in foreign countries, and in the Panama Canal Zone, and shipwrecked American seamen in the Territory of Alaska, in the Hawaiian Islands, Porto Rico, the Philippine Islands, and the Virgin Islands, $200,000: *Provided*, That hereafter the amount agreed upon between the consular officer and the master of the vessel in each individual case not in excess of the lowest passenger rate of such vessel and not in excess of 2 cents per mile, together with such additional compensation for transporting sick or disabled seamen as is now provided by law, shall in each case constitute the lawful rate for transportation on steam vessels.

It appears that the seamen had last served upon the steamship *West Cactus*, owned by the United States Shipping Board, L. B. Newman, San Francisco, Calif., operating agent.

In a similar question considered by this office it was held in 4 Comp. Gen. 118, quoting from the syllabus, that—

Payment for transportation of destitute American seamen from foreign ports to the United States on the vessel on which they last served or on vessels belonging to the same company is not authorized in the absence of evidence showing affirmatively that the owners of the vessel on which the seaman last served have been relieved from all duty, responsibility, and liability with respect to the seaman so transported.

From the evidence now before this office it does not appear that the Government is under any obligation to the claimant, as operating agent for the United States Shipping Board, on account of the transportation furnished to the seamen discharged from another vessel owned by the United States Shipping Board.

In the absence of evidence showing affirmatively that the United States Shipping Board, owner of the vessel on which the seamen last served, had been relieved of all duty, responsibility, and liability with respect to said seamen, payment to claimant company as agent of the United States Shipping Board for the return passage is not authorized.

Such expense, if any, as the agent may have incurred in fulfilling the obligation of its principal with respect to these seamen is for adjustment between the agent and the principal.

Upon review the settlement must be and is sustained.

(A-6927)

INDIAN AFFAIRS—INTEREST ON INDIAN MONEYS

Under section 16 of the act of June 4, 1920, 41 Stat. 756, which provided for the payment of $5 per acre to the Crow Indians for certain reservation lands granted to the State of Montana for common-school purposes, all such amounts paid should, in the absence of a specific provision requiring the payment of interest, be credited to other than an interest-bearing account, there to remain until disposed of as provided by said act of June 4, 1920, or subsequent legislation.

Decision by Comptroller General McCarl, January 27, 1925:

There is for consideration of this office the matter of the grant to the State of Montana for common-school purposes of certain Crow Indian Reservation lands for which, pursuant to section 16 of the act of June 4, 1920, 41 Stat. 751–757, entitled "An act to provide for the allotment of lands of the Crow Tribe, for the distribution of tribal funds, and for other purposes," the United States is required to make payment to said Indians, at the rate of $5 per acre, for the land so granted, an amount sufficient to make payment being appropriated by the said act of June 4, 1920, there being for decision the matter of whether the amount thus paid for the lands so granted is with or without interest from the date of its payment to the date of its authorized distribution among the tribal members.

In an unsigned letter dated December 10, 1924, addressed to this office and purporting to be from the Assistant Secretary of the Interior, it is stated:

By department letter dated August 20, 1924, attention was invited to section 16 of the act approved June 4, 1920 (41 Stat. L. 751–756), providing in part that the United States shall pay the Crow Indians for lands granted to the State of Montana for common-school purposes at the rate of $5 per acre, and also providing for an appropriation out of the Treasury of the United States to carry this provision into effect. A request was also made in this letter

that an account be started in your office and a warrant issued by the Treasury Department crediting the sum of $220,403.70 to the Crow Indians under the title "Payment to Crow Indians for lands, act June 4, 1920."

Warrant No. 25, dated November 24, 1924, signed by the Comptroller General November 28, 1924, appropriating this money under the title requested in department letter of August 20, has been received. The Indian Office is now in receipt of a certificate of the General Accounting Office, No. 1493–I, dated November 20, 1924, and certificate of deposit No. 30873, dated November 29, 1924, from which it appears that it is intended to carry this fund to the credit of "Miscellaneous receipts—Proceeds of Crow lands, act June 4, 1920," and it is informally understood that it is intended by the Treasury Department to credit this money eventually to the Crow Indians under the title "Crow consolidated 4 per cent fund." I will appreciate an early decision as to whether the Treasury Department regards this money as interest bearing or noninterest bearing, and request that a definite title therefor be fixed in order that the money may become available for expenditure when needed.

Article II of an agreement with the Indians of the Crow Reservation in Montana, appearing in and as a part of section 1 of the act of April 27, 1904, 33 Stat. 352–358, the said act being entitled "An act to ratify and amend an agreement with the Indians of the Crow Reservation in Montana, and making appropriations to carry the same into effect," provided, in consideration of certain reservation lands ceded by Article I of the agreement, that the lands thus ceded would be sold in a certain manner and at not less than a stipulated price per acre. Of the total amount received on account of the sales of the lands, designated amounts were appropriated for expenditure for stated objects, to wit, for irrigation, for fencing the diminished reservation, for erection, purchase, and repair of school buildings, for erection and furnishing of a hospital, and for purchase, distribution, etc., of cattle, jackasses, stallions, and ewes, etc. The amount of $100,000 was appropriated and set aside as a trust fund, to be placed in the Treasury of the United States, there to remain for 15 years, the said fund to bear interest at the rate of 4 per cent per annum, the interest accumulations to be expended in maintaining and managing an irrigation system. The amount of $50,000 was appropriated and set aside as a trust fund, to be placed in the Treasury of the United States, the said fund to bear interest at the rate of 4 per cent per annum, the interest accumulations to be expended in maintaining the hospital erected and furnished pursuant to the specific appropriations referred to, *supra*. With respect to the balances of any of the appropriations for specific objects and the balance of the fund unappropriated, it was provided in said Article II of section 1, as follows:

* * * *Provided further*, That should the funds accruing to the Indians from the sale of their lands render it advisable, the Secretary of the Interior may expend the further sum of two hundred thousand dollars in the further purchase of cattle or sheep, should a majority of the Indians so decide and the same be approved by the Secretary of the Interior: *Provided further*, That when each object for which a specific appropriation has been made in this agreement shall have been fully carried out and completed then the balance remaining of said appropriation may be expended for the benefit of the Crow tribe or placed to their credit in such manner as the Secretary of the Interior

may determine: *Provided further*, That the Secretary of the Interior may, in his discretion, while the funds for the several purposes above named are accruing from the sale and disposition of the lands, make per capita cash payments from the proceeds at such times and in such amounts to every man, woman, and child, share and share alike, having tribal rights on the reservation, as he may deem for their best interests.

Section 11 of the act of June 4, 1920, 41 Stat. 754–755, repealed so much of Article II, section 1, of the act of April 27, 1904, 33 Stat. 357–358, as related to the disposition of the trust funds of the tribe, to the purchase and distribution among the Indians of cattle, jackasses, stallions, and ewes, and the building, etc., of fences, schoolhouses, hospitals, ditches, dams, canals, etc., and provided:

* * * *Provided*, That all unexpended balances of trust funds arising under said agreement shall thereupon be consolidated into one fund to the credit of the tribe, the same to bear interest at the rate of 4 per centum per annum: *Provided further*, That there shall be reserved and set aside from such consolidated fund, or any other funds to the credit of the tribe, a sufficient sum to pay the administrative expenses of the agency for a period of five years; $100,000 for the support of the agency boarding school; $50,000 for the support of the agency hospital, and not to exceed $4,000 of this amount shall be expended in any one year for the support of said hospital; and $50,000 for a revolving fund to be used for the purchase of seed, animals, machinery, tools, implements, and other equipment for sale to individual members of the tribe, under conditions to be prescribed by the Secretary of the Interior for its repayment to the tribe on or before June 30, 1925: *Provided further*, That the expenditure of the sums so reserved and hereby specifically authorized, except those for administrative expenses of the agency, which shall be subject to annual appropriations by Congress: *Provided further*, That after said sums have been reserved and set aside, together with a sufficient amount to pay all other expenses authorized by this act, the balance of such consolidated fund, and all other funds to the credit of the tribe or placed to its credit thereafter, shall be distributed per capita to the Indians entitled. * * *

Section 16 of the act of June 4, 1920, 41 Stat. 756–757, provided:

That there is hereby granted to the State of Montana for common-school purposes sections sixteen and thirty-six, within the territory described herein, or such parts of said sections as may be nonmineral or nontimbered, and for which the said State has not heretofore received indemnity lands under existing laws; and in case either of said sections or parts thereof is lost to the State by reason of allotment or otherwise, the governor of said State, with the approval of the Secretary of the Interior, is hereby authorized to select other unoccupied, unreserved, nonmineral, nontimbered lands within said reservation, not exceeding two sections in any one township. The United States shall pay the Indians for the lands so granted $5 per acre, and sufficient money is hereby appropriated out of the Treasury of the United States not otherwise appropriated to pay for said school lands granted to the said State: *Provided*, That the mineral rights in said school lands are hereby reserved for the benefit of the Crow Tribe of Indians as herein authorized: *Provided further*, That the Crow Indian children shall be permitted to attend the public schools of said State on the same condition as the children of white citizens of said State.

It appears from the provisions of the act of April 27, 1904, referred to, *supra*, that the only funds to bear interest were those set aside as trust funds. Section 11 of the act of June 4, 1920, referred to, *supra*, consolidated those trust funds into one fund, the said consolidated trust fund to "bear interest at the rate of 4 per centum per annum." There is reference in section 11 to other funds than

the interest-bearing trust funds, but that reference is to their ultimate disposition with no specific direction or other indication that such funds shall bear interest. Accordingly, it is held that the amount paid to the Indians by the United States for the lands granted to the State of Montana for common-school purposes does not bear interest and, therefore, is not authorized to be credited to the "Crow consolidated 4 per cent fund," but is required to be credited to other than an interest-bearing account there to remain until disposed of as provided in the said act of June 4, 1920, or subsequent legislation.

A copy of this decision will be furnished for the information and guidance of the Secretary of the Interior and the Secretary of the Treasury.

(A-7404)

NAVAL RESERVE FORCE—PROVISIONAL APPOINTMENTS—PRACTICE, REOPENING OF SETTLEMENTS

Where a member of the Naval Reserve Force is given a provisional appointment in a higher grade or rank than that assigned on first enrollment (whether provisional or confirmed) such provisional appointment in the higher grade or rank does not entitle the member to the pay or allowances of such higher grade or rank.

The accounting officers of the Government have authority to reopen a settlement upon the presentation of new and material facts, which, had they been known at the time, would have affected the settlement.

A change in the construction of the law does not authorize the accounting officers of the Government to reopen settled accounts, but such accounts as are settled after the change of construction of the law will be settled under the law as construed at the time the settlement is made.

Decision by Comptroller General McCarl, January 28, 1925:

There is for consideration in the accounts of R. A. Ashton, payments made on the U. S. S. *Cheyenne* to Albert Houston for the period July 5 to 19, 1924, as a lieutenant, United States Naval Reserve Force, class 1, while on active duty other than for training. The naval history of Lieutenant Houston as furnished by the Bureau of Navigation December 30, 1924, and January 8, 1925, is as follows:

14 May, 1898 to 14 Jan., 1899.—Ensign, U. S. Navy.
28 Feb., 1917.—Appointed, confirmed ensign, class 1, U. S. N. R. F., to rank from February 24, 1917.
14 Mar., 1917.—Accepted and executed oath of office.
7 Mar., 1917.—Given provisional rank of lieutenant (j. g.), class 1.
15 Dec., 1917.—Accepted and executed oath of office as provisional lieutenant (j. g.).
5 Dec., 1918.—Given provisional rank of lieutenant, class 1, to rank from July 1, 1918.
9 Dec., 1918.—Executed oath and acceptance as provisional lieutenant, class 1.
2 Dec., 1919.—Given confirmed commission as lieutenant (j. g.), class 1, to to rank from July 3, 1919.
7 Feb., 1920.—Executed oath and acceptance.
* * * On March 13, 1921, above subject was honorably discharged from his enrollment of March 14, 1917; reenrolled March 14, 1921, as provisional lieutenant and confirmed lieutenant (j. g.) United States Naval Reserve Force 1; performed active duty for purpose of training from May 13, 1921, to

May 27, 1921; temporary active duty for purposes other than training from August 19, 1922, to September 2, 1922, from July 28, 1923, to August 11, 1923, and from July 5, 1924, to July 19, 1924; confirmed commission as lieutenant (j. g.) upon reenrollment forwarded January 14, 1924; not confirmed in higher rank than lieutenant, junior grade.

It will be observed that Lieutenant Houston has the confirmed rank of lieutenant (junior grade) and that in addition he holds the provisional rank of lieutenant. While on active duty he was paid as a lieutenant. The act of August 29, 1916, 39 Stat. 587, provides in part as follows:

Members of the Naval Reserve Force may be ordered into active service in the Navy by the President in time of war or when, in his opinion, a national emergency exists.

* * * * * * *

Members of the Naval Reserve Force appointed to commissioned grades shall be commissioned by the President alone, and members of such force appointed to warrant grades shall be warranted by the Secretary of the Navy: *Provided*, That officers so warranted or commissioned shall not be deprived of the retainer pay, allowances, or gratuities to which they would otherwise be entitled. Officers of the Naval Reserve Force shall rank with but after officers of corresponding rank in the Navy.

Enrollment and reenrollment shall be for terms of four years, but members shall in time of peace, when no particular emergency exists, be discharged upon their own request upon reimbursing the Government for any clothing gratuity that may have been furnished them during their current enrollment.

* * * * * * *

When first enrolled members of the Naval Reserve Force, except those in the Fleet Naval Reserve, shall be given a provisional grade, rank, or rating in accordanc with their qualifications determined by examination. They may thereafter, upon application, be assigned to active service in the Navy for such periods of instruction and training as may enable them to qualify for and be confirmed in such grade, rank or rating.

No member shall be confirmed in his provisional grade, rank, or rating until he shall have performed the minimum amount of active service required for the class in which he is enrolled, nor until he has duly qualified by examination for such rank or rating under regulations prescribed by the Secretary of the Navy.

No person shall be appointed or commissioned as an officer in any rank in any class of the Naval Reserve Force, or promoted to a higher rank therein, unless he shall have been examined and recommended for such appointment, commission, or promotion by a board of three naval officers not below the rank of lieutenant commander, nor until he shall have been found physically qualified by a board of medical officers to perform the duties required in time of war, except that former officers and midshipmen of the Navy, who shall have left the service under honorable conditions and who shall have enrolled in the Naval Reserve Force, may be appointed in the grade and rank last held by them without examination other than the physical examination above prescribed.

The legality of a provisional appointment of an officer of the Naval Reserve Force in a higher rank or grade who had been enrolled in a lower rank or grade, either provisional or confirmed, was presented to the Comptroller of the Treasury soon after the Navy began recruiting that service for the World War, and in decision of September 10, 1917, 24 Comp. Dec. 163, it was said:

As his promotion to the higher rank of lieutenant commander is by the statute prohibited from becoming operative without the examinations, recommendation, and finding by the statutory boards it provides for, and as he has not as yet been examined therefor, his present retainer rank is that of lieutenant, and his current retainer pay is at the rate of one month's base pay of a lieutenant, $200 per annum. * * *

The soundness of this view or possibly its desirability seems to have been questioned in the Navy Department and an opinion of the Attorney General seems to have been requested by the then Secretary of the Navy, September 21, 1917, and in an opinion of October 20, 1917, 31 Op. Atty. Gen. 173, the Attorney General reached the conclusion, quoting the syllabus:

> Under the provisions of the act creating a Naval Reserve Force of August 29, 1916, 39 Stat. 587, 588, when an enrolled member in the Naval Reserve Force has been given a provisional rank, he may thereafter, either with or without being confirmed in such provisional rank, be given a higher provisional rank without examination by the statutory board of three naval officers of or above the rank of lieutenant commander and the statutory board of naval surgeons.

Thereafter the Comptroller of the Treasury in decision of May 6, 1918, 24 Comp. Dec. 660, 662, modified his decision of September 10, 1917, using the following language:

> I am advised that, because of urgent need for officers in the Navy, and press of the tremendous volume of important war business, officers of the Naval Reserve Force have been called to active service in the provisional rank and grade at which they were enrolled without examination for permanent appointment, such examination and appointment being indefinitely postponed. If, upon trial by active service, it is found that the provisional rank and grade given to any officer is too high, or too low, to justly represent his value to the service, the Navy Department claims and has exercised the right to lower or raise the rank and grade accordingly, such action not being looked upon as a promotion or reduction, but as a correction of the provisional rank and grade given at the time of enrollment.
>
> I have grave doubt as to whether this method of procedure conforms to the real intent and purpose of the law, but it is not clearly unlawful, and I will accept it as an emergency measure justified by war conditions. It is not an isolated case of refusal or failure to examine an officer, but is a matter of general policy which is understood to have the sanction and order of the Secretary of the Navy.

See also 25 Comp. Dec. 188.

It will thus be seen that the Comptroller of the Treasury, against his better judgment, recognized provisional appointments of members of the Naval Reserve Force, who, before the provisional appointment, were members of the Naval Reserve Force and had either a confirmed or provisional status; and further that second and succeeding provisional appointments were recognized for pay purposes although there was noncompliance with the mandatory requirements of the statute that no person should be appointed or commissioned an officer in any rank in any class of the Naval Reserve Force or promoted to a higher rank therein unless he shall have been examined and recommended for such appointment, commission, or promotion, by the boards established by the statute.

In the case of *John Lawless, jr.* v. *The United States*, decided February 4, 1924, No. B 50, the Court of Claims reached the conclusion that such provisional appointments made without compliance with the requirements of the statute were illegal and gave no right to pay thereunder. The facts of the case show that Lawless enrolled in the Naval Reserve Force April 30, 1917, and that on February 11, 1918, he was given the provisional rank of ensign;

that on March 18, 1919, he was given the provisional rank of lieutenant (junior grade), and that on February 16, 1920, he was given a confirmed commission as ensign. The court in dismissing his petition for pay of lieutenant (junior grade) from date of rank stated in his commision, claimed under the act of March 4, 1913, 37 Stat. 892, said:

* * * The plaintiff's commission as ensign was given in February, 1920. His provisional appointment as ensign and his provisional rank of lieutenant (junior grade) in the absence of the examinations required by the act above mentioned are not sufficient to bring him within the meaning of the act of March 4, 1913, or to constitute him an officer.

In the subsequent case of *Joshua Garrison, jr.* v. *The United States*, decided by the Court of Claims October 28, 1924, No. A–116, the court found claimant entitled to a portion of the flying pay claimed, but as it appeared from the record that the claimant had been given the provisional rank of lieutenant (junior grade) when physically incapacitated as the result of an airplane accident and at a time when the requirements of the statute as to physical examination manifestly could not be met, the court said that his appointment as such lieutenant (junior grade) "was clearly outside the statute and unwarranted under the law," and remanded the case for a restatement of the account to accord with its opinion.

The provisions of the act of August 29, 1916, are plain; they contemplate enrollment and the assignment of a provisional rank, grades or rating (with exceptions in the Fleet Naval Reserve), and active duty for confirmation, with a prohibition on appointment or promotion, except after the examinations by the boards established by law. There can be no second provisional rank, grade, or rating after the first provisional grade is assigned. Also subsequent appointments or promotions must be as the result of the examinations provided and be in a confirmed rank, grade, or rating, and in the Fleet Naval Reserve there can be no provisional grade where a former officer or midshipman is appointed to the grade or rank last held by him without examination other than physical.

As to payments made under the decision of May 6, 1918, these were made under a construction of the law by the officer charged by law with the duty of rendering decisions in such matters and the statute, act of July 31, 1894, 28 Stat. 208, provides that such "decision, when rendered, shall govern the Auditor and the Comptroller of the Treasury in passing upon the account containing said disbursement." It has been a legal principle uniformly followed by the accounting officers and the courts that a change in the construction of a law does not require or justify the reopening of settled accounts and such legal principle properly applies in the present matter; observing also that payments made were for the services actually rendered, so there has resulted no real loss by the United States.

It is proper, however, to point out that it is otherwise where facts come to knowledge which would have made a difference in the settlement. That is, the former settlement properly may be corrected where new and material facts are presented which had they been known when the settlement was made would have resulted in a different settlement. An application of this latter rule is in connection with cases where officers obtained commutation of quarters, heat, and light, on account of alleged dependent mothers on their personal certificates, but facts are subsequently secured showing the absence of dependency.

Any claims that are now pending or may hereafter be filed by former officers or warrant officers of the Naval Reserve Force for arrears of pay or allowances will be settled in accord with the construction of the law herein made.

The item here considered will be passed in the disbursing officer's accounts in accord herewith, if otherwise correct.

(A–6888)

PAYMENTS, ADVANCE—TRANSPORTATION RATES

A stipulation in the published tariff of a carrier that the fares therein named are "conditional upon payment of cash in advance for transportation and are not subject to land-grant or any other deduction," is not applicable to transportation furnished for and in behalf of the United States, and where such transportation has been furnished an employee of the Bureau of Internal Revenue on a Government transportation request the carrier is only entitled to payment at the rate specified in the tariff less any authorized land-grant deduction.

Decision by Comptroller General McCarl, January 29, 1925:

The Illinois Central Railroad Co. applied per letter of December 1, 1924 (file No. 4006–4), for review of settlement T–69677–T, October 22, 1924, in disallowing $10.30 on its claim for $540.49 for passenger transportation furnished during June and July, 1924, per bill APR–76649, on account of the Bureau of Internal Revenue. The disallowance was of an overcharge on transportation request TIR–149307, June 22, 1924, of one person traveling from Hammond, La., to St. Louis, Mo., and return, for which $46.90 was claimed and $36.60 allowed, in accordance with Southeastern and Virginia–Carolina Joint Tariff CX No. 13, I. C. C. No. H–749.

The company in its application for review claims that the fares in the tariff named are "conditional upon payment of cash in advance for transportation and are not subject to land-grant or any other deduction," and as transportation was furnished upon the request without payment of cash in advance, said tariff is not applicable, and that it is entitled to an additional allowance of $10.30. The stipulation in a published tariff that cash be paid in advance for

passenger transportation can not be considered a condition upon which said rate is based, for cash in advance of service or at time ticket is issued is the usual and regular requirement upon which transportation is furnished. See decisions of the Comptroller of the Treasury dated August 15 and 19, 1913, 20 Comp. Dec. 77 and 108. Section 3648 of the Revised Statutes of the United States prohibits payments by the United States in advance of service rendered or supplies delivered. If the tariff clause cited applied to transportation for the United States, it would be an attempted discrimination against the United States and against public policy.

The disallowance is affirmed.

(A-6964)

TRAVELING EXPENSES — NEW APPOINTMENT — EMPLOYEE TRANSFERRED FROM DEPARTMENTAL TO FIELD SERVICE

An employee of the Bureau of Internal Revenue at Washington, D. C., who, upon being transferred to the field service, took the oath of office under the new appointment and then traveled from Washington, D. C., to his home on a leave of absence and thence to his designated post of duty, is not entitled to reimbursement for any traveling expenses incurred.

Decision by Comptroller General McCarl, January 29, 1925:

There is for consideration the question whether credit may be allowed in the accounts of J. H. McMurtry, internal-revenue agent in charge, Louisville, Ky., for an item of $30.12 paid by him to R. E. Watson as reimbursement of traveling expenses of a journey from Washington, D. C., to Louisville, Ky., in July, 1924.

Mr. Watson was an employee of the Bureau of Internal Revenue at Washington and was transferred to the field service effective July 16, 1924. He was directed to report to the assistant deputy commissioner in charge of field divisions for the purpose of taking the oath of office under the new appointment. He took the oath on July 15, 1924, and was directed to proceed to the field division at Louisville, Ky., and report to the internal-revenue agent in charge for assignment to duty.

The letter of notification stated that the employee would be entitled "to reimbursement of amounts actually spent for subsistence and lodging, not to exceed $5 per day, during such periods as you may be absent from your designated post of duty, plus amounts actually spent for transportation and other traveling expenses necessary to the performance of your official duty."

On July 16, 1924, the employee left Washington, D. C., for Paragould, Ark., on his vacation at the expiration of which he reported to Louisville, Ky., and resumed his duties on August 1, 1924. The employee claimed and was paid reimbursement of what it would have cost the Government to transport him from Washington, D. C.,

to Louisville, Ky., plus the cost of two meals that would have been taken if he had actually traveled from Washington to Louisville.

The reimbursement to which an employee is entitled under the law is for expenses actually incurred and necessary to the performance of official duty away from his designated post of duty. The employee in this case was not directed to and did not travel from Washington to Louisville, in the performance of any duty connected with the position which he held in Washington up to July 16, 1924, and he performed no duty in connection with the position to which he was appointed effective July 16, 1924, until after he reported at Louisville, August 1, 1924, therefore, no part of the travel performed between July 15 and August 1, 1924, can be regarded as travel necessary in connection with official business. 20 Comp. Dec. 73. The fact that the employee took the oath of office under the new appointment before leaving his station under his old appointment could not operate to place him in a travel status. This case is essentially different from that of an employee serving under an appointment for field service generally whose station or post of duty is changed by competent orders issued in the interest of the service. In this connection it may be stated that even in an appointment to field service generally the appointee is not entitled to travel expenses in reporting to his designated post of duty or to his first duty assignment as the case may be.

In view of the facts appearing the payment of $30.12 to R. E. Watson as reimbursement of expenses of transportation and subsistence in connection with travel from Washington, D. C., to Louisville, Ky., was an erroneous payment and credit therefor is not authorized in the accounts of J. H. McMurtry.

(A–7120)

APPROPRIATIONS, SPECIFIC v. GENERAL—INTERIOR DEPARTMENT

Where Congress has specifically limited the amount to be expended for stationery by a department during a fiscal year, a later appropriation providing for additional work to be carried on by that department during the same fiscal year does not of itself authorize the exceeding of such limitation.

Comptroller General McCarl to the Secretary of the Interior, January 30, 1925:

There has been received your letter of December 20, 1924, reading as follows:

The act making appropriations for the Department of the Interior for the fiscal year ending June 20, 1925, approved June 5, 1924, contains an appropriation of $75,000 for stationery, etc., for the department and its several bureaus and offices, and, in addition thereto, sums amounting to $60,300 are to be deducted from other appropriations made for the fiscal year 1925, $2,800 being deducted on account of the National Park Service, which sums shall constitute the total appropriation for stationery for the department and its several bureaus and offices for the fiscal year 1925.

The Second Deficiency Act, fiscal year 1924, contains an appropriation of $1,000,000 for continuation of road construction in the national parks and national monuments under the jurisdiction of the Department of the Interior, including the making of necessary surveys and plans, etc., such appropriation to remain available until June 30, 1925.

The chief civil engineer of the National Park Service who has an office in Portland, Oreg., will have charge of the work done under this $1,000,000 road construction appropriation. In doing so it will be necessary to enlarge his office force to handle the increased correspondence and prepare necessary plans and specifications.

When the limitation of $2,800 was placed upon the National Park Service for stationery, contained in the Interior Department appropriation bill for 1925, no appropriation for road-construction work was made and no amount was included to cover such stationery items as we later find are necessary in carrying out the provisions of the road construction act.

In view of the fact that the appropriation of $2,800 will all be needed for regular national-park work and that the purchase of stationery is essential for carrying out the provisions of the road construction act, and sufficient funds to cover the stationery needed in the office of our chief civil engineer in the field will not otherwise be available, it is respectfully requested that this department be advised whether or not any part of the $1,000,000 appropriated for road construction is available for the purpose of stationery needed for use in connection with the preparing of surveys, plans, and specifications under this appropriation.

That portion of the act approved June 5, 1924, making appropriations for the Department of the Interior for the fiscal year 1925, 43 Stat. 392, referred to in your letter is as follows:

For stationery, including tags, labels, index cards, cloth-lined wrappers, and specimen bags, printed in the course of manufacture, and such printed envelopes as are not supplied under contracts made by the Postmaster General, for the department and its several bureaus and offices, $75,000; and, in addition thereto, sums amounting to $60,300 shall be deducted from other appropriations made for the fiscal year 1925, as follows: Surveying public lands, $2,500; protecting public lands and timber, $2,000; contingent expenses of offices of surveyors general, $2,000; contingent expenses local land offices, $3,000; Geological Survey, $2,000; Bureau of Mines, $7,000; Indian Service, $35,000; Freedmen's Hospital, $500; Saint Elizabeths Hospital, $3,500; National Park Service, $2,800; and said sums so deducted shall be credited to and constitute, together with the first-named sum of $75,000, the total appropriation for stationery for the department and its several bureaus and offices for the fiscal year 1925.

That portion of the second deficiency act approved December 5, 1924, 43 Stat. 686, providing for the continuation of road construction, reads:

* * * For construction, reconstruction, and improvement of roads and trails, inclusive of necessary bridges, in the national parks and national monuments under the jurisdiction of the Department of the Interior, including the making of necessary surveys and plans, in accordance with the provisions of, and being part of the amount authorized to be appropriated for the fiscal years 1924 and 1925 by the act approved April 9, 1924, $1,000,000, to remain available until June 30, 1925: *Provided*, That the sum of $3,600 of the appropriation herein made shall be available for the employment of accounting and clerical services in the District of Columbia.

The act of June 5, 1924, restricted the amount available for the purchase of stationery for the Interior Department and its several bureaus during the fiscal year 1925 to the sum of $135,300, and in the absence of a specific provision in the act of December 5, 1924, for the purchase of stationery it must be held that the amount of $135,300 appropriated can not be exceeded, notwithstanding the increased work authorized.

(A-6420)

LEASES, RENTAL OF FOREIGN QUARTERS—FOREIGN SERVICE

Where the local foreign laws (Mexico) require that original lease contracts be executed in duplicate, one copy to be kept by the lessor and the other by the resident lessee for the purposes of inspection upon demand, and that insertion be made in the document of a clause stating the number of copies executed, objection will not be made to the execution of the lease in quadruplicate and the insertion in the document of a clause to this effect.

Comptoller General McCarl to the Secretary of State, January 31, 1925:

I am in receipt of a letter dated November 6, 1924, from David J. D. Myers, consul at Durango, Mexico, replying to request from this office made pursuant to section 3743, Revised Statutes, to furnish original copies of lease contracts executed for the occupancy of premises leased for the use of consular officers at Durango.

It is stated in the consul's letter and corroborated by the quotations of pertinent laws, that the laws of Mexico require that the original copy and a stamped duplicate of lease contracts be kept, one in the office of the consul, and the other by the lessor of the premises, so as to be available for exhibition to tax inspectors upon demand; and in order to be in a position to comply with the request from this office, he suggests executing future leases in quadruplicate, the two stamped copies to be kept, one by the lessor and the other by the consulate, the other two to be forwarded, one to the Department of State, and the other to this office.

The consul states, however, that article 228 of the Mexican "Ley del Timbre" (stamp tax law) requires a statement in the document as to the number of original copies executed of any lease contract and he suggests that a clause be inserted in future leases to the effect that the instrument is executed in quadruplicate and the revenue stamps affixed to the original and the stubs to the duplicate.

The consul alleges that article 228 of the Mexican "Ley del Timbre," copy of which article is submitted by him, provides in substance that when a document not of a public nature is executed in duplicate stub stamps shall be used attaching the principal part of the stamp to one copy and the stub to the other, reciting this fact in the document itself. The consul also represents that if additional copies are desired they shall be legalized as prescribed in article 165. This last article merely outlines the procedure in obtaining additional copies free from Federal tax, but it appears that the local State law provides that documentary copies to be of legal import and validity must be made on stamped paper of the State costing .50 pesos per sheet.

While article 228 of the "Ley del Timbre" provides in specific terms that the reason for using stub stamps and the reason for using one part of the stamp on each copy must be stated in the document,

this section does not appear to make it compulsory that the document should state the number of original copies. However, the matter of stating the reason for using stub stamps must of necessity be that of executing duplicate, triplicate, or quadruplicate copies, and it therefore follows that if the lease is executed in quadruplicate it should be so stated.

There appears to this office no objection to the consul inserting in future leases a clause such as suggested by him if the foreign law requires it. This procedure will enable the consul to file one of the original copies with this office pursuant to law.

(A–6958)

MILEAGE—NAVAL OFFICERS

An officer of the Navy ordered to make a change of station from Washington, D. C., to the Navy Yard, Puget Sound, Washington, under orders directing him to proceed to Hampton Roads, Virginia, thence by navy transport to San Francisco, California, and thence by land to destination, who pays his fare from Washington, D. C., to Hampton Roads and the Government transports him the remainder of the way, is only entitled to 5 cents a mile for the distance over the shortest usually traveled route between Washington, D. C., and Puget Sound, less the cost of transportation furnished by the Government for rail travel from San Francisco to Puget Sound.

Decision by Comptroller General McCarl, February 2, 1925:

Commander John S. Higgins (S. C.), United States Navy, has applied for review of settlement No. M–8502–N, dated June 26, 1924, wherein credit was disallowed in his accounts for $82.62, paid to himself as mileage, being mileage for the difference in distance between the shortest usually traveled route between Washington, D. C., and Puget Sound, Wash., and the route actually traveled, plus $8.03, the cost of transportation furnished by the Government from San Francisco, Calif., to Bremerton, Wash.

Under date of January 17, 1924, Commander Higgins was ordered as follows:

> 1. On 31 January, 1924, you will regard yourself detached from duty in the Bureau of Supplies and Accounts [Washington, D. C.], and from such other duty as may have been assigned you; will proceed to Hampton Roads, Va., and report to the Commandant, Fifth Naval District, and commanding officer of the U. S. S. CHAUMONT for passage.
>
> 2. Upon arrival at San Francisco, Calif., you will proceed and report to the Commandant, Navy Yard, Puget Sound, Wash., for duty as disbursing officer as the relief of Lieutenant E. W. Poore, S. C., U. S. N.
>
> * * * * * * *
>
> 7. The Secretary of the Navy has determined that this employment on shore duty is required by the public interests.

In accordance with orders the officer left Washington at 6.30 p. m., March 2, 1924, paying for transportation to Hampton Roads, Va., where he boarded the U. S. S. *Chaumont* for passage to San Francisco on March 3, 1924. Upon arrival at San Francisco, Calif., he

was furnished with a transportation request to Puget Sound, Wash., at a cost to the Government of $8.03. He arrived at the navy yard on March 28, 1924, and on April 2, 1924, he paid himself as follows:

Washington, D. C., to Hampton Roads, Va., 188 miles @ 8¢ per mile	$15.04
Hampton Roads, Va., to Puget Sound, Wash., via San Francisco, California, overland. 4193 miles at 5¢ per mile	209.65
	224.69

The question in this case was in principle decided in the case of *Moore* v. *United States*, 58 Ct. Cls. 475. Moore was an officer of the Army relieved from duty at the Presidio of Monterey, Calif., and ordered to the Navy Yard, Mare Island, to take passage on the U. S. S. *Henderson* for Hampton Roads and upon the arrival there to proceed to Washington, D. C., for duty in the office of the Chief of Cavalry. The court decided that mileage was payable only for the shortest usually traveled route from San Francisco, Calif., to Washington, D. C. The claim was for mileage under the Army mileage act of June 12, 1906, 34 Stat. 246, over the route actually traveled. The court said:

> The officer is entitled to mileage computed by the shortest usually traveled route with the deductions required by the statute. See *Hutchins case*, 27 C. Cls. 137; 151 U. S. 542; and 20 Comp. Dec. 741.

Section 12 of the act of June 10, 1922, 42 Stat. 631, provides:

> That officers of any of the services mentioned in the title of this act, when traveling under competent orders without troops, shall receive a mileage allowance at the rate of 8 cents per mile, distance to be computed by the shortest usually traveled route and existing laws providing for the issue of transportation requests to officers of the Army traveling under competent orders, and for deduction to be made from mileage accounts when transportation is furnished by the United States, are hereby made applicable to all the services mentioned in the title of this act * * *.

This provision repealed prior laws authorizing and governing the payment of mileage to officers of the Navy, and in effect substituted therefor the conditions previously prescribed for the payment of mileage to officers of the Army by the act of June 12, 1906, 34 Stat. 246. It expressly provides that an officer's mileage is to be computed by the shortest usually traveled route.

The specific duty enjoined by the orders of January 17, 1924, was duty as disbursing officer at the navy yard, Puget Sound, Wash., and the performance of that duty is the only necessity shown in the order for the travel. The direction that the officer go via San Francisco was but incident to the fact that transportation from the east to the west coast was to be made by transport and that San Francisco was the terminus of the transport route. No actual duty was to be performed at San Francisco, and mileage was payable only on the basis of such travel as was actually necessary to the performance of the specific duty enjoined by the orders as "required by the public interests."

The shortest usually traveled route between Washington, D. C., and the navy yard, Puget Sound, Wash., as shown by the official Table of Distances, involves 3,002 miles.

Transportation was furnished by the Government by transport from Hampton Roads to San Francisco, and from San Francisco to Puget Sound by rail on transportation requests at a cost to the Government of $8.03. In the Moore case the Court of Claims negatived allowance of mileage for necessary travel between port of arrival and station to which ordered, denying mileage or any other form of reimbursement for necessary travel between Norfolk and Washington, determining that the officer was "entitled to mileage computed by the shortest usually traveled route with the deductions required by the statute." In this case the officer not having been entitled to mileage, or transportation at the expense of the Government, San Francisco to Puget Sound, the cost to the Government of the transportation furnished is properly chargeable to the officer under the principle announced. 3 Comp. Gen. 788. Commander Higgins paid himself $224.69, an overpayment of $82.62.

Upon review the settlement is sustained.

(A-7149)

APPROPRIATIONS—CONDEMNATION PROCEEDINGS—COURT COSTS—INTEREST

Costs covering attorneys' fees and witnesses' fees incurred by a defendant in perfecting an appeal in condemnation proceedings instituted by the United States in the State of Iowa may be assessed by the court as a part of the award, and when so assessed are payable from the same appropriation as the portion of the award covering the value of the land.

The payment of interest on a judgment against the United States is not authorized when there is an available appropriation for the payment of such judgments when rendered.

Comptroller General McCarl to the Secretary of War, February 3, 1925:

I have your letter of December 22, 1924 [file 6502 (Le Claire Rapids Canal locks) 1], as follows:

On September 3, 1919, proceedings were instituted in the United States District Court for the Southern District of Iowa to condemn, among others, a parcel of 2.01 acres of land belonging to one James P. Pearson, which land was required by the Government for the construction and operation of the Le Claire Canal, a part of the improvement of the Mississippi River.

Following the State practice in condemnation causes, commissioners were appointed to assess the damages that the owners of the land would sustain by reason of the taking of the same by the United States, and these commissioners made a written report to the court, finding that the said Pearson would sustain a damage of $1,500. From this report Pearson perfected an appeal, and the issues involved were tried by a jury, which, by a verdict rendered October 8, 1920, fixed the compensation due him for the 2.01 acres of land at $1,900. On June 2, 1921, the court entered a decree of condemnation which provided that upon deposit by the United States into the registry of the court of the sum of $1,900, the amount awarded by the jury, the said Pearson shall be divested of all right, title, and interest in and to the land embraced in the suit, and that the fee simple to the same shall thereupon vest in the United States free and clear of all encumbrances.

In accordance with this decree the United States, on July 13, 1921, paid into the registry of the court the sum of $1,900 and took possession of the parcel of land. There is a provision at the end of the decree that the same "is without prejudice to the question of costs and attorney's fees." It seems that this provision was added for the reason that counsel for the Government, under instructions from the Department of Justice, had objected to an order entered by the court taxing defendant's costs and attorney's fees against the United States, and had moved for a rehearing on this question. The decree as placed permitted the Government to secure possession of the property, leaving the question of the defendant's right to costs and attorney's fees for further consideration.

It appears that the Government's contention regarding the taxing of defendant's costs and attorney's fees against the United States was overruled, and on October 6, 1921, the court rendered judgment in favor of James P. Pearson and against the United States for the sum of $275 attorney's fees, and for the further sum of $9.40 covering witness fees and mileage. This judgment was brought to the attention of this department by the Department of Justice, but no action looking to its payment was taken. It was not clear that the judgment was payable from War Department appropriations, and besides, the taxing of defendant's counsel fees against the United States as a part of the costs of the suit seemed a judicial error. That the Government should be required to pay the fees of counsel employed by a private party to prosecute an appeal against it in a condemnation suit appeared to be an unusual proposition and, so far as known, without precedent.

I am now in receipt of a petition from the attorneys for Pearson asking that this judgment be paid. I transmit the petition, together with pertinent papers, to you, and shall be pleased if you will advise me whether the judgment is a proper charge against the appropriation for the work for which the land condemned was needed; and if so, whether I am authorized to pay it or settlement will be made in the General Accounting Office.

The act of April 24, 1888, 25 Stat. 94, authorized the Secretary of War to acquire land by condemnation proceedings for river and harbor projects, "such proceedings to be prosecuted in accordance with the laws relating to suits for the condemnation of property of the States wherein the proceedings may be instituted." It appears from the record that pursuant to the authority of the above cited act, condemnation proceedings were instituted under the laws of the State of Iowa against various owners of parcels of land involved in this project and that, in the case of the tract involved in the present claim for costs, on June 2, 1921, the court rendered judgment for $1,900 in favor of the owner, the decree containing, however, the following: "This decree is without prejudice to the question of costs and attorney's fees in this cause." The $1,900 was duly deposited in the registry of the court July 13, 1921.

On October 6, 1921, a supplemental decree was issued by the court assessing against the United States and in favor of James P. Pearson, additional sums of $275, attorney's fees, and $9.40, fees and mileage to certain witnesses. The assessment of the costs of the appeal by the defendant appears to have been made pursuant to section 2007, chapter 4, title 10, of the Statutes of Iowa, which is as follows:

Costs: The corporation shall pay all the costs of the assessments made by the commissioners and those occasioned by the appeal, including reasonable attorney fees to be taxed by the court, unless on the trial thereof the same or a less amount of damage is awarded than was allowed by the commissioners.

While the chapter of which the above section forms a part relates principally to condemnation proceedings by railroads and like corporations, its provisions are made applicable to condemnation proceedings by the United States by section 2024–c as follows:

United States may purchase or condemn. That where the United States of America has undertaken or may hereafter undertake to improve any river, stream, or water course, forming a part of the boundary line of this State, or within the State, or to utilize any river, stream, or water course, for any purpose, deemed advisable, the said United States may purchase or condemn land and private property in accordance with the provisions of chapter 4, title 10, of the Code, for taking private property.

The award by the commissioners in this case was $1,500, or $400 less than the amount allowed by the court on appeal. The attorney's fees and costs of the appeal appear to be payable under the cited sections of the Iowa laws, which laws are required to be followed in condemnation proceedings for river and harbor projects in that State by the act of April 24, 1888, *supra*. See *United States* v. *Engenean et al.*, 46 Fed. Rep. 898. The costs so decreed are payable to the owner of the land and constitute a part of the total compensation or cost to the United States of acquiring the tract in question, and are accordingly payable from the same appropriation as the amount representing the value of the land allowed in the original decree.

The petition of claimant for the payment of the costs awarded by the court also prays for the payment of interest thereon at 4 per cent "as provided by law." He fails, however, to cite the law relied upon as providing for the payment of interest, and there appears to be no Federal statute authorizing the payment of interest in such cases where there is an available appropriation from which the amount of the judgment was payable. In the present case, the assessed costs are payable from the same appropriation as that available for the net award for the land, river and harbor appropriations being without fiscal year limitation—see act of March 3, 1919, 40 Stat. 1309. Payment for the land was made before the supplemental decree for costs issued and any delay in the payment of the costs was not due to lack of an appropriation but failure of the claimant to present the claim to the proper office for payment.

Payment of the costs aggregating $284.40, without interest, may accordingly be made through a disbursing officer of the War Department from the same appropriation and in the same manner as payment for the land.

(A-7346)

LEAVE OF ABSENCE—EMPLOYEES OF NAVAL STATIONS IN THE PHILIPPINE ISLANDS

Leave of absence with pay, under the provisions of the act of August 29, 1916, 39 Stat. 617, may not be granted to employees of the naval stations at Cavite and Olongapo, Philippine Islands, unless they are employed under authorization of the Civil Service Commission, and their appointments or contracts of employment do not designate the period of employment, and the character of the work for which engaged is of a permanent nature as distinguished from employment for a particular job or piece of work.

Comptroller General McCarl to the Secretary of the Navy, February 3, 1925:

I have your letter of January 8, 1925, requesting decision whether leave of absence with pay under the provisions of the act of August 29, 1916, 39 Stat. 617, may be granted to employees of the naval stations at Cavite and Olongapo, P. I., who are termed "temporary employees" for the reason that they are employed without regard to the civil service laws and regulations.

You state in part as follows:

> At Cavite and Olongapo, P. I., there are a number of employees at the naval station who have been employed locally by the commandant in the ratings of clerk, draftsman, stockman, etc., without examination by the United States Civil Service Commission owing to the nonexistence of any representative of that commission in the Philippine Islands, and, generally speaking, the lack of eligible lists maintained by the Philippine Islands Civil Service Bureau for the United States Civil Service Commission for such vacancies as existed at the naval station in the foregoing ratings.
>
> It has been found impracticable to enforce civil-service rules at these stations through the Civil Service Commission owing to being approximately twelve thousand miles distant, and as the population is composed, with a few exceptions, of Filipinos, Asiatics, and a floating white population of various nationalities.
>
> For many years these employees have been termed "temporary employees," in view of not having permanent appointments from the Civil Service Commission, but as this temporary employment does not come within the definition of such employment as quoted from the comptroller's letter on the subject in a preceding paragraph, the department requests a confirmation of the present practice wherein, for leave purposes, these employees are considered permanent employees and entitled to the benefits of the leave law for the field service. * * *

This office has held that temporary employees are not entitled to leave of absence with pay. 3 Comp. Gen. 382; 4 *id.* 17; decision of December 3, 1924, 4 Comp. Gen. 511; decision of December 20, 1924, 4 Comp. Gen. 552; and decision of December 31, 1924, 4 Comp. Gen. 575.

In decision you cite, 4 Comp. Gen. 17, 19, it was stated:

> The first four questions submitted relate to leave of absence of temporary employees. As stated in the decision cited, 3 Comp. Gen. 382, a prolonged leave of absence with pay is inconsistent with temporary employment. The granting of leave after 12 months' service stipulated by the statute shows it had relation to employees having some permanency of tenure. A temporary employment implies a certainty of ending the employment, and it is assumed that in the temporary employments referred to the appointments designate the period of employment and are renewed from time to time, so that the employment has a fixed time for ending, although it may be renewed. This

then must be the condition of employment when a question of leave arises—that under the current appointment the employment will end at a certain date unless renewed. There appears under such conditions no right to grant leave of absence with pay. It is understood that the temporary employment is either because the employee can not qualify as a regular employee or the work conditions are such that employment as a regular employee would not be authorized.

In decision of December 20, 1924, addressed to the president Board of Commissioners, District of Columbia, it was held:

Whether an employee is a permanent or temporary employee is not for determination solely on the length of time the employee may happen to serve, but other conditions are for consideration, such as the character of the appointment, purposes for which employed, and particularly the express terms of the appropriation under which the employees are paid.

That decision dealt particularly with employees paid from appropriations expressly and exclusively available for temporary personal services. There is involved in the present case no question of appropriation. See appropriation for fiscal year 1925, act of May 28, 1924, 43 Stat. 97.

Temporary appointments or employments under the Civil Service rules and regulations are always for a definite period of time. See Rule VIII of the Civil Service rules and regulations. Persons serving under such appointments or employments clearly are not entitled to leave of absence with pay. You indicate, however, that the employees in the present case at Cavite and Olongapo, P. I., are employed without regard to the Civil Service rules and regulations. If the Navy Department has been authorized by the United States Civil Service Commission to employ permanent employees at those naval stations without qualification under the Civil Service rules and regulations, the necessity for designating them " temporary employees " is not apparent. If, as a matter of fact, such authority by the Civil Service Commission has been granted, and the appointments or contracts of employment do not designate the period of employment, and the character of work for which engaged is of a permanent nature as distinguished from employment for a particular job or piece of work, the completion of which will terminate the employment, applying the rules laid down in the previous decisions of this office, you are advised that the employees may be classed as permanent and entitled to leave of absence with pay under the act of August 29, 1916, 39 Stat. 617. On the other hand, in the absence of such authorization by the Civil Service Commission and conditions showing permanency of the tenure of employment, the employees would not be entitled to leave of absence with pay under the controlling statute.

(A-4007)

SALE OF LAND SUBJECT TO LEASE AGREEMENT

Where Indian school land, leased to a tenant for a term of one year at a rental payable in advance, was sold by the United States to a purchaser who had knowledge of the existence of the lease, such purchaser is not entitled to a proportionate part of the rent already received by the United States, in the absence of a stipulation in the contract of sale for the adjustment of the rent as of date of sale, and any statement made by an officer of the United States after the date of such sale that a pro rata adjustment would be made is not binding on the United States.

Decision by Comptroller General McCarl, February 4, 1925:

John E. Sullivan requested, June 2, 1924, review of settlement No. C-14671, dated March 25, 1924, disallowing his claim for a proportionate part of the rent due to and received by the Government from the tenant prior to the consummation of the purchase of the land by the claimant.

The land was farm land belonging to the Kickapoo Indian School and was leased to one, Schuetz, for a term of one year, ending February 28, 1923, the rent being payable in advance, in cash, on March 1 and September 1, 1922. The terms and conditions of the sale were duly published from June 8 to August 1, 1922, and claimant's bid was accepted, subject to approval by the Secretary of the Interior. The purchase price having been paid in full, the bid was thereafter approved by the Secretary on November 14, 1922, and patent issued to claimant on January 29, 1923. The rent, as was required by the lease, was paid to the United States by the tenant in advance for the period September 1, 1922, to February 28, 1923, and the claimant is contending for payment to him of such rent for the period subsequent to the approval of his bid by the Secretary of the Interior, November 14, 1922, to February 28, 1923.

In view of the existing lease, of which the purchaser had knowledge, the sale occurred in the light of the terms thereof, and in the absence of a stipulation in the published notice of terms and conditions of the sale that rent accruing to the United States thereunder would be adjusted as of the date of sale, or some other stated date, it must be assumed the bids were made accordingly and that a larger bid might and doubtless would have been received had the terms of sale contained a provision for division of such rent. There was no stipulation that the rent would be adjusted with the purchaser as of the date of sale, or otherwise, and in the absence thereof, aside from any question of being Indian lands, the accrued rent was properly paid to and received by the United States pursuant to the terms of the lease, and may not be apportioned to the purchaser as claimed. See decision of January 21, 1925, 4 Comp. Gen. 622.

With reference to claimant's contention that the superintendent of schools conducting the sale had stated at the time that the rent

would be adjusted, an examination of the letters submitted by the claimant in support of this contention does not show that the superintendent had so stated at the sale but discloses that he had subsequently expressed it as his opinion that claimant was entitled to the pro rata share of the rental on the land purchased. Such opinion of the superintendent can have no bearing on the matter.

The disallowance of the claim must be and is affirmed.

(A-6242)

TRANSPORTATION OF DEPENDENTS—MARINE CORPS OFFICER ORDERED TO HOSPITAL

Where an officer of the Marine Corps is detached from duty at a foreign station and ordered to the United States for treatment in a naval hospital, such permanent detachment and order to the hospital may be treated as a permanent change of station so as to entitle the officer, under the act of May 18, 1920, 41 Stat. 604, to transportation of his dependents from the foreign station to the United States. The rule is otherwise if the officer is on duty at a station within the continental limits of the United States when ordered to a hospital for treatment.

Comptroller General McCarl to Maj. Charles R. Sanderson, United States Marine Corps, February 4, 1925:

There has been received your letter of November 10, 1924, requesting decision whether you are authorized to pay voucher in favor of Capt. Charles D. Sniffin, United States Marine Corps, $10.02, reimbursement of cost of transportation of his dependent (wife) from New York, N. Y., to Washington, D. C., under his orders of October 15, 1924, as follows:

Reference: (a) Board of Medical Survey, dated October 13, 1924.

1. In accordance with the recommendation contained in the above reference, upon the sailing of the steamship *Iroquois* from Monte Cristi, D. R., October 18, 1924, you will stand detached from your present station and duties and proceed to the United States via that vessel. Upon arrival in the United States you will proceed to Washington, D. C., where you will report to the commanding officer, U. S. Naval Hospital, for treatment.

2. The regimental quartermaster, Second Regiment, U. S. Marine Corps, Cape Haitien, Haiti, will furnish the necessary transportation for you and your dependents to the United States on the Clyde Line steamship *Iroquois*.

3. The travel herein enjoined is necessary in the public service.

The act of May 18, 1920, 41 Stat. 604, authorized transportation for the dependents of officers "when * * * ordered to make a permanent change of station," and it has been held that an order to proceed to a hospital for treatment is not a permanent change of station. Clearly this is correct where there is no detachment from his duty station and where after treatment, whether of limited or extended duration, the officer will return and resume his duties. There is no reason in such case for the travel of his dependents at the expense of the United States. And even in cases of detachment, where the station is in the United States and the officer is ordered to a hospital for treatment, the basic general rule must be that there

is not such a change of station as to justify transportation of the dependents, as they may ordinarily remain at his former station, so far as transportation at the expense of the United States is concerned, until the officer is discharged from hospital and assigned a new station, illness necessitating treatment in the hospital being in nearly all cases relatively temporary.

The situation is somewhat different where the officer is on foreign station and is detached from such foreign station with direction to proceed to the United States for treatment. In such cases there are objections to leaving family or dependents at the foreign station until the officer is assigned a new station on recovery and discharge from hospital, and although the reasons are largely personal, it may be said broadly that anywhere in the United States may be the home of the officer, but not equally so in connection with a station in a foreign country, and *prima facie* the family or dependents are entitled to be brought back to the United States.

If therefore, in such a situation the officer on detachment from a foreign station is ordered to the United States for treatment in a naval hospital, his permanent detachment and order to the hospital will be treated as a permanent change of station so that the officer may not lose his right under the act of May 18, 1920, in bringing his dependents from such foreign station. This holding will not, however, change existing decisions that admission to a hospital for treatment, whether or not detached from his station, does not operate as a permanent change of station entitling dependents to transportation when the officer is stationed within the continental limits of the United States. If otherwise correct, payment may be made accordingly. See in this connection 25 Comp. Dec. 653, and 3 Comp. Gen. 400.

(A-6655)

BURIAL EXPENSES OF WAR VETERANS—EVIDENCE OF INDIGENCY

The mere notation on the voucher of the word "Indigent" is not sufficient evidence to authorize direct settlement or credit in disbursing officers' accounts of claims, under the act of June 7, 1924, 43 Stat. 617, for burial expenses of discharged veterans of any war. There must be furnished with these claims a certificate by the proper officer of the Veterans' Bureau setting forth the facts on which the finding of indigency was predicated, such as the legal domicile of the deceased, the amount of real or personal estate, if any, and from what derived, the amount of life insurance, if any, whether the deceased held membership in any order, company, association, or organization obligated to assume or pay for burial expenses of the veteran, and whether the payment of burial expenses was the legal obligation of any person or persons.

Comptroller General McCarl to the Director, United States Veterans' Bureau, February 5, 1925:

There is before this office for consideration the sufficiency of evidence as to indigency to support payments of burial expenses of

veterans, involving pending claims submitted to this office for direct settlement, and items suspended in the accounts of the disbursing officer of the Veterans' Bureau.

The only information given is the word "indigent" on the vouchers certified and approved by an officer of the Veterans' Bureau, submitted with the claim for direct settlement, or appearing in the accounts of the disbursing officer. The claims for burial expenses are authorized in the act of June 7, 1924, 43 Stat. 617, as follows:

(1) If death occur or shall have occurred subsequent to April 6, 1917, and before discharge or resignation from the service, the United States shall pay for burial expenses and the return of body to his home a sum not to exceed $100, as may be fixed by regulation. Where a veteran of any war dies after discharge or resignation from the service and does not leave sufficient assets to meet the expenses of his burial and the transportation of his body, and such expenses are not otherwise provided for, the United States Veterans' Bureau shall pay the following sums: For a flag to drape the casket, and after burial to be given to the next of kin of the deceased, a sum not exceeding $5; also for burial expenses, a sum not exceeding $100, to such person or persons as may be fixed by regulations: *Provided*, That when such person dies while receiving from the bureau compensation or vocational training, the above benefits shall be payable without reference to the indigency of the deceased: *Provided further*, That where such person, while receiving from the bureau medical, surgical, or hospital treatment or vocational training, dies away from home and at the place to which he was ordered by the bureau, or while traveling under orders of the bureau, the above benefits shall be payable without reference to the indigency of the deceased and in addition thereto the actual and necessary cost of the transportation of the body of the person (including preparation of the body) to the place of burial, within the continental limits of the United States, and including also, in the discretion of the director, the actual and necessary cost of transportation of an attendant: *And provided further*, That no accrued pension or compensation due at the time of death shall be deducted from the sum allowed.

This statute is an amendment of the provisions of the act of March 4, 1923, 42 Stat. 1523, which was considered in decision of January 9, 1924, 3 Comp. Gen. 404. Stating the quoted provision of law now in force conversely, the indigency of the deceased—and that the burial expenses had not otherwise been provided for—must be shown if the deceased was at time of death a discharged veteran of any war not in receipt from the bureau of disability compensation or vocational training or not in receipt of medical, hospital, or surgical treatment away from home or traveling incident thereto.

The mere notation on the voucher of the word "indigent" is not sufficient evidence to authorize direct settlement or credit in disbursing officer's accounts by this office. Sufficient evidence must be disclosed in the form of a certificate by the proper officer of the Veterans' Bureau, to accompany the vouchers and receipted bills as now required, to show either that the veteran is of the class for which the statute provides the allowance for burial expenses without showing of indigency, or to report the facts upon which the finding of indigency is predicated. The certificate stating the facts upon which the finding of indigency is predicated, or following the requirements of the statute more closely, to show insufficiency of assets to

pay for the burial expenses, and that the burial expenses are not otherwise provided for, should include such items as the legal domicile of the deceased, amount of real or personal estate, if any, and from what derived, amount of life insurance, if any, whether the deceased held membership in any order, company, association, or organization obligated to assume or pay for burial expenses of the veteran, and whether the payment of burial expenses was the legal obligation of any person or persons.

In claims now pending before this office for direct settlement or submitted prior to the date of this decision, and in accounts of disbursing officers for the current quarter such evidence as may now be in the Veterans' Bureau on the basis of which presumably there was made a finding of indigency and the notation of "indigent" was placed upon the voucher, should either be transmitted to this office or extracts therefrom be made duly certified and transmitted, so that action may be taken accordingly.

It is to be understood that the requirements herein mentioned are necessary, primarily that it may appear from facts upon the record there was a claim proper for consideration under the statutory provisions relating to indigency payments. A mere notation of indigency furnishes nothing to show a lawful claim.

(A–7208)

WAR RISK INSURANCE

In this decision various questions are decided as to the status of policies for insurance issued under the war risk insurance act, as amended, and the World War veterans' act of June 7, 1924, 43 Stat. 625, relative to lapse, reinstatement, and the refund of premiums. For points involved see decision.

Comptroller General McCarl to the Director, United States Veterans' Bureau, February 5, 1925:

I have your letter of December 27, 1924, submitting a statement of facts in the cases of Wallace V. Green and John T. Bittle, with request for decision of several questions involved therein as follows:

Wallace V. Green was granted $5,000 term insurance, effective June 7, 1921, when he registered an allotment to cover his premiums to expire June, 1923. The Navy allotment office has reported that the allotment was not renewed but that subsequent premiums for twelve months were deducted. On May 12, 1924, Green applied for the conversion of $1,000 of insurance, stating that the premiums on the term insurance had been paid to include May, 1924, and executing a new allotment of his pay to cover premiums effective June 1, 1924. Being of the opinion that this action on the part of the insured constituted an acknowledgment and ratification by him of the premium deductions made by the Navy after the expiration of the first allotment, the bureau issued the converted policy without a formal reinstatement of the term insurance and took steps to secure from the Navy credit for the premiums for the period from June, 1923, to May, 1924. At the suggestion of the Navy Department, the bureau's claim was filed through the General Accounting Office, but the claim was denied September 15, 1924. (Claim 044 233 ALJ–806.)

It is to be noted that in this case the term insurance was converted without formal reinstatement on the assumption that the insured's acquiescence in the deduction of premiums from his pay really kept it in force so that no reinstatement was necessary. Your decision in the Carberry case, however, seems not altogether consistent with this view.

The other case is that of John T. Bittle, who entered the service August 25, 1922, and applied for insurance September 6, 1922. His application bore the notation:

"Allotment for $1.28 for 21 months to pay for premiums registered at naval training station at San Francisco, California, effective September, 1922."

This allotment was not accomplished prior to the sailor's transfer through no fault of his. He subsequently executed a new application dated December 24, 1922, which was after the expiration of the 120 days allowed for applying for insurance, and also executed an allotment to cover the premiums beginning with the month of January, 1923. The premiums were deducted under this allotment to include the month of September, 1923. The bureau has held that the second application was invalid as an original application for insurance. It has further been held that the first application was valid notwithstanding the failure of the insured to execute an allotment, but that the insurance lapsed at the end of 31 days. This is in accordance with the precedents of this bureau of long standing and believed to be correct.

The questions presented are typical of those arising in quite a number of other cases and this bureau has on hand a considerable amount of money that has been deducted from the pay of soldiers and sailors for insurance premiums under conditions similar to those set forth above. Where these premiums have been turned over to the bureau by the Army or Navy the question is simply whether or not the insurance is in force, and if not, whether the bureau must make a refund of the premiums to the insured. Where the premiums have not been turned over to the bureau by the Army or Navy the question is whether the insurance was in force, and if so, whether the Army or Navy must account to the bureau for the premiums.

There is also the question as to what effect, if any, sections 411 of the War Risk Insurance Act and 307 of the World War Veterans' Act, relating to incontestability, have on either or both of these cases.

Specifically, the questions the bureau desires to have answered are as follows:

In the Green case—

(1) Did the insurance lapse after the expiration of the first allotment, notwithstanding that the premiums were deducted from the insured's pay with his acquiescence and subsequent ratification? The fact that section 4065 of the Regulations, stipulating the circumstances under which the insurance shall lapse, contains the words "unless the insured * * * otherwise makes payment of said premiums * * *" would seem to raise some doubt on this point.

(2) Assuming the insurance to have lapsed, can the converted policy issued without formal reinstatement of the term insurance be held to have been valid when issued?

(3) If the answer to the preceding question is in the negative, did the converted policy so issued become incontestable at the expiration of six months after it was issued, full premiums having been paid thereon during that period?

(4) In case you hold that the converted policy is invalid, is this bureau authorized to refund to the insured the premiums which it received under the second allotment?

(5) In case you hold, either that the term insurance did not lapse after expiration of the first allotment, or that the converted policy was valid when issued, or that it became incontestable at the expiration of six months, is this bureau entitled to credit from the Navy Department for the premiums deducted for the period from June, 1923, to May, 1924, during which time no allotment was in force?

In the Bittle case there can be no doubt, of course, that the insurance lapsed prior to the filing of the second application. Therefore the only questions presented are the following:

(1) Did the execution of the second application for insurance, taken in connection with the execution of the allotment effective January 1, 1923, and the deduction of premiums thereunder for more than six months, constitute such a reinstatement of the insurance as would, though informal, ripen into incontestability under sections 411 of the War Risk Insurance Act and 307 of the World War Veterans' Act, 1924?

(2) Assuming that the above question must be answered in the negative, is this bureau authorized to refund to the insured the premiums with which it has been credited by the Navy Department, the same having been deducted from the pay of the insured for the period from January, 1923, to September, 1923?

The bureau regulations relative to reinstatement of lapsed or canceled insurance while the insured is still in the military or naval service are to be found in U. S. Veterans' Bureau Regulations, 1923, section 4085 *et seq.*

The answers to the questions submitted are as follows:

In the Green case:

(1) This question is answered in the affirmative. See section 4065, Regulations, United States Veterans' Bureau, 1923, construed in decisions of July 10, 1924, 4 Comp. Gen. 36, and August 5, 1924, 4 Comp. Gen. 155. In the last-cited case it was held:

* * * In the absence of affirmative action by the enlisted man authorizing the application of the amount deducted from his pay as insurance premiums there exists no proper basis for a settlement by this office in favor of the Veterans' Bureau of the amount deducted. The payment of insurance premiums is a matter of contract between the Veterans' Bureau and the insured and necessitates an authorization by the enlisted man before any amount deducted from the pay of the enlisted man may be applied as premiums.

(2) Sections 408 and 409 of the war risk insurance act, March 4, 1923, 42 Stat. 1525, and sections 304, 305, and 306 of the World War veterans' act, June 7, 1924, 43 Stat. 625, provide the exceptions to the requirement that insurance premiums must be paid to keep alive insurance policies, and it is understood that these cases do not fall within any of these exceptions. The term insurance of Green lapsed August 1, 1923, the expiration of the grace period from June 30, 1923, termination of the allotment made by him for insurance premiums. The validity of his converted policy depends on the right of the insured to have his term insurance reinstated under the controlling regulations of the Veterans' Bureau. That is to say, if he had a right under the regulations to reinstatement of the term insurance on May 12, 1924, when making application for conversion of $1,000 of insurance, the administrative error in failing to formally reinstate the term insurance for the purpose of conversion will not be held to render invalid the policy of converted insurance issued to him. If, however, he had no right to reinstatement of his term insurance under the regulations of the bureau, the policy of converted insurance based thereon is invalid. The regulations controlling reinstatement and conversion of term insurance while the insured is in the active service contain certain conditions which must be met by the insured. The facts submitted are not sufficiently stated to justify application of the regulations by this office.

(3) In decision of May 29, 1924, 3 Comp. Gen. 906, construing section 411, act of August 9, 1921, 42 Stat. 157, as amended by the act of March 4, 1923, 42 Stat. 1527, reenacted as section 307 of the

World War veterans' act, June 7, 1924, 43 Stat. 627, providing that policies of insurance shall be incontestable after having been in force six months from the date of issuance or reinstatement, with certain exceptions, it was held as follows:

> The policy of insurance can have no greater meaning nor impose a greater liability upon the United States than that which is provided by the statute. I would understand the provision of the statute with reference to incontestability after six months to mean incontestable with respect to those matters which usually are so incontestable in life insurance—health condition, family conditions, relationship, etc.; that is to say, whether the insured appears a proper insurable subject. It has relation to what might be classed "defects" in the subject of insurance rather than defects in the authority to contract.

Thus in this case if it be determined that because Green was not entitled to reinstatement of his term insurance under the regulations of the Veterans' Bureau, which have the force and effect of law, there was no authority to enter into a contract of converted insurance, the policy issued contrary to the law and regulations and the incontestability provision would have no application to it.

(4) The refund of premiums covering period for which no insurance protection is given is authorized. Accordingly, if under the regulations of the bureau the reinstatement of the term policy was not authorized refund of premiums collected subsequent to the lapsing thereof may be made.

(5) The right of the bureau to credit for premiums deducted from the pay of Green during period from June, 1923, to May, 1924, would depend on whether the insured was entitled to reinstatement of his term insurance under the regulations which required as a condition of such reinstatement payment of back premiums. If so, the insured should be required as a condition of the validating of present insurance to authorize affirmatively the application of the amount deducted from his pay to the payment of such back premiums.

In the Bittle case:

(1) The facts in this case are not entirely clear, but it is understood that the enlisted man, although making application for insurance within the specified period of 120 days after entrance into the service, failed to follow it up with the execution of a proper allotment of his pay or to otherwise provide for the payment of the insurance premiums, the policy having lapsed after 31 days. On that basis the question is answered in the negative. See 3 Comp. Gen. 905, and answer to question (3) in the Green case herein. If, on December 24, 1922, the applicant for insurance had a status entitling him under the regulations of the bureau to reinstatement of the insurance that had lapsed at the expiration of the 31-day period, the second application for insurance should be so considered. Answer to question 2 in the Green case.

(2) The insurance premiums may be either credited to, or refunded to, the applicant for insurance, depending on the right to reinstatement.

(A-7863)

ARMY PAY—LONGEVITY

The act of July 9, 1918, 40 Stat. 875, authorizing the crediting of State service in the Organized Militia or National Guard for longevity pay purposes in the case of officers of the Army, other than the Regular Army, who entered the service otherwise than through draft, is not retroactive in its application, and an officer in the Medical Officers' Reserve Corps of the Army who is within its provisions is entitled to count such prior State service, in computing his longevity pay, for active duty service rendered on and after July 9, 1918, only.

Decision by Comptroller General McCarl, February 5, 1925:

Dr. John B. Steele has requested reconsideration of decision of August 18, 1922, wherein was sustained settlement No. W-825425, dated June 30, 1922, disallowing his claim for longevity pay while serving as a commissioned officer in the Medical Officers' Reserve Corps.

The claim was based on prior State service in the Tennessee and Alabama National Guard, and it was disallowed for the reason that service in the Alabama National Guard was not properly authenticated. The Adjutant General of the State of Alabama and the officers commanding Company F of the Alabama National Guard have, however, furnished certificates sufficient to show his service as an enlisted man, Medical Department, Company F, Third Alabama Infantry, during the period from July, 1902, to July, 1905 "three years' continuous service." Service also had been shown as assistant surgeon of Battery A, Light Artillery, Tennessee National Guard, during the period from April 8, 1906, to October 15, 1907, one year, six months and seven days, a total prior State service of four years, six months and seven days. Claimant entered upon active service in the Medical Officers' Reserve Corps May 29, 1917, and served continuously thereafter until discharged July 8, 1919, at Jefferson Barracks, Mo. Counting such prior State service he completed five years of service November 21, 1917, but officers during the World War who entered the service otherwise than through draft with National Guard organizations under section 111 of the act of June 3, 1916, 39 Stat. 211, were not entitled to count their prior State service in the Organized Militia or National Guard for longevity pay purposes until the passage of the act of July 9, 1918, 40 Stat. 875, which act was prospective only in its operation. 25 Comp. Dec. 199. Officers of the Officers' Reserve Corps placed on active duty prior to July 9, 1918, were not therefore prior to that date entitled to count such service for longevity increase of pay.

An examination of the original pay vouchers on file in this office shows that claimant has been paid only the base pay authorized for the ranks held by him, plus 10 per cent thereon for foreign service, during the period from August 24, 1918, to June 27, 1919. He is accordingly entitled to the difference between the pay received by him and pay with over five years' service as follows:

Period	Rank	Monthly pay received	Monthly pay due	Monthly difference	Total difference due
July 9, 1918, to Aug. 23, 1918	Major	$250.00	$275.00	$25.00	$37.50
Aug. 24, 1918, to Mar. 20, 1919	do	275.00	302.50	27.50	189.75
Mar. 21, 1919, to June 27, 1919	Lieutenant colonel	320.83	352.91	32.08	103.73
June 28, 1919, to July 8, 1919	do	291.67	320.83	29.16	10.69
Total difference due claimant					341.67

The settlement is accordingly modified and $341.67 is certified due claimant.

(A-6262)

RENTAL ALLOWANCE—OFFICERS OF THE NATIONAL GUARD

Under section 6 of the act of June 10, 1922, 42 Stat. 628, as amended by section 2 of the act of May 31, 1924, 43 Stat. 250, and the Executive order of August 13, 1924, pursuant thereto, officers of the National Guard are entitled to rental allowance while in attendance at service schools under section 99 of the act of June 3, 1916, as amended by the act of September 22, 1922, 42 Stat. 1035, for periods of three months or less, or for periods in excess of the fixed three months to cover minor variations. 4 Comp. Gen. 571, modified.

Comptroller General McCarl to the Secretary of War, February 6, 1925:

There has been received your letter of January 15, 1925, asking for reconsideration of decision of December 27, 1924, 4 Comp. Gen. 571, in which it was held that, quoting the syllabus:

* * * officers of the National Guard attending encampments under section 94, or camps of instruction under section 97, of the National Defense Act, 39 Stat. 206 and 207, for periods of 30 days or less, or attending service schools for periods of three months or less under section 99 of the National Defense Act, 42 Stat. 1035, are, under section 6 of the act of June 10, 1922, as amended by section 2 of the act of May 31, 1924, 43 Stat. 250, and the Executive order of August 13, 1924, pursuant thereto, entitled to rental allowance, the station assigned for the training period not being a permanent station.

Your letter states that while the three months' limitation placed on courses at service schools under section 99 would be adequate in a majority of cases, several of these courses exceed that period, the flying course at Brooks Field, Texas, being for a period of four months, the course at the Command and General Staff School, Fort Leavenworth, Kans., being for a period of three months and ten days, and in some other courses the three months' period is exceeded by several days.

The basic condition must be attendance at a military service school to pursue a regular course of study as authorized by section 99, 42 Stat. 1035. The enactment does not limit the period of the study and obviously this is dependent to some extent upon the course of study. The decision of December 27, 1924, called attention thereto and that for the purposes of the decision which concerned rental allowance it will be understood orders to such active duty under section 99 will fix a period not in excess of three months. This must be the general rule, but there may be the exceptional case of minor variation from the period of three months by reason of the length of the course of the particular school and where that is stated in the order, the service may be considered as temporary duty within the decision in question. The instances given in the submission of four months, three months and ten days and also several days in excess of three months are understood as representing the maximum of variation from three months and action will be governed accordingly.

(A–7360)

FEES OF UNITED STATES COMMISSIONERS—WARRANTS OF ARREST

In cases involving joint offenses committed by joint offenders under the national prohibition act, a United States commissioner is entitled only to fees for the drawing of one copy of complaint, issuing one warrant of arrest and entering return on same.

A United States commissioner is not entitled to fees for issuing warrants of arrest, entering returns on same, and making copies of complaints in cases where the defendants were already in the custody of United States prohibition officers at the time the warrants were issued and the commissioner had knowledge of that fact.

Decision by Comptroller General McCarl, February 6, 1925:

Thomas A. Jenkins, United States commissioner of the southern district of Ohio, Ironton, Ohio, by letter dated August 14, 1924, requested review of so much of the settlement of his claim to fees as was disallowed on the adjustment of his accounts for the quarter ended March 31, 1924, certificate No. 03773R–J, dated July 11, 1924.

The items disallowed are stated and considered as follows:

1. Case 58, Harvey Abrams.

(a) Total of fees listed, $17.80, instead of $18.90 as charged, difference disallowed, $1.10.

No objection being made to evident erroneous addition, it is assumed that the error is conceded, therefore, the disallowance as to this item is sustained.

(b) Charges for fees and mileage for witnesses, $3.50, disallowed, because no fee is provided for this service, same being payable by the marshal.

The fact that the marshal pays all such fees seems to be well known, and no objection being made to the disallowance, it is

assumed the correctness of action taken is conceded, and therefore the disallowance as to such action is sustained.

2. Cases 58, 59, 60, 61, 62, 63, 64, 65, four defendants, Harvey Abrams, William Abrams, Isaac Abrams, and George Gates. Duplicate separate charges against each offender as for two separate offenses under the national prohibition act, viz, having and possessing intoxicating liquor, and manufacturing intoxicating liquor. Fees charged in each case for drawing copy of complaint, issuing warrant of arrest and entering return, issuing temporary commitment and entering return, recognizance of all witnesses in case, transcript of proceedings, disallowed because they represent an unnecessary multiplication of cases, contrary to section 32 of the national prohibition act of October 28, 1919, 41 Stat. 317.

The explanation of the circumstances of the arrest of these offenders discloses that they were all arrested in a raid, and from the fact that all of them are represented to have been connected with the operation of apparently the same still, and in that they possessed liquor, it is evident, and was so known to the officers, that they were guilty of joint offenses in the possessing of liquor. This fact is admitted in the statement that the officers wanted two distinct charges for each case.

In the letter requesting a review it is stated that those representing the Government in such cases decided that they wished prosecution conducted in a certain way, affidavits filed in a certain way, and separate cases made, with an intimation that the wisdom of such proceedings was a question of judicial determination alone, and that, by reason of the action thus taken, the fees so charged became properly due. However, no evidence has been presented to show that the district attorney or any officer having authority to direct the commissioner in the matter required that eight separate cases be made out of the charges against these four men. Neither has it been established that there was any necessity for such procedure.

The national prohibition act, under which all proceedings were conducted, provides, section 32, Title II, 41 Stat. 317:

In any affidavit, information, or indictment for the violation of this Act, separate offenses may be united in separate counts and the defendant may be tried on all at one trial and the penalty for all offenses may be imposed. It shall not be necessary in any affidavit, information, or indictment to give the name of the purchaser or to include any defensive negative averments, but it shall be sufficient to state that the act complained of was then and there prohibited and unlawful, but this provision shall not be construed to preclude the trial court from directing the furnishing the defendant a bill of particulars when it deems it proper to do so.

The two charges filed were merely distinct offenses covered by the same statute, and under the provisions of the act which those enforcing it were presumed to know, the matter could have been the subject of one charge or complaint with two or more counts, thus composing a joint offense.

Similarly, under the conditions of their apprehension it is clear that these offenders were jointly guilty of the same offense, and as it does not appear that separate hearings before the commissioner were

demanded by the accused, there appears to have been no good reason why they should not have been considered by the commissioner as joint offenders, thus requiring but one complaint, etc. It appears that all were heard and the cases practically disposed of on February 23, except Harvey Abrams, whose final hearing was continued until the 25th. The witnesses, with one exception, appear to have been the officers who apprehended all the prisoners jointly, and there is disclosed no special condition to require either separate charges or separate cases against what were clearly joint offenses of joint offenders.

Commissioner's legal rights to fees under such circumstances have been the subject of rulings by former Comptrollers of the Treasury, and the decisions are to the effect that fees for the unnecessary services are not authorized.

In 5 Comp. Dec. 570 it was said, quoting from the syllabus:

> Under the rule in 5 Comp. Dec. 320, a United States commissioner who, in a case against eleven joint offenders, made ten separate cases, is entitled to such fees only as he would have been entitled to in one case. (See also 5 Comp. Dec. 717; 6 Comp. Dec. 285; 10 Comp. Dec. 340.)

A case before a commissioner is not a case to the extent comprehended by a court action involving the practical questions of procedure of both prosecution and defense, and the distinction in such proceedings has previously been so recognized, it being stated in 7 Comp. Dec. 480 that:

> The term "case" as used in the first proviso [to section 21] of the act of May 28, 1896 [29 Stat. 185], relates to the proceedings before the United States commissioner, and it does not mean a case in its broad legal sense * * *

A case, therefore, before a commissioner is merely a preliminary hearing for the purpose of establishing a probable cause, and where there is available the necessary witnesses or evidence, there is no justifiable reason why there may not usually be heard all the defendants jointly charged with the same offense. Only where, for instance, in a case against several joint offenders it is impossible for a commissioner to hear and decide as to all of them at the same time, or where it is impossible to commence proceedings against two joint offenders at the same time, that there develops a separate "case" with the right to the attendant fees. 7 Comp. Dec. 480; 8 *id.* 805.

In view of the circumstances disclosed as to these offenders it must be held that the proceedings concerning them are to be regarded and considered as one case, so far as the right to fees is concerned.

Other matters for consideration are the charges for issuing warrants for these defenders. It is stated that they were apprehended by prohibition officers under incriminating circumstances, lodged in jail, and then complaints sworn to and warrants issued next day for a deputy marshal to produce them for hearing. This pro-

cedure appears unnecessary and improper. The prohibition agents have authority to arrest offenders caught violating the prohibition act, and where offenders are so apprehended it is the duty of such officers to carry their prisoners forthwith to the commissioner, file their complaint, and release them to such jurisdiction. If offenders thus apprehended are committed to jail, it is only for the convenience, and on the responsibility, of the arresting officers, and the duty remains unfulfilled and their personal liability continues until the offenders are carried before the proper magistrate. The commissioner is presumed to know the procedure to be followed by arresting and complaining officers in such cases.

In the explanation of the commissioner to the Department of Justice, dated May 23, 1924, it is stated relative to the circumstances of the issuing of these warrants, as follows:

Item 7. All of these defendants that were before me were in custody before warrants were issued and before I knew anything about anyone intending to make these raids. I knew that some of these parties had been suspected of handling liquor for some time. These Federal officers took these defendants to the Lawrence County jail immediately after they caught them in their trap. They appeared before me the next day and sought warrants to have them arrested. I called the U. S. District Attorney at Cincinnati on long distance telephone at the expense of about $1.00 (I called him several times at about the same expense which was paid out of my own pocket). The district attorney authorized the issuance of the warrants but they could not be served except that deputy marshal came from Cincinnati to serve them. While this is no doubt the usual method, it would seem that some investigation ought to be made of this surplus expense involved in a case of this kind. We had three or four big Federal officers hanging around here with the men arrested in jail waiting for another man to come from Cincinnati to take the warrants from my office to the county jail and serve them on these defendants. I had no knowledge that these defendants were arrested and in jail except what I got from the officers who came to me to have the warrants issued.

From the record it appears quite clear that the commissioner was aware that these offenders were in jail at the time complaint was filed, and he seems to have been acquainted with the circumstances of the arrests, and those accomplishing them; consequently it was plainly his duty to have required the arresting officers to bring the prisoners before him. Accordingly no fees are authorized for the issuing of what under the circumstances were in their entirety unnecessary warrants. 3 Comp. Gen. 13; *id.* 898.

Also there is a charge of $1.15 for temporary commitments, and entering return of same as for eight defendants. Considering that only one final commitment was necessary to commit these defendants for court, as indicated by but one such charge, the assumption is justified that only one temporary commitment was necessary for all, and the charge as for eight was therefore unwarranted.

Considering all the circumstances involved in the apprehension and commitment of these four defendants, it must be held that there are disclosed no valid grounds for the allowance of fees for more than

for one case. Accordingly, the fees properly chargeable in this case are as follows:

Drawing complaint, with oath and jurat to same	$0.50
(Fees charged for issuing subpoenas for five witnesses—$0.45 and entering return of subpoenas, $0.15, not allowed as these witnesses being the prosecuting officers for the Government have no authority to require subpoenas for themselves.)	
Issuing temporary commitment and copy of same and entering return	1.15
Administering oaths to five U. S. witnesses at trial at $0.10 each	.50
Hearing and deciding	5.00
Hearing, one additional day	5.00
Issuing final commitment and making copy of same	1.00
Entering return of final commitment	.15
Recognizance of all witnesses in case	.50
Oath to one U. S. witness as to attendance and travel	.05
(Order in duplicate to pay first U. S. witness not allowed as commissioner having paid same no order was necessary.)	
Transcript of proceedings	.60
Total allowance	14.45
Total fees claimed	54.15
Disallowed	39.70

3. Items 67 to 77, inclusive, fees in the amount of $1.40 each for issuing search warrants. Final action on these items was suspended for additional information, description and location of premises to be searched, and nature of property to be seized in each case.

The commissioner has submitted statement that the warrants were made out to search the premises of each defendant named, and that the property to be seized was intoxicating liquor or implements used for the manufacture of the same. The additional information appears sufficient to remove the objections as to these items, accordingly, there is now allowed the sum of $15.40, representing the issuing of 11 search warrants at $1.40 each.

Upon review a difference of $11.25 is certified due claimant in addition to the amount of $18.60 heretofore allowed, and for the reasons hereinbefore stated, the disallowance as to $39.70 is sustained.

(A-2250)

RENTAL ALLOWANCE—DEPENDENTS OF NAVAL OFFICER OCCUPYING QUARTERS AT PANAMA CANAL

Occupancy of quarters, owned by the Panama Canal and for which the Canal exacts a rental, by dependents of a naval officer while he was on sea duty, the Canal Zone not being the home yard of the vessel on which the officer served, does not constitute an assignment of quarters at the officer's permanent station such as would preclude the payment of rental allowance on account of dependents under section 6 of the act of June 10, 1922, as amended by section 2 of the act of May 31, 1924, 43 Stat. 250, and Executive order of August 13, 1924, pursuant thereto.

Decision by Comptroller General McCarl, February 7, 1925:

Lieut. John L. Cash (S. C.), United States Navy, supply officer of the U. S. S. *Denver*, applied by letter dated March 6, 1924, for review of settlement N-4719-N, dated January 29, 1924, wherein was

disallowed in his accounts a payment of $239.61 made to Capt. William N. Jeffers, United States Navy, as rental allowance from July 1 to September 30, 1923. During the period in question Captain Jeffers was on sea duty, and his wife and three minor children occupied quarters on the Panama Canal Zone owned by the Government and controlled by the Panama Canal, for which Captain Jeffers paid rent to the Panama Canal.

During the period in question Captain Jeffers was on sea duty and having dependents was entitled to rental allowances within the limits fixed by the act of June 10, 1922, 42 Stat. 628. Being an officer of the grade of captain his total pay, including rental and subsistence allowance, could not exceed $7,200 per year, and payment on account of rental allowance for the period amounted to $239.61. During the entire period Captain Jeffers rented from the Panama Canal quarters at 559–a–d, Ancon Boulevard, Balboa, Canal Zone, for his wife and three children and paid to the Panama Canal rent of $36.50 per month, fuel $2.50 per month, and for metered electric current, the total for all items of quarters, heat and light approximating $50, it is stated.

Section 6 of the act of June 10, 1922, as amended retroactively to July 1, 1922, by section 2 of the act of May 31, 1924, 43 Stat. 250, provides in the first, fourth, and fifth paragraphs, so far as here material, as follows:

> Except as otherwise provided in the fourth paragraph of this section, each commissioned officer below the grade of brigadier general or its equivalent, in any of the services mentioned in the title of this Act, while either on active duty or entitled to active duty pay shall be entitled at all times to a money allowance for rental of quarters. * * * .
>
> No rental allowance shall accrue to an officer, having no dependents, while he is on field or sea duty, nor while an officer with or without dependents is assigned as quarters at his permanent station the number of rooms provided by law for an officer of his rank or a less number of rooms in any particular case wherein, in the judgment of competent superior authority of the service concerned, a less number of rooms would be adequate for the occupancy of the officer and his dependents.
>
> Regulations in execution of the provisions of this section in peace and in war, shall be made by the President and shall, whenever practicable in his judgment, be uniform for all of the services concerned, including adjunct forces thereof.

Paragraph 1 (e) of the Executive order of August 13, 1924, promulgating regulations in execution of this section provides:

> The term "permanent station" as used in this act shall be construed to mean the place on shore where an officer is assigned to duty, or the home yard or the home port of a vessel on board which an officer is required to perform duty, under orders in each case which do not in terms provide for the termination thereof; and any station on shore or any receiving ship where an officer in fact occupies with his dependents public quarters assigned to him without charge, shall also be deemed during such occupancy to be his permanent station within the meaning of this act.

Under this regulation the permanent station of Captain Jeffers was at the home yard or home port of the vessel to which he was

assigned; his permanent station was not in the Canal Zone for the reasons the home yard or home port of the vessel to which he was assigned was not the Canal Zone, and he did not occupy with his dependents quarters furnished there by the Government without charge.

The officer's right to the allowance under the law and the regulations is clear and the amount paid will be passed to the credit of the disbursing officer.

(A–1156)

COMPENSATION, SUSPENSION FROM DUTY—CIVILIAN EMPLOYEE

A civil-service employee who, while on an approved leave of absence with pay, is removed or suspended from duty and pay by administrative action alone, such removal or suspension can not become effective until the employee receives notice thereof, and if revoked prior to such notice, the failure to receive notice not being due to wrongful acts of the employee, the employee is entitled to pay otherwise due without regard to the suspension order.

Decision by Comptroller General McCarl, February 9, 1925.

Reconsideration has been requested of decision of November 21, 1923, which sustained disallowance of $62.33 in the accounts of Charles A. Gregory, former special disbursing agent and prohibition director, State of Illinois.

From the facts before this office at the time the disallowance was made and sustained it appeared that one, Marvel Biglow, an employee of the office of the prohibition director for Illinois, was legally suspended from her employment by the Secretary of the Treasury without pay; that the suspension became effective on August 17, 1922; that by reason of such suspension the employee performed no service from said date to August 27, 1922; and therefore that the disbursing agent erred in making payment to her for the period covered by such suspension.

Additional evidence has been submitted and the facts are now shown by the record to be as follows:

Marvel Biglow was employed as chief clerk, disbursing section, office of the prohibition director, State of Illinois, Chicago. As she was under orders from the director and disbursing agent to give official information from the records of the disbursing section to no one without the director's consent, she refused information requested from her by the associate director on August 5, 1922. The associate director on the same day made a written charge of insubordination against her, presenting a copy to her for reply thereto. On August 7, upon return of the director, who was out of the city on August 5, the matter was explained to the associate director by

the director and the charge against the employee was answered by her in writing and the information requested by the associate director was furnished him. The employee and the director understood and assumed that the explanations were satisfactory and that the incident was closed. Thereafter, to wit, on or about August 13, 1922, the employee submitted a regular application for leave of absence with pay for the period from August 14 to 26, 1922, inclusive. The granting of the requested leave with pay was approved by the associate director, who had theretofore preferred the charges, as well as by the director, and accordingly the employee proceeded immediately to her home in Wisconsin and did not return to her office until Monday, August 28, 1922, the first work day following the expiration of her leave. Without the knowledge of the employee or the director under whom she was employed, the charge of insubordination had been forwarded on or about August 7, 1922, by the associate director to the Federal Prohibition Commissioner, Washington, D. C., through whom the matter was referred to the Secretary of the Treasury, who ordered the employee suspended from duty and pay for a period of 30 days, effective August 17, 1922. The director at Chicago did not receive any notice that such action had been taken or was contemplated until August 17, 1922, and he did not then advise the employee who was on her vacation in Wisconsin, but wrote to the bureau at Washington under date of August 19, 1922, with a view to having the suspension revoked. On August 26, 1922, the following telegram, signed by the Commissioner of Internal Revenue and approved by the Assistant Secretary of the Treasury, was sent to the Federal prohibition director, Chicago:

Suspension Clerk Marvel Biglow from duty and pay hereby terminated effective close business August twenty-seven Letter follows

It thus appears that during the entire period from the date of the order of suspension to the effective date of the action terminating the suspension the employee was on regularly authorized leave of absence with pay at her home in Wisconsin and that no notice of the suspension was conveyed to her until her return to duty on August 28, 1922, after the termination of the suspension.

With reference to removal and suspension of employees, Rule XII of the Civil Service Regulations provides:

1. Section 6 of the act of August 24, 1912, 37 Stat. 555, provides "That no person in the classified civil service of the United States shall be removed therefrom except for such cause as will promote the efficiency of said service and for reasons given in writing, and the person whose removal is sought shall have notice of the same and of any charges preferred against him, and be furnished with a copy thereof, and also be allowed a reasonable time for personally answering the same in writing; and affidavits in support thereof; but no examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer making the removal; and copies of charges, notice of hearing, answer, reasons for removal, and of the order of removal

shall be made a part of the records of the proper department or office, as shall also the reasons for reduction in rank or compensation; and copies of the same shall be furnished to the person affected upon request, and the Civil Service Commission also shall, upon request, be furnished copies of the same: * * *."

* * * * * * *

3. Pending action under section 1 of this rule, or for disciplinary reasons, a person may be suspended for a period not to exceed ninety days, but the reasons for such suspension shall at the time of the suspension be filed in the records of the proper department or office and copies shall be furnished the commission upon request. The period of suspension may be extended beyond ninety days with the prior consent of the commission.

It is well settled that the granting of leave with pay in such cases as the one here under consideration is within the discretion of the proper administrative officer subject, of course, to statutory restriction. See 26 Comp. Dec. 379. And leave thus granted may be revoked and the employee recalled to duty before the termination thereof upon giving proper notice to the employee. It is also established that the head of a department has the authority to suspend an employee without pay under certain circumstances. 1 Comp. Gen. 42, and cases there cited. However, when an employee otherwise in a pay status is removed or suspended by administrative action alone, such removal or suspension can not become effective until the employee receives notice thereof unless the receipt of notice is prevented by a wrongful act of the employee.

The suspension here was removed before it became effective and during the period in question the employee remained in a leave-with-pay status.

Accordingly, upon reconsideration, the item of $62.33 is certified for credit in the disbursing agent's account and the charge against the employee will be removed.

(A-4443)

CLASSIFICATION OF CIVILIAN EMPLOYEES—CHANGES IN GRADES IN WHICH THE PROPER AVERAGE HAS BEEN EXCEEDED

The requirement, based on the "average provision" in the appropriation acts for the fiscal year 1925, that an employee on promotion from a lower to a higher grade, in which the salary average has been exceeded, can only receive the minimum salary of the grade to which promoted even though less than his former salary, is not changed during the fiscal year 1925 by the exception to the average provision in the act of January 22, 1925, 43 Stat. 764, making appropriation for the Treasury Department for the fiscal year 1926, as such exception is applicable only to payments made from the appropriation in which it occurs.

Comptroller General McCarl to the Secretary of the Treasury, February 9, 1925:

There has been before this office for consideration your letter of October 7, 1924, and your undated letter received October 17, 1924, requesting reconsideration of decision of September 12, 1924, 4

Comp. Gen. 294, holding that if Guy H. Sutton, an employee in the office of the Register of the Treasury, receiving compensation in grade 6 of the clerical, administrative, and fiscal service at the rate of $2,500 per annum, were promoted to grade 7 of the same service in which the salary average is excessive, he could be paid in grade 7 only at the minimum salary rate for that grade, viz, $2,400 per annum, notwithstanding the "promotion" would actually reduce the employee's compensation at the rate of $100 per annum.

The decision was the application of a definite rule previously laid down in several decisions of this office that any change of personnel made by an administrative office in grades having excessive salary averages must be at the minimum salary rate of the grade.

The application of the rule to promotions from a lower to a higher grade in the same bureau, office or other appropriation unit, as proposed in the Sutton case, was again given consideration and the same conclusion reached in question and answer 15, decision of November 29, 1924, 4 Comp. Gen. 498.

The act of January 22, 1925, 43 Stat. 764, providing appropriations for the Treasury Department for the fiscal year 1926, has reenacted the "average provision" but with the following additional exception:

* * * *Provided*, That this restriction shall not apply * * * (3) to require the reduction in salary of any person who is transferred from one position to another position in the same or different grade in the same or a different bureau, office, or other appropriation unit, * * *

It would appear, therefore, that on and after July 1, 1925, and for the fiscal year 1926, for which the appropriations were provided containing the restrictive average provision with the above quoted exception, promotions as proposed in the Sutton case may be authorized without reduction of salary.

(A-6846)

MEDICAL TREATMENT—ARMY OFFICER ON HUNTING LEAVE

Leave of absence with permission to hunt is a furlough within the meaning of the act of March 2, 1923, 42 Stat. 1399, and payment for private medical and hospital treatment furnished an officer of the Army who had been injured while on such leave of absence may not be made from public funds.

Decision by Comptroller General McCarl, February 9, 1925:

The Wilmar Hospital (Inc.) has requested review of settlement No. W-059154, dated October 23, 1924, disallowing its claim for $144.50 on account of hospital care and treatment, including board, lodging, nursing, and ambulance hire, rendered to First Lieut. Robert W. Ehinger, Field Artillery, United States Army, during the period from October 31 to November 4, 1923.

It appears that Lieutenant Ehinger was injured October 31, 1923, by the accidental discharge of a shotgun in the hands of another officer, while on authorized leave of absence for a three-day hunting trip.

The appropriation for Medical and Hospital Department, act of March 2, 1923, 42 Stat. 1399, to which this expense, if payable by the Government, is chargeable, provides in part, as follows:

> * * * for medical care and treatment not otherwise provided for, including care and subsistence in private hospitals, of officers, enlisted men, and civilian employees of the Army, of applicants for enlistment, and of prisoners of war and other persons in military custody or confinement, when entitled thereto by law, regulation, or contract; *Provided*, That this shall not apply to officers and enlisted men who are treated in private hospitals or by civilian physicians while on furlough * * *.

Similar provision appears in prior appropriation acts under which it has been held repeatedly that payment for expenses of hospital and medical treatment rendered by private hospitals and civilian physicians to officers and enlisted men of the Army is not authorized when incurred while in a status of on leave of absence or furlough, 5 Comp. Dec. 363; 19 *id.* 383; 27 *id.* 514; 1 Comp. Gen. 137, 440; 2 *id.* 447. The question accordingly resolves itself into whether Lieutenant Ehinger was or was not on leave of absence or furlough at the time he was injured.

The basic law authorizing pay to officers of the Army when absent from duty is section 1265, Revised Statutes, which is as follows (the amendment of July 29, 1876, 19 Stat. 102, not being here material):

> Officers when absent on account of sickness or wounds, or lawfully absent from duty and waiting orders, shall receive full pay; when absent with leave, for other causes, full pay during such absence not exceeding in the aggregate thirty days in one year, and half-pay during such absences exceeding thirty days in one year. * * *

The Army Regulations since 1889, and possibly prior thereto, have contained provisions that under certain conditions permission to hunt will not be considered as a leave of absence.

A decision by the Chief of Staff, dated July 15, 1905, published by order of the Secretary of War by Circular No. 35, War Department, concerning leave of absence of Army officers is as follows:

> In view of the positive language of section 1265, Revised Statutes, it is held that all authorized absence from duty on the part of Army officers, not otherwise specially provided for by law, whether in the form of delays in reporting for duty under orders, extra time allowance for making journeys, permission to be absent without formal leave, or under any authority of any kind or nature whatever, unless specially stated and shown to be for the convenience of the Government, or excused by competent authority as unavoidable, must be regarded as absence with leave and be subject to the same conditions as to pay as absence in pursuance of formal orders granting leaves of absence; * * *.

In view of this decision it has been held by the Judge Advocate General of the Army:

* * * that although hunting leaves have not been looked upon as ordinary leaves, but rather expeditions for the special improvement of the officer and for the acquisition of topographical information for the Government, they must, since the publishing of the above circular, be considered as ordinary leaves unless it is shown in each specific permission that the leave to hunt is for the convenience of the Government. (Dig. App. J. A. G., 1912, page 11.)

Regulations governing leaves of absence and delays in effect during the period in question were promulgated by Army Regulations 605–115. Changes No. 3, dated October 5, 1923, amended paragraph 21 thereof, which, so far as is here material, is as follows:

* * * An officer authorized to grant leaves of absence may grant permission to hunt or fish for periods not greater than ten days. Hunting and fishing under this provision will be encouraged.

* * * * * * *

Absence under a permission to hunt or fish will not be counted against the annual leave allowance if the officer on his return to his post of duty forwards to the officer granting such permission a certificate that his time while absent was employed solely in hunting or fishing, as the case may be. The officer granting the permission may, when considered desirable, require the officer to whom such permission is granted to furnish a report giving as complete a description as possible of the country traversed by him.

It would appear that permission to hunt was originally authorized for the acquisition of topographical information of value to the Government. Hunting in its usual sense is a form of sport from which is derived recreation and diversion for the benefit of the individual.

The status of leave of absence and that of duty are incompatible and both can not exist at the same time with respect to the same person. It is apparent that permission to be absent from military control and jurisdiction for an extended period of time for the purpose of hunting must be considered as authorized leave of absence "for other causes" within the meaning of section 1265, Revised Statutes.

Special Orders No. 238, Headquarters, Fort Snelling, Minn., dated October 29, 1923, authorized leave to Lieutenant Ehinger as follows:

3. Under provisions of par. 21. A. R. 605–115, a hunting leave for three (3) days, effective on or about October 30, 1923, is granted 1st Lt. Robert W. Ehinger, 9th F. A.

There appears nothing in this order to indicate that the officer was absent from his station in the performance of duty. Lieutenant Ehinger must be considered as in the status of on authorized leave of absence at the time he was injured and accordingly falls within the inhibition contained in the appropriation act cited, against the use of public funds for the medical care and treatment of Army officers while on leave of absence or furlough.

Upon review the settlement is sustained.

(A-7387)

APPROPRIATIONS, ALLOCATION OF—SERVICES BETWEEN DEPARTMENTS AND ESTABLISHMENTS

There is no authority under section 7 of the act of May 21, 1920, 41 Stat. 613, for the advance of funds to the Signal Corps of the Army by the several departments and establishments of the Government for the furnishing and procurement of telegraphic services for such departments and establishments by the Signal Corps.

Comptroller General McCarl to the Director of the Budget, February 9, 1925:

There has been received from the chief coordinator a request for decision as to whether there is authority for the advance of funds to the Signal Corps of the Army by the several departments and establishments of the Government on whose account telegraphic services are furnished and procured by the Signal Corps, the said funds to be used by the Signal Corps for paying the charges of commercial lines for telegraphic messages transmitted part over Signal Corps wires and part over commercial wires, it being represented that said Government facilities are being used to the fullest extent practicable in sending such messages and at a considerable saving to the Government, but that the funds of the Signal Corps available for carrying on its communication service are not sufficient to finance the operations; that is, to await the delay incident to the Signal Corps first paying the commercial line proportions and thereafter seeking reimbursement from the department and establishments concerned.

In reply to the letter of the chief coordinator, which I assume is by your direction, you are advised that the only existing general legislative authority for advances by one department, establishment, or bureau or office of such department or establishment, to another department, establishment, or bureau or office thereof, is section 7 of the act of May 21, 1920, 41 Stat. 613. However, that provision was intended for the doing or making by the one for the other of a definite job or investigation or for the procurement of a definite article or articles. Allocations under section 7 of the act of May 21, 1920, referred to, *supra*, are expressly made available for obligation during the two fiscal years following the one for which the appropriation allocated was made. 27 Comp. Dec. 106. It does not appear to have been or to be the intention of Congress that appropriations should be extended in their period of availability for obligation from one to three years, as affecting the character of services here in question, which are appropriated for on an annual basis, and I am constrained to advise you that allocations of funds for such purposes would not be authorized. 21 Comp. Dec. 201. I may add that appropriations are made to the various branches of the Government for similar items of services or supplies, but the similarity does not

authorize placing the funds of all to the credit of one to procure the services or supplies similarly appropriated for. If telegraphic service for the Government is best handled by one Government agency, it would seem proper to present it to the Congress for its consideration. I do not feel I can sanction the allotment of appropriations, as it would in effect produce such consolidation of telegraphic service, contrary to our present system of appropriations and without authority of Congress.

(A-7434)

COMPENSATION, APPOINTMENT—OFFICERS AND EMPLOYEES, DELEGATION OF AUTHORITY

An employee of the Government is not entitled to compensation for any period prior to the date of his appointment, although during such period he may have actually performed the duties of the office or position and taken the oath of office.

Under section 169, Revised Statutes, the appointing power in the various executive departments and bureaus thereof is vested in the head of the department and, in the absence of specific statutory authority therefor, may not be delegated to a subordinate.

Temporary employees as might be engaged by the President in his discretion, under authority of the act of April 4, 1924, 43 Stat. 76, making appropriation to enable the President in case of threatened or actual epidemic of bubonic plague and certain other diseases of live stock to aid the States in preventing and suppressing the spread of the same, would not be regarded as officers and employees of the Public Health Service such as would require specific appointment by the Secretary of the Treasury.

Comptroller General McCarl to the Secretary of the Treasury, February 9, 1925:

I have your request of January 8, 1925, for a decision upon the question therein submitted as follows:

My attention has been invited to the fact that suspensions have been made by the General Accounting Office in the pay of certain field employees of the Public Health Service because the approval of the journal carrying their appointments, which is prepared in the Division of Appointments of this Department, bore a date subsequent to the date such employees took the oath of office and entered on duty. This has created a situation with regard to the appointment of field personnel in the Public Health Service which is causing serious delays, as well as considerable expense that should be unnecessary were it practicable to follow the principles of good business conduct. I should like to lay the whole matter before you for your consideration.

I should perhaps explain that in 1921, when the Public Health Service was charged with the care of beneficiaries of the World War, and when its field organization had grown to such proportions that it seemed advisable to institute a careful check on additional nominations by field officers, it was agreed between the Appointment Division of this Department and the Public Health Service that no additional nominations were to be submitted to the Department, other than nominations to fill vacancies as they occurred, without first securing an authorization from the Secretary of the Treasury for the additional position contemplated. After securing such authority for a position, the field officer was notified and instructed to submit the nomination of an employee through the District Office of the Civil Service Commission. Since authority for the position had already been secured, and since delays incident to routing the nomination through the Civil Service Commission were numer-

ous, it it often happened that approval of the Department on the formal nomination of the individual employee was not secured until some time subsequent to the employee's entrance on duty.

In view of the action by the General Accounting Office in suspending payment of compensation in such cases, the Public Health Service necessarily instructed field officers that employees in new positions could not be placed on duty, even when authority for the positions had been secured from the Secretary of the Treasury, until formal approval had been secured from the Division of Appointments of the Treasury Department on the individual nominations. This policy, in emergent cases, has made necessary the frequent use of the telegraph and radio. Recently, in connection with the appearance of bubonic plague in New Orleons, it was necessary for the field officer to telegraph the Surgeon General for authority to employ rat-trappers, fumigators, inspectors, etc.;-for the Surgeon General then to send a special request to the Secretary of the Treasury for approval, and upon that approval for the Surgeon General to wire authority to the field officer at New Orleans to make the nominations, but not to place the employees on duty until advised that their nominations were approved. The field officer thereupon had to telegraph the names of 164 emergency employees; the Bureau of the Public Health Service had to prepare the formal nominations and send to the Division of Appointments by special messenger for approval, and after such approval, the Surgeon General again had to telegraph the field officer that the employees could be placed on duty. This same cumbersome and expensive method is necessarily being followed in the suppression of plague at Oakland, California.

This procedure is followed whenever an additional nurse, doctor, or other employee is needed for immediate duty. I believe you will agree that this is an involved and expensive requirement which serves no good purpose and which should be corrected. The fact that authority has previously been granted for a particular position by the Secretary of the Treasury, which carries with it the direction to the field officer to enter into a contract with a prospective employee and submit his nomination, should, for practical purposes, be sufficient consummation of an appointment, subject to subsequent approval, to enable the field officer to place the employee on duty upon his taking the oath of office.

These facts are submitted for your consideration and for an expression from you as to whether the laws governing the appointment of field employees are such that a prior authorization from the Secretary of the Treasury for the employment of an individual in a newly created position can be considered sufficient authority for placing such individual on duty, the formal nomination of the employee to be dated not later than the date upon which he entered on duty and took the oath of office, and such formal nomination to be approved when received in the department through the usual channels, effective from the date of entrance on duty.

The forerunner of the present Public Health Service was the United States Marine Hospital Service, the name being changed by the act of July 1, 1902, 32 Stat. 712, to the Public Health and Marine Hospital Service of the United States, and again changed by the act of August 14, 1912, 37 Stat. 309, to the Public Health Service. The act of February 3, 1905, 33 Stat. 650, provided that "said service shall remain under the jurisdiction of the Treasury Department until otherwise hereafter specifically provided by law."

It is well established that an employee of the Government is not entitled to compensation for any period prior to the date of his appointment, although during such period he may have actually performed the duties of the office or position. 23 Comp. Dec. 65; 8 *id.* 521; 6 MS Comp. Gen. 640; 2 *id.* 407.

The appointing power in the various executive departments and the bureaus thereof is vested in the head of the department by

section 169, Revised Statutes, and, in the absence of specific statutory authority therefor, may not be delegated to a subordinate. 26 Comp. Dec. 444; 27 Comp. Dec. 656; 21 Op. Atty. Gen. 356; *Burnap* v. *United States*, 252 U. S. 512.

No general statutory authority is found authorizing you to delegate to the Surgeon General or to any of his subordinates the general power or authority to appoint employees. The only provisions of law authorizing the employment of personal services in the Public Health Service other than by appointment of the Secretary of the Treasury are the provisions in the act of July 1, 1902, 32 Stat. 712, which authorize the Surgeon General to appoint, with the approval of the Secretary of the Treasury, civilian members of the advisory board for the Hygienic Laboratory, and, under certain circumstances, "competent persons to take charge of the divisions, respectively, of chemistry, zoology, and pharmacology of the Hygienic Laboratory." Where the law provides for the appointment by one officer with the approval by another officer, the approval, when given, will relate back to the date of action by the authorized appointing officer, and the appointment will be effective from said date if the other conditions necessary to make the appointment effective had been fulfilled on that date. 3 Comp. Gen. 559. But, of course, the appointment in such cases could be made only subject to approval of the approving officer, and in no case should any payment be made prior to such approval.

The attention of this office was heretofore called to the practice of the senior surgeon of the public health service at Chicago in employing help and paying them salaries determined by him prior to the actual appointments by the Secretary of the Treasury. This resulted in several salaries so fixed being disapproved by you and a lower rate of compensation being fixed in the appointments when made. See my decision of May 23, 1922, in answer to your request of November 10, 1921, for review of the settlement made in that case. That case is mentioned here as an instance indicating the confusion which would result from the adoption of such a procedure as that suggested by you even were it authorized by law.

Answering your submission directly, you are advised that the creation of a position, or the specific authorization for the employment of a given number of employees, followed by the nomination by a field officer of an individual to fill such a position does not constitute an appointment by you, and you are not authorized to appoint retroactively employees nominated for appointment by a subordinate, or to pay such employees any compensation for services rendered prior to the date the appointment is actually made by you, except in cases in which the law specifically authorizes appointment by a subordinate either with or without your approval.

With reference to the cases of bubonic plague in New Orleans, La., and Oakland, Calif., attention is invited to the appropriation made in the act of April 4, 1924, 43 Stat. 76, to enable the President, in case only of threatened or actual epidemic of bubonic plague and certain other diseases, "to aid State and local boards or otherwise, in his discretion, in preventing and suppressing the spread of the same." Such temporary employees as might be engaged in the discretion of the President under authority of this provision would not be regarded as officers or employees of the Public Health Service, such as would require a specific appointment from you. Such temporary services in said emergencies could be engaged in any manner prescribed by the President.

(A-7794)

CLASSIFICATION OF CIVILIAN EMPLOYEES—UNIT OF APPROPRIATION—WAR DEPARTMENT

The aggregate amount of the regular appropriation for personal services in the District of Columbia and the additional amount from field service or other appropriations made available for personal services in the District of Columbia under the following office headings of the War Department, constitute in each instance a "bureau, office, or other appropriation unit" within the meaning of the average provision appearing in the act of June 7, 1924, 43 Stat. 478:

Office of the Chief of Finance.
Office of the Quartermaster General.
Office of Chief of Ordnance.
Office of the Chief of Air Service.
Office of Chief of Chemical Warfare Service.
Office of Chief of Engineers.
Office of the Chief Signal Officer.

Comptroller General McCarl to the Secretary of War, February 9, 1925:

I have your letter of January 31, 1925, as follows:

The War Department appropriation act for the current fiscal year provides, for the office of the Chief of Finance, $318,720 "for personal services in the District of Columbia in accordance with 'the classification act of 1923.'" The act also appropriates $1,454,000 for compensation of clerks and other employees in the field service of the Finance Department and provides "that $500,000 of this amount shall be available only for the compensation and traveling expenses of clerks and other employees engaged on work pertaining to the audit of World War contracts, and of this amount not to exceed $25,000 shall be available for personal services in the office of the Chief of Finance, War Department."

For the office of the Quartermaster General the act appropriates "for personal services in the District of Columbia in accordance with 'the classification act of 1923,' $586,280," and provides that "in addition to the foregoing employees appropriated for in the office of the Quartermaster General, the services of technical experts and such other services as the Secretary of War may deem necessary may be employed in the office of the Quartermaster General, to be paid from the appropriation for 'Incidental expenses of the Army': *Provided*, That the entire expenditures for this purpose for the fiscal year 1925 shall not exceed $16,300."

Authority similar to that given for the office of the Quartermaster General is given for the offices of the Chief of Ordnance, Chief of Air Service, Chief of the Chemical Warfare Service, Chief of Engineers, and Chief Signal Officer.

Decision is requested whether, in each of these cases, the force of employees paid from the allotment of field funds thus provided constitutes a separate appropriation unit from the regular force paid from the departmental appropriation for the bureau within the meaning of the restriction imposed by the appropriation act that "the average of the salaries of the total number of persons under any grade or class thereof in any bureau, office, or other appropriation unit shall not at any time exceed the average of the compensation rates specified for the grade by such act."

The act of June 7, 1924, 43 Stat. 478, appropriating for the military activities and other expenses of the War Department contains the "average" provision relative to expenditure of funds provided for personal services in the District of Columbia in accordance with the Classification Act of 1923, common to other appropriations for personal services in the District of Columbia. This average provision specifies as a basis for determining the salary average of all persons within a grade the "bureau, office, or other appropriation unit." The intent of Congress by the use of this phrase has heretofore been generally stated. 3 Comp. Gen. 1001; 4 *id.* 167; *id.* 342; *id.* 497.

In your present submission you mention seven offices in the War Department. For each of these offices the appropriation has provided an amount for personal services in the District of Columbia in accordance with "the Classification Act of 1923," and also in each instance an additional amount from a field service or other appropriation for personal services in the District of Columbia. The additional amounts are clearly supplemental to and for the same general purpose as the regular item for personal services in the District of Columbia. It is evident then that the aggregate amount in each instance of the regular item and the additional amount provided in supplement thereof for personal services in the District of Columbia constitute one "bureau, office, or other appropriation unit" within the meaning of the average provision.

(A-7255)

ADMIRALTY—COSTS WHEN UNITED STATES NOT A PARTY TO SUIT

In admiralty proceedings in which the United States is not a party the expenses incurred in connection with the safe-keeping of a libeled vessel, such as compensation of a shipkeeper, are not payable from public funds, notwithstanding an order from the court directing the payment of such fees by the marshal.

Comptroller General McCarl to the Attorney General, February 10, 1925:

I have your request of December 30, 1924 (JDH 61-1874), for decision whether the compensation of a shipkeeper which the marshal has been ordered by the court to pay in connection with the safe-keeping of a libeled vessel, may be paid from the appropriation in the act of January 3, 1923, 42 Stat. 1083, for "salaries, fees, and

expenses of marshals, United States courts," or from any other judiciary appropriation. Your inquiry has particular reference to the case of *James Bowen, Peter Peterson*, and *Joseph Bernier* v. *Steamer Gladstone, her engines, etc.*, in the United States District Court for the Eastern District of Michigan, in which the vessel did not sell for sufficient to satisfy all claims. The attorney for the libellants asserts that the shipkeeper's compensation should be paid from Government appropriations by virtue of the provision in the act of January 3, 1923, 42 Stat. 1083, as follows:

> * * * *Provided*, That there shall be paid hereunder any necessary cost of keeping vessels or other property attached or libeled in admiralty in such amount as the court, on petition setting forth the facts under oath, may allow * * *.

This identical provision has been inserted in the appropriation acts for "salaries, fees, and expenses of marshals, United States courts," each year beginning with the fiscal year 1919, 40 Stat. 683. Prior to that time the only provision of law pertaining to the compensation of shipkeepers was section 829, Revised Statutes, which allowed and limited the fees payable to marshals—

> For the necessary expenses of keeping boats, vessels, or other property attached or libeled in admiralty, not exceeding two dollars and fifty cents a day.

In construing this provision of section 829, Revised Statutes, it was held by the former Comptroller of the Treasury, that in cases in which the United States is not a party, expenses paid by marshals to other than their deputies for keeping property attached on mesne process are not to be charged by them in their accounts; that the United States is not liable for costs so incurred. 6 Comp. Dec. 827; 7 *id.* 203.

The provision for the payment of expenses of keeping vessels or other property, quoted above from the act of January 3, 1923, was first inserted in the act of July 1, 1918, 40 Stat. 683, at the instance of the Department of Justice, and a reference to the hearings before the subcommittee of House Committee on Appropriations, page 1496, discloses the reason for this provision. That portion of the hearing relating to this provision is quoted herewith:

> Mr. KENNARD. The present law under which we are operating allows an expense of only $2.50 per day for keeping vessels attached in admiralty, which allows only one guard at $2.50 for 24 hours' work. That is altogether inadequate compensation, and we have to have more than one guard in such matters under the present circumstances. Where we do employ a number of guards or pay them a different rate of compensation, we have to have a special taxation by the court and approval by the President, which burdens the President with matters he ought to be relieved of. This provision of law was enacted 60 or 70 years ago, and does not fit the present circumstances at all. The provision is section 829 of the Revised Statutes.
>
> Mr. MONDELL. What is that used for?
>
> Mr. KENNARD. That is $2.50 for a day of 24 hours. The Comptroller holds that the law provides for one guard only, and you can see how inadequate that will be in cases where we have to seize vessels that are involved in the German propaganda. Therefore, we would like to have authority to employ guards in

the discretion of the courts, and pay them out of this appropriation, without involving the President in the matter.

This clearly establishes that the provision was intended to apply only to cases in which the United States was an interested party and the payment of fees in excess of those authorized by section 829, Revised Statutes, was necessary for the protection of the Government's interest.

Answering your question specifically you are informed that you are not authorized to pay from the appropriation for "salaries, fees, and expenses of marshals, United States courts," or any other judicial appropriation, expenses of keeping vessels or other property involved in admiralty proceedings in which the United States is not an interested party.

The apparent purpose and effect of the court's order in the case mentioned in your submission were to authorize the marshal to pay the amount stated in the order from the proceeds of sale as a part of the costs of the proceedings and before making any distribution to the libellants. It could not, under the circumstances appearing, operate to impose a liability upon the United States.

(A-1787)

NATIONAL GUARD—ARMORY DRILL PAY

Where a State law automatically extends enlistments in its National Guard to make good time lost on account of absence without leave, the enlisted men are entitled to pay for drills attended during such extended enlistments.

Comptroller General McCarl to Capt. M. T. Legg, United States Army, February 11, 1925:

There has been received your letter of February 11, 1924, submitting supplemental pay roll for Battery D, Two hundred and twelfth Artillery, A. A., New York National Guard, for the quarter ended December 31, 1923, containing claims for armory drill pay of several enlisted men who attended drills of the organization after the expiration of their enlistments. It is stated that the terms of enlistment of the men were automatically extended by their absence without leave under a law of the State of New York incorporating the Articles of War in the chapter containing the State military laws "so far as they are consistent with its provisions and with the regulations now or hereafter issued thereunder"; and this operates to extend to the National Guard of the State of New York the provisions of the one hundred and seventh article of war requiring enlisted men to make good time lost by absence without leave, etc.

The Judge Advocate General of the Army has expressed the opinion that although there is no Federal statute requiring enlisted men of the National Guard to make good time lost, a State law so requiring, not being in conflict with a Federal statute, is effective, and that the man by virtue of State law being a member of its National Guard, in the language of section 110 of the act of June 3, 1916, as amended, 42 Stat. 1035, belongs "to an organization of the National Guard" and is entitled to the pay prescribed therein. In this opinion the Militia Bureau concurs.

I perceive no reason for difference of opinion, and the pay roll, if otherwise correct, may be paid.

(A–5839)

WAR RISK INSURANCE—MATURITY BY DEATH PENDING CONSIDERATION OF APPLICATION FOR CASH SURRENDER VALUE

The effective date of the cash surrender of a policy of converted war risk insurance is the date of final adjudication and payment of the cash surrender value by the Veterans' Bureau, and the death of the insured at any time prior to that date, while the insurance is still in force under the terms of the policy, matures the policy and obligates the Government to make lawful payment thereunder, rather than to pay the cash surrender value.

Comptroller General McCarl to the Director, United States Veterans' Bureau, February 11, 1925:

I have your letter of October 17, 1924, partly as follows:

A question has arisen with respect to your decision A. D. 8132, dated March 4, 1924, in so far as it determined the effective date of the cash surrender of a United States Government life (converted) insurance policy.

The case of William Wozny, C–630,294, is one which will be vitally affected by the determination of this question. The records show that the above-named man while a member of the active military service made a valid application for $1,000 converted insurance on the 20-year endowment plan. The effective date of the policy was October 1, 1920. Premiums on this policy were paid continuously to include August, 1922. On October 27, 1922, the insured wrote the following letter to the bureau:

ELEVENTH ORDNANCE COMPANY,
SCHOFIELD BARRACKS, HAWAII,
October 27, 1922.

Subject: Reimbursement of cash surrender value of insurance.
To: U. S. Veterans' Bureau, Washington, D. C.

1. Request that I be reimbursed with the cash surrender value of my insurance.
2. Kind of insurance: 20-year endowment.
3. Amount of insurance: One thousand dollars ($1,000.00).
4. Policy number: K 213,308.
5. Insurance became effective October 1, 1920; terminated July 31, 1922, by request.
6. I herewith inclose my policy and surrender all claim thereto.

(Signed) WILLIAM WOZNY,
(R–1368307) *Private, Eleventh Ordnance Company.*

The insured died on November 22, 1922, a few days before his request for cash surrender, accompanied by the policy, was received by the bureau. The United States Government life (converted) insurance policy provides as follows:

"Grace for Payment of Premiums. 2. For the payment of any premium under this policy, a grace of thirty-one days without interest will be allowed, during which time the policy will remain in force; but if the policy shall become a claim within the grace period, the unpaid premiums shall be deducted from the amount of insurance payable.

"Cash Surrender and Loan Provisions. 5. Cash-surrender value, paid-up insurance, extended insurance, and policy-loan provisions as follows shall be effective only after premiums for twelve full months have been paid—all values, reserves, and net single premiums being based on the American Experience Table of Mortality, with interest at three and one-half per centum per annum:

"Cash Surrender Value. (a) Upon written request therefor by the insured made while this policy is in force or not later than three calendar months after the due date of the premium in default, and upon complete surrender of this policy with all claims thereunder, the United States will pay to the insured the cash-surrender value hereof. The said cash-surrender value at the end of any policy year for which premiums have been paid in full, if no installments on account of total permanent disability have been paid, shall be the reserve, together with any dividend accumulations left on deposit, less any indebtedness under this policy. For each month within any policy year, for which month the premium has been paid, the reserve at the end of the preceding policy year shall be increased by one-twelfth of the increase in reserve for the current policy year.

* * * * * * *

"*Extended Insurance.* (c) Upon default in payment of premium and the expiration of the grace period, if the policy has not been surrendered for a cash value or for paid-up insurance, this policy shall be extended automatically as term insurance, payable in monthly installments, for such time from the due date of the premium unpaid as the cash-surrender value will purchase when applied as a net single premium at the attained age of the insured. * * *."

In decision of March 4, 1924, 3 Comp. Gen. 582, considering the effect of a request to surrender a policy received in the bureau, but not acted upon until after evidence had been received in the bureau showing the policy had matured by permanent and total disability, it was held:

Under the terms of the policies quoted, the bureau must determine as a fact that the written request by the insured for cash surrender was made "while this policy is in force." That is, that there was a valid and subsisting insurance policy which had not matured by permanent total disability. * * *

* * * * * * *

* * * It may be said, therefore, that the proof was actually in the bureau at the time the policy was finally surrendered, which would be the date of payment of the cash value. * * *

The question for determination on the present submission is whether upon the facts presented the liability of the Government is on the basis of the cash-surrender value or the insurance; that is to say, whether the action of the insured in sending in his policy and requesting payment of the cash-surrender value thereof relieves the Government of its liability to make payment on the basis of the face value of the policy when death occurs thereafter but before payment of the cash-surrender value. The answer to this question is dependent upon whether the policy continued in force as an insurance

policy to November 22, 1922, date of death of the insured, notwithstanding the fact that the insured had relinquished possession of said policy with the expressed intention of surrendering same for the cash-surrender value thereof.

The offer of the insured to surrender the policy in this case and to terminate the insurance thereunder was for the specific purpose of obtaining, and upon the condition that he receive, the cash-surrender value thereof. Therefore, under the well-established rule that the offer to surrender a policy upon a condition does not terminate the insurance unless and until the condition is accepted and complied with, it must be held that the surrender of possession of the policy in this case, accompanied by the request for the cash-surrender value, did not terminate the insurance, and that in such cases the policy, if otherwise valid and subsisting, remains in full force and effect until payment of the cash-surrender value.

In other words, the application of the insured to surrender the policy must be considered and determination made by the bureau that the terms of the policy relative to surrender have been complied with. Pending that determination and the adjudication based thereon the policy remains in full force and effect if otherwise valid and subsisting. If the contingency insured against happens—that is, death or permanent total disability—at any time prior to such final adjudication and payment of cash surrender value, the liability of the Government for the amount of the policy, subject to the terms thereof, becomes absolute and would not be satisfied by payment of the cash surrender value.

In the decision of March 4, 1924, *supra*, there were involved retroactive ratings of permanent total disability, and as the effective date of maturity for that reason is exclusively a matter for determination by the Veterans' Bureau, as well as the adjudication of an application for surrender, the controlling factor in determining whether the rating of disability or the action upon the application to surrender took precedence was held to be the date of receipt in the bureau of the evidence on which the disability rating was based.

However, in this case a different situation is presented. The date of maturity of a policy by death is a fact susceptible of proof without action by the bureau, and if death occurs at any time prior to a final adjudication of an application for surrender and the payment of the cash surrender value based on that adjudication, the Government is liable under the terms of the policy.

In the case of William Wozny, presented by you, it appears that death occurred before the application for surrender was received in the bureau and, of course, before the application had received any consideration by the bureau and while the policy was in full

force and effect under the extended insurance provisions thereof. On the facts presented payments are authorized under the policy.

(A-5491)

APPROPRIATIONS—DEPARTMENT OF AGRICULTURE—DESTRUCTION OF DISEASED ANIMALS

The payments authorized, by the act of May 11, 1922, 42 Stat. 511, to be made by the Secretary of Agriculture to owners of animals destroyed in the effort to control and eradicate tuberculosis are in the nature of gratuities and are to be made only in the discretion of the Secretary, subject to the statutory restrictions, when in his opinion such payments are necessary to promote the work of controlling and eradicating the disease of tuberculosis of animals.

Comptroller General McCarl to the Secretary of Agriculture, February 12, 1925:

I have your letter of September 29, 1924, as follows:

There is before the Department for payment a voucher executed by the First National Bank of Hallock, Minnesota, as mortgagee of cattle slaughtered under the provisions of the item in the agricultural appropriation act for the fiscal year 1923 (42 Stat. 507, 511), reading as follows:

"GENERAL EXPENSES, BUREAU OF ANIMAL INDUSTRY.

"* * *; to purchase and destroy diseased or exposed animals or quarantine the same whenever in his judgment essential to prevent the spread of pleuropneumonia, tuberculosis, or other diseases of animals from one State to another, as follows:

* * * * * * *

"For investigating the disease of tuberculosis of animals, for its control and eradication, for the tuberculin testing of animals, and for researches concerning the cause of the disease, its modes of spread, and methods of treatment and prevention, including demonstrations, the formation of organizations, and such other means as may be necessary, either independently or in cooperation with farmers, associations, State, Territory, or county authorities, $2,877,600, of which $850,000 shall be set aside for administrative and operating expenses and $2,027,600, of which $300,000 shall be immediately available, for the payment of indemnities: (1) *Provided, however*, That in carrying out the purpose of this appropriation, if in the opinion of the Secretary of Agriculture it shall be necessary to destroy tuberculous animals and to compensate owners for loss thereof, he may, in his discretion, and in accordance with such rules and regulations as he may prescribe, expend in the city of Washington or elsewhere out of the moneys of this appropriation, such sums as he shall determine to be necessary, within the limitations above provided, for the reimbursement of owners of animals so destroyed, in cooperation with such States, Territories, counties, or municipalities, as shall by law or by suitable action in keeping with its authority in the matter, and by rules and regulations adopted and enforced in pursuance thereof, provide inspection of tuberculous animals and for compensation to owners of animals so destroyed, but no part of the money hereby appropriated shall be used in compensating owners of such animals except in cooperation with and supplementary to payments to be made by State, Territory, county, or municipality where condemnation of such animals shall take place; nor shall any payment be made hereunder as compensation for or on account of any such animal destroyed if at the time of inspection or test of such animal, or at the time of condemnation thereof, it shall belong to or be upon the premises of any person, firm, or corporation, to which it has been sold, shipped, or delivered for the purpose of being slaughtered: (2) *Provided further*, That out of the money hereby appropriated no payment as compensation for any tuberculous animal destroyed shall exceed one-third of the difference between the appraised value of such animal and the value of

the salvage thereof; that no payment hereunder shall exceed the amount paid or to be paid by the State, Territory, county, or municipality, where the animal shall be condemned; and that in no case shall any payment hereunder be more than $25 for any grade animal or more than $50 for any pure-bred animal, and no payment shall be made unless the owner has complied with all lawful quarantine regulations; * * *."

The cattle for which claim is made by the First National Bank were the property of Mr. Oliver Cutt, who is now deceased. It seems from the file transmitted herewith that the slaughtered cattle were included in a chattel mortgage given by Mr. Cutt to the First National Bank of Hallock.

B. A. I. Order 237, Regulation VIII, requires that when animals have been destroyed in carrying out tuberculosis-eradication work, the inspector shall take reasonable precaution to determine who is the owner of the slaughtered cattle and whether there is any mortgage or other lien outstanding against the animals. A copy of this order is also transmitted. It has been the uniform practice in paying these claims that, where it appears that a first lien exists against the slaughtered animals, the holder of the lien is either required to release the same or is included in the voucher, together with the record owner. Some question, however, has arisen as to the propriety of this procedure and your decision is respectfully requested whether, in the instant case, the Department is authorized to pay the First National Bank of Hallock as the holder of the first lien against the slaughtered cattle without reference to the deceased owner or his estate to the extent of the amount of the mortgage.

There is also a claim pending before the Department in which the facts are similar to those above described, with the exception that the record owner, one G. S. Batson, can not be located, having disappeared for parts unknown. Your decision is requested whether in such a case the holder of the lien, assuming the lien to cover the entire interest of the mortgagor, is entitled to payment, or will the Department be required to hold the amount of the indemnity until the record owner can be located and make payment to him without reference to the mortgagee.

Would your answer be the same in the case of the slaughter of tuberculous cattle bought by a claimant from another person on a conditional-sale contract?

The payments authorized to be made under the provisions of law quoted in your letter, to owners of destroyed tuberculous animals, are in the nature of gratuities as the Government receives no tangible return from such payments. The statute does not confer upon the owners of, or persons having an interest in, the destroyed animals any legal right to require the United States to make any payment thereunder. Such payments as are authorized to be made by the Secretary of Agriculture to such owners are to be made only "in his discretion, and in accordance with such rules and regulations as he may prescribe," subject to the restrictions and limitations specifically imposed by the statute. The restrictions imposed by the statute with reference to the persons to whom and the conditions under which the payments may be made are:

(1) That the payments are authorized to be made only where the animals are destroyed in "such States, Territories, counties, or municipalities, as shall by law or by suitable action in keeping with its authority in the matter, and by rules and regulations adopted and enforced in pursuance thereof, provide inspection of tuberculous animals and for compensation to owners of animals so destroyed." That is to say, unless the State, Territory, county, or municipality provides by law, or under authority of law, for the destruction of tuberculous animals and for compensation to the owners thereof, there is no authority to use the Federal funds for that purpose.

(2) That no part of the Federal funds so appropriated "shall be used in compensating owners of such animals except in cooperation with and sup-

plementary to payments to be made by State, Territory, county, or municipality where condemnation of such animals shall take place."

(3) That no payment shall be made if the destroyed animal, at the time of inspection, test, or condemnation, belonged to or was upon the premises of any person, firm, or corporation to which it had been "sold, shipped, or delivered for the purpose of being slaughtered."

(4) That "no payment shall be made unless the owner has complied with all lawful quarantine regulations."

In view of these restrictions you are not authorized to make payment under the provisions in question unless the person claiming to be the owner of the destroyed animals establishes to your satisfaction (1) that he has complied with all lawful quarantine regulations; (2) that the animal had not at the time of inspection, test, or condemnation been sold, shipped, or delivered for the purpose of being slaughtered; and (3) that the State, Territory, county, or municipality in which the animal was destroyed has made or will make payment to him on account of the destruction in accordance with provision made therefor by law or under legal authority. Such essential facts being duly established, you are authorized, in your discretion, to make payment to such person without making independent inquiry as to mortgages, liens, etc., but should conflicting claims be asserted you would be justified, in the exercise of your discretion, to decline making any payment until such conflicts have been reconciled to your satisfaction.

The law does not require that payment be made on account of each and every animal destroyed; nor does it require that the amount authorized to be paid in any given case be apportioned to all parties who had an interest in the destroyed animal at the time of its destruction. As hereinbefore stated, the payments authorized to be made under this law are in the nature of gratuities payable only in the discretion of the Secretary of Agriculture subject to the statutory restrictions; and in no case should such payment be made unless "in the opinion of the Secretary of Agriculture it shall be necessary" to promote the work of controlling and eradicating the disease of tuberculosis of animals.

(A-6244)

REWARD FOR DELIVERY OF DESERTER—PAYMENT OF, TO DEPUTY UNITED STATES MARSHAL

The payment of a reward to a salaried deputy United States marshal for the apprehension and delivery of a deserter from the Marine Corps is not authorized.

Comptroller General McCarl to Maj. Charles R. Sanderson, United States Marine Corps, February 12, 1925:

There has been received your letter of November 10, 1924, supplemented by your letter of January 17, 1925, transmitting voucher

dated October 11, 1924, in favor of Henry C. Bradford, Deputy United States marshal, Buffalo, N. Y., for $50, covering reward for the apprehension and delivery on October 11, 1924, of Private Howard F. Ragsdale, United States Marine Corps, deserter, at marine recruiting station, 306 customhouse, Buffalo, N. Y., and requesting to be advised as to whether you are authorized to pay the same in view of the apparently conflicting decisions of the Comptroller of the Treasury, dated December 6, 1912, 63 MS. Comp. Dec. 993, and January 15, 1919, 25 Comp. Dec. 499, and inviting attention to Department of Justice Circular No. 888, dated September 9, 1918, addressed to United States district attorneys and United States marshals.

It appears that on August 20, 1924, the commanding officer of marine barracks, Quantico, Va., offered a reward of $50 for the apprehension and delivery of Private Ragsdale, deserter, at any marine barracks or marine recruiting station on or before August 20, 1928.

Article 1697, Navy Regulations, 1920, authorizes the offering of a reward not exceeding $50 for the apprehension and delivery of a deserter from the Navy or Marine Corps, the payment of which to be in full satisfaction of all expenses for arresting, keeping, and delivering the deserter with certain exceptions not here material.

The question presented is whether a reward as such, without regard to amount of expenses incurred, may be paid to a deputy United States marshal for arresting and delivering a deserter from the Marine Corps.

The act of February 16, 1909, 35 Stat. 622, provides:

> Sec. 15. That it shall be lawful for any civil officer having authority under the laws of the United States or of any State, Territory, or District to arrest offenders, to summarily arrest a deserter from the Navy or Marine Corps of the United States and deliver him into the custody of the naval authorities.

A similar provision was made in section 6 of the act of June 18, 1898, 30 Stat. 484, for the arrest and delivery of a deserter from the Army. Referring to this statutory provision, it was held in 25 Comp. Dec. 499:

> Where a deserter from the Army who was shot while attempting to escape arrest by a deputy marshal's posse was placed by that officer in a hospital for care and treatment, such expense being incurred without consultation with or direction from any military authority, the cost of said medical treatment is a proper charge against the judiciary appropriation for the support of prisoners; that in arresting deserters marshals and their deputies act by virtue of their office and under express statutory authority; and the expense incurred is an expense of their respective offices, subject only to the statutory provision that not exceeding $50 of such expense in each case may be paid from Army appropriations.

The Judge Advocate General of the Army in an opinion rendered January 8, 1918, held:

> No reward should be paid to any United States marshal or deputy marshal for the arrest and delivery of deserters from the military service. The expenses of such officers are paid from public funds, and they are forbidden by the Department of Justice to demand or accept any further sum by way of reward. (See Digest of Opinions of Judge Advocate General of the Army, Jan., 1918, p. 6.)

In said circular letter No. 888, issued by the Department of Justice, referring to circular letter of August 12, 1918, issued by the office of the provost marshal general, it was stated:

> Paragraph five, subdivision two, of the enclosed circular, states that in all cases the person delivering a wilful deserter is entitled to collect a reward of $50. This, however, is to be understood only as a statement of a general rule or principle, and is modified by circumstances described elsewhere, and particularly by paragraph 6 (a), which states that rewards can not be paid to Federal officials, but that such may obtain reimbursement only for actual and necessary expenses within the limit of $50 per man.

In paragraph 8 of said Circular No. 888, it was also stated that if in any instance marshals, deputy marshals, or special agents of the department incur expenses in endeavoring to arrest and deliver deserters, accounts for reimbursement should be submitted to the department for review and appropriate action.

It thus appears that not only was it held by a Comptroller of the Treasury but it has been recognized by the Department of Justice that marshals and their deputies in arresting deserters from the Army act by virtue of their office under express statutory authority and not in their personal capacity. As there is similar statutory authority for arresting deserters from the Marine Corps no distinction can be made in this respect.

It is understood that Mr. Bradford is a salaried deputy marshal.

In instructions to United States marshals, attorneys, clerks, and commissioners, June 1, 1916, under the head of salaried deputy marshals, compensation, it is provided:

> 120. Salaried deputies and clerical assistants are paid monthly by marshals. Their annual salaries are fixed by the Attorney General. (See act of May 28, 1896, 29 Stat. L., 182, and pars. 329 and 345.)
>
> 121. Salaried deputies also receive actual traveling expenses and actual expenses of lodging and subsistence, not exceeding $3 per day (see 35 Stat. L., 640) when absent from their stations on official business; they are also reimbursed for expenses of transporting prisoners, including necessary guard hire. (See pars. 398 to 410.)
>
> 122. There is a penalty for demanding or receiving any fees or compensation other than those above mentioned.

While in the earlier decision of the Comptroller of the Treasury, December 6, 1912, to which you refer, it was held that the payment to a deputy United States marshal of a reward for the apprehension and delivery of a deserter from the Marine Corps was authorized, as such service was not a part of his official duties, the provision

in the act of February 16, 1909, *supra*, was not referred to therein and apparently was not considered.

In view of the foregoing considerations you are advised that the payment of the voucher is not authorized.

(A-7315)

INSURANCE ON PUBLIC PROPERTY

The incurring of expense for insuring public property being transported is ordinarily not authorized as it is the policy of the Government to assume its own risks.

In the absence of a showing that insurance was requested in writing by the Government, as required by I. C. C. Tariff Regulation No. 1959, the Government is not liable for marine insurance purchased by a carrier upon the assumption that the valuation placed by the Government on the public property being transported warranted its insurance.

Decision by Comptroller General McCarl, February 13, 1925:

The American Railway Express Co. applied by letter of January 2, 1925 (File No. G-30-5-S), for review of settlement T-10291-N, Navy bill G/8/11513A, for transportation of one box of silverware weighing 87 pounds from Vallejo, Calif., to Honolulu, Hawaii, per Government bill of lading No. 317106 of July 21, 1924.

There was disallowed in the settlement the sum of $2.88 representing marine insurance of 25 cents per $100, upon $1,200 valuation placed on shipment. The disallowance was made in accordance with Local, Joint, and Basing Tariff No. 81, I. C. C. No. 1959, with which the claimant company must be presumed to be familiar and which provides, page 3, section 3, item 2, "Marine insurance is not required on * * * United States Government shipments (except upon written request therefor)."

In its request for review, claimant company states:

> We have received shipping order which clearly indicates when receipt was given valuation as $1,200.00 was declared, this being our liability in event shipment was lost, therefore, it was necessary to protect declared valuation and for this reason marine insurance was placed on shipment. There is also a notation indicated on the shipping order to the effect that $8.31 was collected to cover excess cost of shipping by express and it may be that amount in question should be collected from Lt. L. D. McCormick, who was consignee.

The statement as to the valuation on the shipping order can not be considered as a written request by Government official for marine insurance on the property shipped, and the statement "$8.31 was collected to cover excess cost of shipping by express" does not of itself change the nature of the shipment from Government property to private property. It must, therefore, be held that there was no authorization in accordance with I. C. C. No. 1959 to insure the property.

The question of insuring Government property has been the subject of numerous decisions and the established rule is that Government

officers ordinarily are not authorized to incur expenses for the insurance of public property both upon the ground that the appropriations sought to be charged with the expense are not available and because it was held to be the policy of the Government to assume its own risks. 13 Comp. Dec. 779; 21 *id.* 308; 23 *id.* 297, and citations therein; Re A–5011, January 2, 1925.

However, assuming that reimbursement for cost of marine insurance might be made in a proper case such reimbursement is not authorized in the absence of a showing that the insurance was requested in writing as required by I. C. C. No. 1959. The insurance in the instant case was taken out, apparently, on the company's own initiative, and for its own protection, and there is no law shifting the liability therefor to the Government.

Upon review the settlement is sustained.

(A–6637)

WAR RISK INSURANCE—DEDUCTION OF PREMIUMS

The responsibility for failure to deduct insurance premiums from the pay of a naval officer, in accordance with an authorization or allotment therefor, causing the insurance to lapse, will be held to be that of the officer himself, unless he can establish affirmatively by competent evidence that the fault was not his.

Where a naval officer draws or accepts pay for two or three consecutive months in such amounts as would not leave funds sufficient to cover his insurance premiums as due, the conclusion is justified that he had withdrawn his allotment or authorization for insurance premiums.

Where papers transferring the accounts of a naval officer, incident to a change of ship or station, plainly state no allotment or authorization for war risk insurance premiums, the officer is presumed to have had actual knowledge that his prior authorization to deduct insurance premiums had not been indicated in the transfer papers, and the responsibility is his for failure to deduct and pay insurance premiums thereafter becoming due causing his insurance policy to lapse.

Comptroller General McCarl to the Director, United States Veterans' Bureau, February 14, 1925:

I have your letter of December 2, 1924, as follows:

The question has arisen in this Bureau as to the proper adjudication of the case of Thomas C. Latimore, Lieutenant, United States Navy, in view of your decisions of October 10, 1923, (A. D. 7867) and December 5, 1923, (A. D. 7875).

In your decision of October 10, above mentioned, in the case of Anthony Alfred Skomsky, you held that the fact that an enlisted man in the active service accepted monthly pay without deduction of an allotment for payment of insurance premiums, is not sufficient alone to establish a presumption of breach or revocation of the allotment. You stated therein:

"The question for decision, therefore, is whether acceptance by the enlisted man of monthly pay without deduction of this allotment must be taken as either a breach or a revocation of the allotment. In this respect the enlisted man stood on a different footing from an Army officer who prepares his own pay voucher, and a naval reservist whose retainer pay is sent to him from the central office in Washington. The enlisted man in active service is not, generally speaking, responsible for the correct computation of his monthly pay.

The computation is made by a superior officer and the net amount found due is received and accepted by the enlisted man, usually without question and without verification of the amount received. * * * In case the failure to deduct premiums is due entirely to the Government, and there is no affirmative evidence showing the fault of the insured, the insurance must be considered as continuing effective until such time as attention is called to the error and an opportunity given for correction. If the insured has died in the meantime, I see no reason why the insurance which would otherwise be due may not be paid subject to the deduction of the unpaid premiums."

In your decision of December 5, 1923, with reference to Army officers you stated:

"The specific authorization for deduction of premiums from commissioned pay does not necessarily place upon the Government the responsibility for making the deduction. There is no explanation of why the deduction was not made or why the officer continued to accept pay without deduction. Upon the facts appearing no final conclusion can be reached in this case. * * * It is noted that the general authorization for deduction of premiums from pay is qualified by the words 'unless they be otherwise paid.' It was customary for officers to note the deduction of premiums from their pay vouchers. The absence of such notation on this officer's pay voucher indicates that the premiums were intended to be otherwise paid."

From the above it will be seen that by your decisions you have covered the cases of enlisted men in the military and naval service and officers in the military service. However, the instant case is that of an officer in the naval service, and before adjudicating this case the bureau desires your decision as to the rule which should apply in the cases of naval officers.

The above-named man, while an officer in the active naval service, applied for $10,000 war risk insurance November 14, 1917, and authorized deductions to be made from his pay. For some unknown reasons no deductions were made from his pay subsequent to December 7, 1919, until September 21, 1922, when he applied for the reinstatement of his insurance. In answer to this application on December 17, 1922, the bureau advised him that a careful search of the records failed to show that his insurance had been discontinued by request and in accordance with the precedents of this office then existing he was advised that the insurance was in full force and effect and that all premiums in arrears were due the bureau. The amount of these unpaid premiums were established as a lien against the insurance. The case was then admitted to the office of the general counsel of this bureau for an opinion, and it was ruled by that officer that the insurance lapsed for the nonpayment of the premium due January 1, 1921, but that premiums to that date were due and owing to the bureau for the reason that protection had been extended the officer to that date. The general counsel's opinion was predicated upon the fact that authorization to deduct premiums made by this man at the time of application for insurance when he was a naval officer, that he had continued in the same status to January 1, 1921, and that he failed to discontinue or to express in any way his desire to discontinue his insurance, and the mere failure to deduct premiums was not sufficient. This opinion set forth that an officer of the Navy does not draw pay regularly each month by means of a pay voucher as does the officer in the Army, but draws on his pay at any time he so desires up to the amount due him. Also, in many cases an officer will not draw his full pay for a period of several months or even a year and that in such cases the accrued pay is held by the pay officer of the Navy, to be drawn upon by the officer. Attention was called to the fact that it would very easy in such cases for an officer who had authorized deduction of premiums to be totally unaware of the facts that insurance premiums were not being paid. It was therefore held that as there was no affirmative evidence to show that the officer desired to discontinue his insurance and that in view of the fact if he had died during the intervening period, the insurance would be payable, that he owed the bureau for the insurance protection which had been extended to him.

The reason for arriving at January 1, 1921, as the effective date of lapse, was due to the issuance by the Navy Department in the fall of 1920, of Navy Department Circular No. 14, which changed the method of payment of premiums in the Navy on term insurance from the checkage system to the allotment system. Full notice of this change was extended to all officers and men of the Navy and an ample opportunity was given to execute an allotment if it was desired to continue insurance in force. Having failed to do this it

was held that the insurance lapsed subsequent to January 1, 1921, the effective date of Navy Department Circular No. 14. This opinion while recognizing the right under the statute of a person in the military and naval service to have his premiums deducted from his pay, nevertheless held that the War and Navy Departments had the right to specify the proper method by which such deduction would be made and that if such regulations pertaining to deductions were not complied with, the insurance would lapse, if premiums were not actually paid within the grace period.

The question which arises in the case now, is whether the bureau's action in this matter was proper. If your ruling pertaining to Army officers applies to officers of the naval service, then the ruling apparently is incorrect and the insurance lapsed for the nondeduction of premiums in December, 1919. If your ruling with reference to enlisted men is to govern, then the bureau's ruling appears to be correct and the insurance did not lapse until January 1, 1921. This office is in doubt as to which rule should apply, and it is therefore requested that a decision be rendered covering this class of cases.

While it is understood that naval officers do not execute monthly pay vouchers for the full amount of pay due them for the month as do Army officers (2 Comp. Gen. 249 and decision of December 5, 1923, 28 MS. Comp. Gen. 216), but are usually paid on the same rolls with enlisted men of the Navy (section 4912, Naval Instructions, 1913, and section 1538, Naval Regulations, 1920), the actual condition is that naval officers have closer contact and familiarity with, and greater opportunity to verify, their accounts than do enlisted men of the Navy. It may not be said, therefore, that the rule heretofore laid down concerning the responsibility for checkage of insurance premiums from pay of enlisted men of the Navy (3 Comp. Gen. 202) applies in all cases to responsibility for checkage of insurance premiums from pay of naval officers.

In the cases of naval officers the primary responsibility for proper deduction from his pay of insurance premiums will be held to be that of the officer himself. Where there has been a failure to deduct insurance premiums from the pay of a naval officer, under an allotment made by him, for a sufficient time to cause the policy to lapse, the responsibility will be that of the officer himself unless he establishes affirmatively by competent evidence that the fault was not his. What would constitute competent evidence in all cases is not possible to state generally, but the Veterans' Bureau should make careful inquiry into the actual facts disclosed to determine where the responsibility lies for failure to deduct and pay the premiums. What conclusions may be reached from existing facts may not be stated generally, but, as an illustration, if the officer draws or accepts his pay, say, for two or three consecutive months, in such amounts as would not leave funds sufficient to cover his insurance premiums as due, it would be action by him so inconsistent with the purpose of the allotment and so effectual in preventing its operation as to justify the conclusion that he had withdrawn the allotment.

The records of this office in the present case indicate the reason for failure to deduct insurance premiums after December, 1919, from

the pay of Lieutenant Latimore. On December 11, 1919, his accounts were transferred from Capt. Joseph Fyffe, Pay Corps, navy yard, Philadelphia, Pa., to Lieut. L. H. Huebner, Pay Corps, U. S. S. *Leary*. In the transfer paper entitled "single transfer account," described as "transfer of allotment only," the blank space for war-risk insurance premiums is crossed out, and in the "single transfer account" transferring the remainder of the account is the statement "no insurance form received with account." In the same papers issued incident to the transfer of Lieutenant Latimore, May 5, 1920, from the U. S. S. *Leary* to the U. S. S. *Putnam* the blank space for insurance premiums is left blank. It is understood that these transfer papers are actually carried in person by the officer being transferred from one station or ship to another. Whether such papers were actually carried or sent at the time of transfer, the notation on the transfer papers is reasonably persuasive that Lieutenant Latimore had actual knowledge that his previous authorization to deduct insurance permiums had not been indicated in the transfer papers, sufficient to have put him on notice and enabled him to have corrected the omission or oversight, if such. These facts, in addition to the fact that he later requested reinstatement on the basis that the policy had lapsed, establish that the policy lapsed in December, 1919, or January, 1920, at the end of the grace period, and that the officer so understood it. Accordingly, the account between the Veterans' Bureau and Lieutenant Latimore should be adjusted on that basis.

(A–7703)

LEASES, RENT—COMPENSATION FOR USE OF FURNITURE, EQUIPMENT, ETC.

Where under a lease by the United States the entire plant of a private military college including furniture, equipment, etc., was acquired for a certain period as a training school for disabled war veterans, and after the termination of said lease and the transfer of title to the real property, a new lease, which did not cover the personal property, was entered into with the new owner of the realty, and the furniture, equipment, etc., which were shown to have little or no rental value to the Government, were permitted to remain on the premises after termination of the prior lease, without any agreement as to compensation for its use, there is no obligation on the Government to pay for the reasonable use as may have been made of such personalty.

Decision by Comptroller General McCarl, February 14, 1925:

The Peacock Military College (Inc.) has submitted through the United States Veterans' Bureau a claim dated December 30, 1924, for rent or compensation for use since July 1, 1922, of certain personal property, the circumstances and conditions giving rise to the claim being hereinafter set forth.

It appears from the record that for a number of years prior to March 1, 1921, the claimant corporation had owned and operated a school plant at San Antonio, Tex. It may be stated here that Edith W. Peacock owned all of the capital stock of the corporation except two qualifying shares, one of which was owned by her husband, Wesley Peacock, who was president of the corporation and manager of the school, the other qualifying share being owned by Mr. Peacock's attorney. The school was in active operation as a military college with, it is alleged, an enrollment of about 200 students when, by lease agreement dated February 5, 1921, the entire plant, including the residence of Mr. and Mrs. Peacock, and another residence, covering in all 59 city lots, together with all furniture, equipment, paraphernalia, etc., was leased to the Government for use by the Federal Board for Vocational Education as a training school for disabled veterans. This lease covered the period from March 1, 1921, to June 20, 1922, with an option in the Government to renew for one year thereafter upon the same terms and conditions, but it also reserved to the Government the right to terminate the lease at the end of any month upon 30 days' notice. The rent stipulated in the lease was at the rate of $12,950 per annum, payable monthly. The lessor was required to make all necessary repairs; and while the lease did not expressly require the lessor to make improvements or alterations, it seems that there was an oral understanding that it would, immediately upon approval of the lease, proceed to make improvements and alterations as directed by the Government officer in charge to the extent of about $9,000. Accordingly, on or about March 1, 1921, the lessor vacated the premises, moving the military students to Mr. Peacock's ranch to finish out the semester under camping conditions, and the repairs, alterations, and improvements were proceeded with and were practically completed in June, 1921. It is understood that no trainees arrived at the school until after July 1, 1921.

It appears that the cost of improvements made by the lessor at the direction of the officer in charge was vastly in excess of $9,000, which amount the lessor had agreed to expend, and as the lease agreement of February 5, 1921, contained no provision authorizing the Government to reimburse the lessor for such additional expenditures, the matter was taken up prior to July 1, 1921, with a view to the modification of the terms of the lease, and an adjustment was effected by a supplemental agreement dated December 8, 1921, whereby the rent was increased by $2,975.48, effective from July 1, 1921, a part of the consideration for such increase being the use by the Government since July 1, 1921, of the increased facilities provided by the lessor's expenditures in excess of $9,000, which said expenditures were stated in the agreement as consisting

of a shop building at a cost of $4.083.38 and the construction of 50 tent houses at a cost of $6,745. There was also embraced in this supplemental agreement and mentioned as a part of the consideration for the increase in rent a tract of farm land, said to consist of about 20 acres, which was not covered by the original lease of February 5, 1921.

The aggregate amount paid to claimant as rent under the lease of February 5, 1921, and the supplemental agreement of December 8, 1921, for the entire period from March 1, 1921, when the lease became effective, to June 30, 1922, when it terminated, was $20,242.13; and while the supplemental agreement of December 8, 1921, may be accepted as establishing that the entire amount expended by the lessor for improvements as distinguished from repairs was only ($9,000 plus $10,828.38) $19,828.38, which it may be noted is only $413.75 less than the entire amount of rent received by the lessor, it is also disclosed from other evidence on file that the aggregate amount expended by the lessor at the direction of the Government officer in charge for repairs, alterations, and improvements during the first six months covered by the lease was approximately $10,000 in excess of the total amount of rent received by the lessor for the entire period of 16 months covered by the lease. As a result of this fact and the fact that Mr. Peacock devoted practically his entire time to the interest of this school until about January 1, 1922, the claimant-corporation could not meet certain of its financial obligations and accordingly all of the real property covered by the original lease of February 5, 1921, except the three lots on which one of the residences was located, was sold at sheriff's sale July 4, 1922, by order of a court, to satisfy three judgments aggregating $27,742.02 with interest from April 28, 1922, date of said judgments, and all cost of suit and sale together with the foreclosure of all mechanic's, materialman's, and other liens existing on April 28, 1922. The price at which the property was sold at said sheriff's sale is not shown in the papers before me but it is understood from representations made on behalf of claimant that the entire amount of the proceeds was applied to the payment of the judgments and costs of suit and sale, no part of said proceeds being received by claimant.

The Government did not discontinue operation of the school on June 30, 1922, the date of termination of the lease of February 5, 1921, as supplemented by the agreement of December 8, 1921, but instead, the United States Veterans' Bureau, which, under the provisions of the act of August 9, 1921, 42 Stat. 147, had succeeded to the duties and responsibilities of the Federal Board for Vocational Education with respect to such schools, under date of July 5, 1922, entered into a lease agreement with John T. Wilson, the new owner of the property sold at the sheriff's sale, as hereinbefore stated, with

rent at the rate of $12,153 per annum, and under date of July 1, 1922, entered into a lease agreement with Edith W. Peacock for the three lots comprising a residence property owned by her but which had been included in the original lease of February 5, 1921, and three lots adjoining which had been purchased in her name in 1921 at a cost of $1,000 as a site for the shop building referred to in the supplemental agreement of December 8, 1921, *supra*. The rent stipulated in Mrs. Peacock's lease was $6,000 per annum. Each of these two leases purported to cover a period of four years, or until June 30, 1926. The appraised valuation of the property covered by Mrs. Peacock's lease was $11,700, and it now clearly appears that both the Veterans' Bureau and Mrs. Peacock understood at the time the lease was made that the apparently exorbitant rental of $6,000 per annum for property representing an appraised investment of only $11,700 was intended not only to give her a fair return for the use of said property but also to reimburse her to the extent of approximately $20,000 for the loss she had sustained on other property, as hereinbefore and hereinafter indicated. Whatever justification there may have been for this arrangement from an equitable standpoint, the irregularity and, in fact, illegality of the transaction are apparent. While there may have been a moral obligation on the part of the Government to Mrs. Peacock on account of the large expenditures her company was induced to make in 1921 under threats that the Government would take advantage of the 30-day termination clause in the lease of February 5, 1921, if such expenditures were not made, and intimations that the property would be rented by the Government for many years if such expenditures were made, it does not appear that there was any legal obligation on the Government to reimburse her for any part of said expenditures; and regardless of any moral or legal obligations in the matter, there appears to have been no justification for the attempted adjustment resorted to by the bureau.

Had the lease of July 1, 1922, been permitted to continue for the full period which it originally purported to cover, to wit, until June 30, 1926, Mrs. Peacock would have been reimbursed for the greater portion of the expenditures made by her company in 1921 at the direction of the Government officer in charge, which expenditures, it appears, caused her company to lose title to the 56 lots and the improvements thereon as hereinbefore stated. But the lease was terminated effective June 30, 1924, the Government having no further use for the property, as it had been vacated in May, 1924, in accordance with plans for final closing of the school. It may be stated in this connection that there was no authority of law for entering into a four-year lease in this case as there was at that time no appropriation adequate for its fulfillment and no statute spe-

cifically authorizing a lease for more than one fiscal year in such a case. It is now well established that a lease purporting to be for more than one year under such circumstances must be construed to be a lease for the fiscal year current when it becomes effective, with an option in the Government to renew from year to year to the end of the stated term. See 1 Comp. Gen. 10, and authorities therein cited. The lease in this case was renewed for the fiscal year 1924 only.

The claim here under consideration was not filed until after June 30, 1924, when said lease of July 1, 1922, was terminated, and it is rather significant that the amount in which it is stated, to wit, $9,075, is approximately the amount which Mrs. Peacock would have received in excess of the fair rental value of her property if the lease had not been terminated.

The basis of the claim appears to be that some of the furniture, equipment, etc., covered by the lease of February 5, 1921, remained on the premises and was used by the Government after the termination of said lease on June 30, 1922, although neither of the two leases covering the real property for the period subsequent to said date contained any provision with reference to the said personal property.

There was no lease, contract, or stipulation of any kind providing for the payment by the Government of any rent or compensation for the use of the furniture, equipment, etc., after June 30, 1922. That no such payment was contemplated by the Government or the claimant is apparent from the fact that no such payments were made and no claim therefor was presented until more than two years had elapsed. That this personal property was of but little use to the Government and had practically no rental value is indicated by the statements made by W. A. Roberts in a letter dated April 21, 1921, transmitting the property inventory as made by him and J. C. Johnston (Roberts representing the Government and Johnston representing the lessor). The statements referred to are as follows:

> 2. This property as a whole is in very poor condition, a majority being entirely unserviceable at the present time.
> 3. All of the mattresses need overhauling and most of the springs will be serviceable a very short time.
> 4. The automobiles as a whole are useful only for instruction purposes unless completely overhauled.

The inventory placed no value on the articles listed. It will be noted that this statement as to the unserviceableness of this equipment was made in April, 1921, soon after the Government took over the property and before any use had been made of it by the Government, and it is but reasonable to assume that the value to the Government was even less on July 1, 1922, the beginning of the period covered by this claim. Another evidence that this personal

property had practically no rental value to the Government is the fact that the rent reserved in the three leases covering all of the real property, but no personal property, for the period subsequent to June 30, 1922, was $2,677.52 per annum in excess of the rate paid up to June 30, 1922, under the agreements of February 5 and December 8, 1921, for the identical real property and all of the personal property. In this connection it may be noted also that the mess hall, which was one of the improvements on the real property covered by the lease which terminated June 30, 1922, was destroyed by fire in June, 1922; therefore the value of the real property covered by said lease was greater than the value of the property covered by the leases beginning in July, 1922.

It is shown that much of the property listed on the inventory of April, 1921, was removed by Mr. Peacock in December, 1921, and that certain other property was theretofore and thereafter removed by him. It is also shown in a report submitted under date of November 13, 1924, by William A. Stoller, the Veterans' Bureau officer in charge of the property at the school, that numerous articles, which he specifically indicated by reference to the inventory, were destroyed in the fire which occurred at the school in June, 1922. Mrs. Peacock, in an affidavit made February 3, 1925, stated, in substance, that the fire which occurred in June, 1922, was in the mess hall and kitchen of the school; that in May, 1921, the furniture and equipment belonging to her company and which were covered by the Government's lease of February 5, 1921, were removed from the said mess hall and kitchen and stored in other buildings on the premises; and that the personal property destroyed in the fire was property which had been installed to take the place of her property, and belonged to the National Subsistence Corporation, which had some kind of an arrangement with the Government for boarding and catering to the trainees. Regardless of whether claimant's mess hall and kitchen equipment was or was not destroyed by the fire, it is evident that it was not used by the Government at any time subsequent to June 30, 1922, the period covered by this claim.

The situation with respect to this personal property would appear to be that practically all of what was left thereof on June 30, 1922, was located on the premises acquired by Wilson at the sheriff's sale; that the property was permmitted to remain there after the premises had been leased by the Government from Wilson; that claimant had the right, in so far as the Government was concerned, to remove at any time after June 30, 1922, all or any part of said property; and that the claimant, having no immediate use for the property which had little or no sale value, preferred to leave it on the premises at claimant's own risk rather than to remove it and pay expenses inci-

dent to moving and storing elsewhere. If such were the facts, it is clear that there is no legal obligation on the Government to pay for any reasonable use that may have been made of said property with the knowledge and sanction of the owners so long as it was permitted to remain on the premises.

Furthermore, it appears that in May, 1923, Mrs. Peacock was notified by the Veterans' Bureau that her lease of July 1, 1922, under which rent was being paid at the rate of $6,000 per annum on property of the appraised value of only $11,700, would terminate on June 30, 1923, and would not be renewed for any period thereafter at such an exorbitant rental. With reference thereto, Mrs. Peacock, for the corporation, her husband and herself, submitted to the Director of the Veterans' Bureau a statement sworn to under date of May 28, 1923, reading in part as follows:

> In leasing the premises demised by the present lease of July 1, 1922, the amount of rent reserved was not fixed solely in accordance with the reasonable rental value of said real estate. It was the purpose in arriving at said rental to extinguish all claims which the corporation, my husband and myself might have against the United States on account of the matters related above and for which no reimbursement had been made by the Government, thereby causing the property to be sold by foreclosure proceedings, all to a great loss to the Peacock Military College, to my husband and to myself. This understanding was had orally with the agents of the United States and was not carried into the provisions of the written lease. The oral understanding and agreement upon the part of my husband and myself and aforesaid corporation was that in consideration of a four year lease at a reserved rent of $6,000.00 per year said corporation, my husband and myself released and extinguished all claims for reimbursement of moneys advanced for improvements for the United States anywhere and all claims on account of the use and occupation of the personal property or the continued use and occupation of said personal property until the expiration of this present lease of July 1, 1922, reserving however, to ourselves the right to have said personal property or its equivalent returned to us in good condition, ordinary wear and tear excepted.
>
> At the time of the making of said lease of July 1, 1922, the said real estate mentioned in the lease of February 5, 1921, having been sold, the United States was occupying said premises under a lease from the new owner and was occupying a part of the premises mentioned in said lease of July 1, 1922, and was holding and using the furniture, fixtures, paraphernalia and other personal property hereinabove mentioned which had not been sold under foreclosure. The purpose and intent of the lease of July 1, 1922, therefore, was to lease and let to the United States the specific real property therein mentioned belonging wholly to myself, and also the furniture, fixtures and paraphernalia heretofore mentioned and already then in possession of the Government, and to extinguish all claims which the lessor and lessee might have against each other growing out of said original leases and the matters hereinabove related, and was made with the understanding that the United States would faithfully and fully pay the rental therein reserved for the full four-year term mentioned in said lease of July 1, 1922, and at the end of said period would deliver up said premises and said personal property to myself in good order and condition, reasonable use and wear thereof excepted.

By letter of the same date, May 28, 1923, the Director of the Veterans' Bureau advised Mrs. Peacock that, in view of the statements made by her, the premises would continue to be occupied by the Veterans' Bureau at the rental of $6,000 per annum until June 30, 1924. Thereafter the lease was formally renewed "for the term beginning July 1, 1923, and ending June 30, 1924," which renewal

Mrs. Peacock "acknowledged and unqualifiedly accepted" October 13, 1923. Rent has been paid under said lease at the rate of $6,000 per annum for the entire period from July 1, 1922, to June 30, 1924, date of termination, and it does not appear that any part of said property has been used by the Government since said date, it appearing that the school was closed at or about that time.

From the facts herein set forth it is clear that the claimant has no legal claim against the Government for rent or compensation for use of the personal property in question, and therefore said claim must be and is disallowed.

From the records and reports transmitted to this office in connection with this claim, it is apparent that the Veterans' Bureau was attempting to compensate claimant in some way for the loss sustained as a result of expenditures made for improvements in 1921. The first attempt at an adjustment on account of said expenditures was the supplemental agreement of December 8, 1921. That agreement purported to allow a rental of $2,975.48 for increased facilities that were stated to have cost $10,828.38 and for the farm land which the bureau induced the claimant to include in the lease on the basis of a valuation of $10,000 when, as a matter of fact, claimant did not own but was only leasing said land, probably at a nominal rental, and had expressed a willingness that the Government should make such use thereof as was contemplated without charge. It may be stated here that that same tract of land has been leased by the Government from the owner thereof for the period subsequent to June 30, 1922, at $450 per annum. It thus appears that if the Government had continued to occupy the property under lease from claimant upon the terms of the lease of February 5, 1921, as modified by the supplemental agreement of December 8, 1921, up to June 30, 1925, as apparently contemplated, the increase in rent paid under the said supplemental agreement in excess of the reasonable rental value of the farm land would have reimbursed claimant for approximately the entire cost of the improvements referred to in said supplemental agreement, and such, no doubt, was the intent of the parties, although the terms of the agreement and the administrative report submitted with the request for approval of said agreement would indicate otherwise. But as hereinbefore shown this arrangement terminated June 30, 1922.

The next attempt of the Bureau to make restitution in the matter was in the lease of July 1, 1922, when it undertook to pay Mrs. Peacock, within a period of four years, rent to the amount of $24,000 for the use of property representing an investment of only $11,700, with a rental value of probably less than $1,000 per annum. As that lease was permitted to run for only two years, claimant evi-

dently feels that the Government is still morally and equitably indebted to it in the sum of approximately $10,000 on account of its loss resulting from expenditures made for improvements in 1921. It is true that the improvements were made to claimant's own property but for the most part they were of such character as to add little or nothing to the value of the property except for the extraordinary purposes for which the Government was using the property; for instance, the three shop buildings erected on Mrs. Peacock's property at a cost to claimant of over $7,000 add little to the value of her property and the salvage value thereof is shown to be approximately $500.

It may be stated, also, that papers on file in this case indicate that the Government officers in charge of the school accepted voluntary services from the claimant in the form of a loan of certain livestock (chickens, rabbits, and hogs) in violation of the provisions of section 3679, Revised Statutes, as amended by section 3 of the act of February 27, 1906, 34 Stat. 48, 49.

While I am inclined to the view that Mrs. Peacock has a moral and equitable claim against the Government growing out of the various transactions herein referred to, there has been established no legal claim such as could be allowed and certified by this office. The matter would appear to be proper for presentation to Congress with a view to obtaining relief by means of special legislation.

There is another matter requiring consideration in connection with this claim. The lease agreement of February 5, 1921, stipulated that the lessor should furnish light, water, and janitor service and that the Government should pay therefor in addition to the rental, the sum of $8,000 per annum. The supplemental agreement of December 8, 1921, contained the following provisions:

> Whereas the furnishing of light, water, and janitor service by the said Peacock Military College has resulted in confusion and unsatisfactory service by reason of the fact that the janitors are employed by one party and directed by the other, and
>
> Whereas it is the desire of the parties hereto, for this reason, to relieve the said Peacock Military College from its obligation to furnish such service and to deduct the amount paid therefor from the rent stipulated by said agreement,
>
> Now, therefore, this supplemental agreement, made and entered into this 8th day of December, 1921, * * * Witnesseth:
>
> That for and in consideration of the premises as herein above set forth parties hereto agree as follows:
>
> * * * * * * *
>
> Fourth. That except as herein otherwise provided the premises and property hereby leased shall be subject in all respects to the terms and conditions contained in the agreement of lease dated February 5, 1921, herein referred to, and to which this agreement is supplemental; provided, however, that from and after the 1st day of January, one thousand nine hundred and twenty-two, the said party of the first part shall be relieved of the obligation assumed by it under said agreement of lease dated February 5, 1921, and under this lease, for furnishing light, water, and janitor service to the premises and property covered by said leases, and that from and after said date such service shall be furnished by the party of the second part, it being understood and agreed that

in consideration therefor there shall be deducted thereafter from the sum stipulated to be paid to the said party of the first part under said agreement of lease dated February 5, 1921, the amount stipulated therein to be paid for furnishing such light, water, and janitor service.

Notwithstanding these plain provisions of the agreement and the fact that the claimant furnished no light, water, or janitor service after December 31, 1921, the Veterans' Bureau inadvertently continued to make payments to the claimant for light, water, and janitor service at the rate of $8,000 per annum until the termination of the lease, June 30, 1922, resulting in an overpayment aggregating $4,000, which said amount is admitted in the claim of December 30, 1924, to be due the United States. It therefore becomes necessary to certify a charge against claimant in the sum of $4,000.

(A-5693)

CLASSIFICATION OF CIVILIAN EMPLOYEES—CONSOLIDATION OF APPROPRIATIONS PROVIDING FOR PERSONAL SERVICES

The authority under the "average" provisions to group the various appropriation items for similar activities under a bureau of the Department of Commerce into one unit for the purpose of computing the average compensation in accordance with the Classification Act of 1923, does not relax the provisions of section 3678, Revised Statutes, nor permit the consolidation of the sums appropriated for personal services under various appropria tion items into one fund to be used for personal services without regard to the restrictions or amounts of the respective appropriations so consolidated.

No objection would be offered to an administrative procedure of appointing employees for duty in a particular bureau rather than appointing them specifically under a particular appropriation and thus obviating the necessity of formal reappointment when found expedient to transfer the employee to a roll payable from another appropriation item in the same bureau. The particular appropriation item charged with the compensation of the employee and the time engaged on the work provided for under each appropriation so charged should be shown on the pay rolls.

Comptroller General McCarl to the Secretary of Commerce, February 16, 1925:

I have your letter of November 24, 1924, as follows:

Under date of October 9 I addressed a letter to you requesting decision as to whether or not appointments of employees of this department could be made to read payable from "miscellaneous appropriations," instead of naming the specific appropriation from which payment would be made.

I wish to withdraw that letter and substitute therefor the following:

By your decision rendered to this department under date of October 1, 1924, it was ruled that each bureau would be the appropriation unit within the meaning of the average restriction provision appearing in the appropriation act for the fiscal year 1925, and in view of that decision it would appear to be immaterial out of which appropriation made for the respective bureaus an employee was paid. In administering the affairs of a bureau it is often found advisable to transfer an employee, without in any way changing the character of the work, from one unit of a bureau to another with a corresponding transfer of the charge of the employee's compensation to another appropriation. At the present time recommendations from a bureau in case of original appointment therein indicates the appropriation from which payment will be made, and if the recommendation is approved by the department the notice of appointment specifies the individual appropriation. Should it be desired to trans-

fer the employee to another appropriation, that action, under current practice, requires another recommendation to the department and involves another appointment. The present procedure is voluminous and requires considerable clerical work which it would seem might be greatly curtailed in the interest of economy and efficiency. In view of the fact that the bureau is responsible for placing its employees on the correct appropriation and transferring them to any other appropriation which they may later be more properly payable from, and also in view of the fact that such recommendation is concurred in by the department, under the present procedure, I would request that you advise if there would be any legal objection to the appointments made in any bureau which, under your decision of October 1, 1924, constitutes an appropriation unit, to be on the miscellaneous appropriations of the bureau in question instead of in each case indicating the specific appropriation. With the proposed flexibility in appointments when an employee is transferred from one appropriation to another all that would be necessary would be to cancel the liability for balance of employee's salary and make a corresponding charge on the new appropriation and the transaction is completed. The only change between the proposed and present procedure would be that a bureau would be enabled to make the many necessary changes they are at present making without the necessity of having the changes passed upon by the department, which changes the bureau could make immediately with a saving of an immense volume of clerical work and time of higher officials who necessarily are at present required to approve and sign the documents in each case.

I understand two of the larger departments have followed the proposed procedure for a number of years and it would seem that there would be sufficient precedent for this department to follow, but it was thought that it would be wiser to secure your approval before making any change in the present procedure.

In view of your modification dated November 17, 1924, of the decision of October 1, so far as it covers service chargeable to the appropriation for carrying out the provisions of the China trade act, the employees carried on that appropriation would, of course, be excluded from consideration in connection with the question now submitted, as under the modified ruling the appropriation of each will be charged to the minor appropriation as at present.

Section 3678, Revised Statutes, provides as follows:

All sums appropriated for the various branches of expenditure in the public service shall be applied solely to the objects for which they are respectively made, and for no others.

The decision of October 1, 1924, 4 Comp. Gen. 342, to which you refer, applied the term "bureau, office, or other appropriation unit" appearing in the "average" provision of appropriation acts for personal services for the fiscal year 1925, to the various appropriations under the Department of Commerce, and it was held that the bureaus, under which there had been provided two or more appropriation items for similar or related activities, were the units for the purpose of computing the average of compensation paid in each grade under the Classification Act of 1923. An exception was made as to the appropriation item "Enforcement of China trade act" by decision of November 17, 1924. The decisions were based on the prior decisions of June 26, 1924, 3 Comp. Gen. 1002, and August 8, 1924, 4 Comp. Gen. 167. These decisions show the intent of Congress when it used the term "bureau, office, or other appropriation unit" as establishing the unit, and in so doing, adopted the similarity of purpose for which appropriation items were provided as the basis for determining whether the bureau as a whole, or individual items thereunder, constitute the unit.

There is nothing in the "average" provision, the classification act, or the cited decisions of this office that in any manner may be taken as relaxing the requirements of section 3678, Revised Statutes. While there may be such a similarity of purpose between various appropriation items under a bureau heading as to justify grouping the personnel employed under all of them together for the purpose of classification, constituting the whole bureau the unit for the purpose of computing the average, those paragraph items provide for separate and distinct projects or purposes to which Congress has given separate and distinct consideration and approval. The amounts appropriated under one item, whether for personal services or other lawful expenditure, could not be applied to the purposes under another item in the absence of express statutory authority therefor.

It is not clear whether your request to consolidate the appropriation items provided under the bureau heading into one fund is desired in order to lessen the accounting resulting from transfer of personnel between the appropriation items or whether it is merely the administrative procedure incident thereto that you desire to curtail. If the desire to lessen the accounting controls your request, you are advised that, in the absence of statutory authority, the several amounts provided under the individual appropriations under the bureau heading may not be combined and included in one general fund for the bureau and cost of personal services charged to such general fund rather than to the individual appropriation items. The several appropriation items under the several bureaus appear on the books of the Government under separate headings, on which the disbursing officer of the Department of Commerce draws his requisition for funds. While the appropriation accounts on the books of the Government do not reflect the transfer of personnel costs between appropriation items, the audit requires that the pay-roll accounts of the disbursing officer indicate the particular appropriation to which the compensation of each employee is charged, in order that it may be properly determined whether there has been a compliance with section 3678, Revised Statutes.

Referring to the statement in your letter to the effect that two of the larger departments have followed the proposed procedure for a number of years, it is probable that the departments referred to are working under statutory authority, such as "General account of advances" and "Naval supply account," under the Navy Department, acts of June 19, 1878, 20 Stat. 167, and March 1, 1921, 41 Stat. 1169, respectively, and "Army account of advances" under the War Department act of June 5, 1920, 41 State. 975.

If and to the extent that the proposed change in procedure involves merely the assignment of work to the employees within an

" appropriation unit "—that is to say, contemplates the appointment by the Secretary of employees for service in the bureau or other appropriation unit without designating the appropriation under which salary is to be paid, the amount of the salary to be charged to the appropriation for the work on which engaged during the time covered by the payment—I know of no legal objection thereto, provided an accounting under the individual appropriations is maintained. The procedure by which employees in a bureau are assigned to the work required of the various appropriation items within the same " appropriation unit," would appear to be one of administration. No doubt, the details of the procedure can be worked out to materially lessen the clerical work which you now state is involved in effecting the changes in personnel between appropriation items under one bureau heading. The particular appropriation charged with the compensation of the employees and the time engaged on work provided for under each appropriation so charged should be shown on the pay rolls.

(A-7070)

COAST GUARD PAY—OFFICER DETAILED TO DUTY WITH A STATE

Where an officer of the Coast Guard was detailed to duty with a State and there is no showing that the duty to which assigned was a part of the authorized work of the Coast Guard, credit may not be allowed in the accounts of the disbursing officer for disbursements of pay and allowances to the officer while on the detail, as the appropriation for the Coast Guard is only available for its authorized work.

Decision by Comptroller General McCarl, February 21, 1925:

There is before this office for consideration payment made to Lieut. Commander M. S. Hay, United States Coast Guard, during the months of February, March, April, and May, 1924, and appearing in the accounts of William H. Webb, special disbursing officer, United States Coast Guard. During the period involved Commander Hay was on duty pursuant to the following order dated June 19, 1923:

From. Commandant.
To: Lieutenant Commander M. S. Hay, *Pequot*.
Subject: New assignment; movement orders; mileage.

1. On June 26, 1923, proceed to Philadelphia, Pa., and report in person to Mr. George F. Sproule, President of the Board of Commissioners of Navigation of the State of Pennsylvania, at Room #344, Bourse Building, for assignment to duty as Commanding Officer of the Pennsylvania Nautical Schoolship *Annapolis*, and such other duties as he may direct.

2. These orders constitute a permanent change of station from New London, Connecticut, to Philadelphia, Pennsylvania.

W. V. E. JACOBS.
Acting.

The travel incident to the execution of the foregoing orders is hereby authorized. Mileage is allowed.

(Signed) EDWARD CLIFFORD,
Assistant Secretary.

It is stated that in reply to inquiry Commander Hay has informed the Commandant of the Coast Guard as follows:

The State of Pennsylvania, through the Board of Commissioners of Navigation, Philadelphia, Pa., pays me a salary of $250 per month for services as Superintendent of the State Nautical School, and Commander of the Schoolship *Annapolis*.

It is stated that the detail was made pursuant to an opinion of the Solicitor of the Treasury Department of November 17, 1919, that:

The Naval Appropriation Act of August 29, 1916 (39 Stats. 601), cited by you provides:

"Any commissioned or warrant officer, petty officer, or other enlisted man in the Coast Guard may be assigned to any duty which may be necessary for the proper conduct of the Coast Guard."

The authority then to make the assignment in question depends upon the construction of the words "necessary for the proper conduct of the Coast Guard," or rather the words "necessary" and "conduct."

In defining the word "necessary" Bouvier says:

"Reasonably convenient. 19 So. Rep. 202. This word has great flexibility of meaning. It is used to express mere convenience, or that which is indispensable to the accomplishment of a purpose. 43 Ill. 307. It frequently imports no more than that one thing is convenient, or useful, or essential to another; 4 Wheat. 414."

In the sense used in the statute above referred to I think the word means "convenient" or "useful."

The word "conduct" is generally defined as "The act or manner of carrying on, directing or managing, as a business; management; direction."

It would seem from the statements of your letter and those of the Captain Commandant that the instruction to be given by an officer of the Coast Guard in the performance of his duty as Superintendent of the New York State Nautical School would be useful in the carrying on or management of the Coast Guard.

Consideration may also be given to the fact that the Government has evidenced much interest in these schools and the building up of our merchant marine by appropriations and otherwise.

It is my opinion, therefore, that the assignment in question may be made.

The opinion of the Solicitor of the Treasury is entitled to due and proper consideration, but is not controlling in the matter now before this office. In view of that opinion, the matter has been carefully and exhaustively examined. This is now set forth and the necessity for reaching a decision contrary to the opinion quoted will fully appear.

The Coast Guard was created by the act of January 28, 1915, 38 Stat. 800, and consists of what theretofore was the Revenue Cutter Service and the Life Saving Service. The primary duties of the Revenue Cutter Service were in connection with the customs, revenue, and shipping laws. See sections 2747, 2758, 2760, and 2762, Revised Statutes, and by the act of July 7, 1884, 23 Stat. 199, it was provided that:

* * * hereafter revenue cutters shall be used exclusively for the public service, and in no way for private purposes.

The Life Saving Service was of gradual growth as result of authorization at various places of life saving stations; by the act of June 18, 1878, 20 Stat. 164, a general superintendent was authorized

to be appointed and his duties defined; additional stations have been from time to time authorized by statute, and provision also has been made for the authority, duties, pay, etc., of officers and men of the service. The complete provision contained in the act of August 29, 1916, 39 Stat. 601, a part of which only was quoted in the opinion of the Solicitor of the Treasury, is:

> Any commissioned or warrant officer, petty officer, or other enlisted man in the Coast Guard may be assigned to any duty which may be necessary for the proper conduct of the Coast Guard; and the Secretary of the Treasury in time of peace and the Secretary of the Navy in time of war may, in his discretion, man any Coast Guard station during the entire year, or any portion thereof, maintain any house of refuge as a Coast Guard station, and change, establish, and fix the limits of Coast Guard districts and divisions.

That the intent and purpose of the provision was any other than to secure the complete amalgamation of the two services into a single effective organization created less than two years before by the consolidation of two separate, distinct, and somewhat unrelated services is not apparent; that it was not authority to detail officers, warrant officers, and enlisted men to duty with a State, municipality, corporation, or institution maintaining an activity either proximately or remotely related to the work of the Coast Guard seems obvious. The furnishing of personnel from the military or civil establishments of the Federal Government to aid a State in the development of Federal plans or purposes, when authorized, is provided for in language the meaning of which is clear. For example, see act of March 4, 1911, 36 Stat. 1353, authorizing the detail of officers of the Navy for the very duty which Commander Hay appears to be perfoming for the State of Pennsylvania. See also sections 40b and 55c of the act of June 4, 1920, 41 Stat. 777 and 780; and section 100 of the act of June 3, 1916, 39 Stat. 208.

The Coast Guard, by the terms of the act of January 28, 1915, is constituted a part of the military forces of the United States to operate with the Treasury Department in time of peace and as a part of the Navy Department in time of war, and it was held in *Louisville & Nashville Railroad Co.* v. *The United States*, 258 U. S. 374, that when the Coast Guard operates as a part of and at the expense of the Treasury Department, its members are not troops of the United States.

Article 1, section 9, of the Constitution, provides:

> No money shall be drawn from the Treasury, but in consequence of Appropriations made by Law; * * *.

Having reference to this provision, the Court of Claims, in *Collins* v. *The United States*, 15 Ct. Cls. 35 *et seq.*, said:

> That provision of the Constitution is exclusively a direction to the officers of the Treasury, who are intrusted with the safekeeping and payment out of the public money, and not to the courts of law; the courts and their officers can make no payment from the Treasury under any circumstances.
>
> * * * * * * *

When this court gives judgment against the United States, the constitutional prohibition referred to applies to the judgment as it did to the claim upon which it is founded. The officers of the Treasury cannot pay the judgment unless there is an appropriation therefor, either in the general form for the payment of judgments of this court or specially for the particular case. * * *

Section 3678, Revised Statutes, provides:

All sums appropriated for the various branches of expenditure in the public service shall be applied solely to the objects for which they are respectively made, and for no others.

The appropriation for the fiscal year 1924 for the Treasury Department, act of January 3, 1923, 42 Stat. 1087, under "Coast Guard," 1098, appropriates funds—

For every expenditure requisite for and incident to the authorized work of the Coast Guard, as follows * * *

For pay and allowances prescribed by law for commissioned officers, cadets and cadet engineers, warrant officers, petty officers, and other enlisted men, active and retired, temporary cooks and surfmen, substitute surfmen, and one civilian instructor, $8,300,000, * * *.

The deficiency appropriation act of April 2, 1924, for the fiscal year 1924 and prior years, and making supplemental appropriations for the fiscal year 1924, 43 Stat. 50, under "Coast Guard" appropriates in excess of $12,000,000 for additional motor boats and their equipment and for repairs and alterations to vessels transferred from the Navy Department "for the use of the Coast Guard in enforcing the laws of the United States and in performing the duties with which the Coast Guard is charged," and contains a deficiency appropriation under pay and allowances of nearly a million dollars.

It has not been suggested that the detail of Commander Hay to duty with the State of Pennsylvania as commanding officer of the Pennsylvania Nautical School ship *Annapolis*, or that his performance of the duties of superintendent of the State Nautical School, was a part of the authorized work of the "Coast Guard," or that he was performing duties "with which the Coast Guard is charged."

By reference to the Navy Directory for January, 1925, it is noted that the *Annapolis* is listed as, "Out of commission (loaned to State of Pennsylvania)." It is assumed that the loan of the vessel was made under the provisions of the act of March 4, 1911, which authorized the Secretary of the Navy to loan vessels to States "to promote nautical education," and by section 3 authorized the President "when in his opinion the same can be done without detriment to the public service, to detail proper officers of the Navy as superintendents of or instructors in such schools," with a proviso:

* * * That if any such school shall be discontinued, or the good of the naval service shall require, such vessel shall be immediately restored to the Secretary of the Navy and the officers so detailed recalled: *And provided further*, That no person shall be sentenced to or received at such schools as a punishment or commutation of punishment for crime.

This statute seems to have provided a complete scheme for Federal aid for State nautical schools; only officers of the Navy were authorized to be detailed as superintendents or instructors and such detail was required to be made by the President and only when in his opinion it could be done without detriment to the public service. The detail of officers of the Coast Guard in lieu of naval officers, and by any other than the President, seems to be an infringement upon and modification of the statutory scheme for Federal aid. If such detail is authorized independent of and contrary to the terms of the statute, the statute is useless. It should be observed also that the detail was made at a time when the Coast Guard was receiving greatly increased appropriations and greatly increased personnel in connection with the enforcement of the laws of the United States; see deficiency appropriation act of April 2, 1924, 43 Stat. 50, the act of January 12, 1923, 41 Stat. 1130, providing for advancement in grade of various officers of the Coast Guard, and act of April 21, 1924, 43 Stat. 105, authorizing a temporary increase of the Coast Guard for law enforcement.

The duty to which Commander Hay was assigned so far as the facts presented indicate was not connected with the authorized work of the Coast Guard, and the appropriation for pay and allowances of officers of the Coast Guard being available only for its authorized work is not available for the pay and allowances here in question.

The items will be disallowed in the next settlement of the disbursing officer's accounts.

(A-7405)

PERSONAL SERVICES, REAL ESTATE APPRAISERS—SALE OF LAND FOR TAXES

The appropriation "Salaries and expenses of collectors of internal revenue," is not available for the hire of persons outside the Government service to appraise real estate in connection with distraint proceedings instituted in accordance with the provisions of sections 3186, 3196, and 3197, Revised Statutes.

The "minimum price" at which property should be offered for sale under distraint proceedings instituted in accordance with the provisions of sections 3186, 3196, and 3197, Revised Statutes, and at which the Government is to acquire the property in the event no bids are received at or above such price, should be fixed, not with reference to any appraised valuation of the property but at the amount of taxes, penalties, costs, etc., as provided in the statute.

Comptroller General McCarl to the Secretary of the Treasury, February 24, 1925:

This office is in receipt of a letter from the Commissioner of Internal Revenue, dated January 10, 1925, stating that the collector of internal revenue at Detroit, Mich., employed three individuals to

appraise certain real estate in connection with distraint proceedings instituted in accordance with the provisions of sections 3186, 3196, and 3197, Revised Statutes. The purpose of the appraisal was stated to be to enable of the collector to fix a minimum price at which to offer the property for sale. As no previous authority for employing said appraisers had been obtained, the Commissioner requested to be advised whether payment for the service of these men was authorized from the appropriation "Salaries and expenses of collectors of internal revenue."

There is nothing in the appropriation for "Salaries and expenses of collectors of internal revenue," or any other appropriation in this connection that could be construed as authority for engaging the service of persons outside of the Government to make an appraisal of property as in the instant case. See 4 Comp. Gen. 356. Moreover, the "minimum price" at which the statute authorizes the property to be offered for sale under such circumstances, and at which the Government is to acquire the property in the event no bids are received at or above such price, should be fixed, not with reference to any appraised valuation of the property but at the amount of the taxes, penalties, costs, etc., as provided in the statute. Therefore, the employment of appraisers in such cases would appear to be unnecessary and the incurring of expenses therefor unauthorized.

The matter is brought to your attention for such action as you may deem proper with a view to correction of the practice.

The proposed payment to the appraisers employed by the collector, as hereinbefore indicated, is not authorized.

(A-6897)

SUBSISTENCE, PER DIEM IN LIEU OF—AT WASHINGTON, D. C.

Employees of the field surveying force of the General Land Office are entitled to per diem in lieu of subsistence while temporarily detailed to duty at Washington, D. C.

A voucher covering the payment of per diem in lieu of subsistence to an employee temporarily detailed to duty at Washington, D. C., should show the headquarters of the particular employee, and have attached a copy of the order or letter detailing him to Washington, D. C., showing the maximum period to be covered by the detail and containing direction to return to headquarters upon termination of the detail.

Comptroller General McCarl to the Secretary of the Interior, February 25, 1925:

I have your request of December 11, 1924, for decision whether employees of the field surveying force of the General Land Office may be paid per diem in lieu of subsistence while temporarily de-

tailed to Washington, D. C. With regard to the nature of the detail you state:

> The volume of work coming before the surveying division of the General Land Office in the form of the final examination of the returns of surveys executed by the field surveying service under the appropriation for surveying the public lands, which appropriation carries the proviso in question, is larger than can be disposed of by the regular staff of office engineers assigned to such duties. To move the arrearage that accumulates annually, authority was granted by Congress to detail some of the engineers from the field to the General Land Office.
>
> Considering the object sought to be accomplished by this legislation, and the amount of money made available therefor, it appears reasonable to consider a detail of four months a temporary one within the meaning of the law. A shorter detail would not be profitable owing to the character of the work. It is submitted that better results can be secured from five details of four months, than ten details of two months each, or twenty details of one month each.
>
> The engineers who are subject to detail are, as before stated, members of the field surveying service, with headquarters in the West, where many of them have their families and permanent homes. While they are at their field headquarters, no subsistence or per diem in lieu thereof is allowed, but when they are ordered away on official duties and thus separated from their homes, actual or constructive, subsistence or lieu allowance is granted regardless of the character of the assignment. It is the separation from home and headquarters that justifies the subsistence allowance rather than the character of the duties assigned.
>
> A field engineer is often assigned to execute a large survey where he is engaged for an entire season with a permanent camp, but his presence on official duties for a prolonged time at one place does not change his headquarters or his home, and thus deprive him of his right to subsistence. The actual fact of headquarters and home remains unchanged. So his temporary detail to the General Land Office, under authority of law, does not change the fact of his headquarters and home so long as the detail keeps within the provision of law as to its temporary character.
>
> The details last year were each kept substantially within the four-month limit, and you are assured that all future details, including those already made this year, will be so limited.

It appears from your submission that per diems have been paid for some time under authority of the decision of the former Comptroller of the Treasury reported in 27 Comp. Dec. 587, but that some doubt had arisen owing to recent suspensions in the accounts of Mr. J. B. Callahan, covering such payments. The suspensions referred to did not question the legality of payment of per diems under proper details to Washington but merely required evidence showing the purpose of the detail and the period covered thereby in order that it may be determined whether or not the detail is in fact a temporary one.

The appropriations for surveying public lands for recent fiscal years have carried the following provision:

> * * * That not to exceed $10,000 of this appropriation may be expended for salaries of employees of the field surveying service temporarily detailed to the General Land Office. (See 42 Stat. 558, 1180; 43 Stat. 394.)

This provision is a limitation on the amount which may be expended for salaries of field employees temporarily detailed to the General Land Office and is authority for such temporary details within its limits. It does not bar the payment of per diem in lieu of

subsistence in proper cases. 27 Comp. Dec. 587. However, vouchers covering the payment of per diem in lieu of subsistence to employees while temporarily detailed to Washington must be supported by sufficient evidence to enable the accounting officers to determine whether the particular employees are temporarily detailed. Whether or not a detail is temporary is dependent upon the facts and a mere statement that a detail is temporary is not sufficient to justify allowance of credit for per diem payments based on such detail. 1 Comp. Gen. 426; 2 *id.* 757; 3 *id.* 331, 907. Therefore, the vouchers should show the headquarters of the particular employee, and should have attached a copy of the order or letter detailing him to Washington and a certificate showing the period of all other details, if any, of the employee to Washington during the year immediately preceding the current detail. The orders for the detail should show the maximum period to be covered by the detail and should direct return to the employee's headquarters upon termination of the detail. In the case of Earl G. Harrington submitted by you the order from the Commissioner of the General Land Office does not state the period for which detailed nor does it specifically direct a return to the proper headquarters upon completion of the temporary detail.

With regard to the recent suspensions, copies of the letters or orders detailing the particular employees and a certificate as to service in Washington during the preceding year under former details should be furnished. If the orders for the details are in substantially the same form as that submitted in the Harrington case and the per diems are otherwise payable the suspensions will be removed. In future cases, however, the orders detailing the employees to Washington should be drawn along the lines indicated above.

(A-6633)

CLAIMS, COMPROMISE—RECLAMATION SERVICE—JURISDICTION OF DISBURSING OFFICERS

Under the provisions of the act of June 5, 1924, 43 Stat. 416, damages caused to the owners of lands or private property of any kind by reason of irrigation operations, etc., are authorized to be compromised by agreement between the claimant and the Secretary of the Interior and paid from the reclamation fund, and no payments of damages as a result of compromise agreements may be made prior to approval of the Secretary of the Interior.

The act of June 5, 1924, 43 Stat. 416, merely authorizes the compromise by the Secretary of the Interior of claims for damages caused to the owners of lands or private property of any kind by reason of irrigation operations, etc., and in no way suspends or supersedes the jurisdiction of the General Accounting Office to settle and adjust such claims, as provided by section 236, Revised Statutes, as amended by section 305 of the act of June 10, 1921, 42 Stat. 24.

Claims for payment of damages under the act of June 5, 1924, 43 Stat. 416, involving doubtful questions of law and fact, should not be paid by disbursing officers but forwarded to the General Accounting Office for direct settlement.

Comptroller General McCarl to the Secretary of the Interior, February 26, 1925:

There has been received your letter of December 2, 1924, respecting the provision in the appropriation act for the fiscal year 1925, 43 Stat. 416, for the Reclamation Service authorizing the compromise by the Secretary of the Interior of claims for damages to owners of lands or private property "by reason of the operations of the United States, its officers or employees, in the survey, construction, operation, or maintenance of irrigation works," pursuant to the reclamation act of June 17, 1902, 32 Stat. 388, and its amendments. The provision is similar to that which has heretofore appeared in appropriations for the Reclamation Service.

Your submission urges that the appropriation authority "takes from the accounting officers jurisdiction which they might otherwise have had and thus vests it in the Secretary of the Interior who, in his discretion, may liquidate by compromise agreements those claims which he believes to be meritorious."

The duties of the General Accounting Office relate specifically to the settlement of all claims and demands by or against the United States and the adjustment of accounts in which the United States appears as debtor or creditor. These duties necessarily involve the uses and availability of appropriations; and while in the performance of these duties, particularly in view of the present system of Government disbursements, the action taken is not initially by the General Accounting Office but by the administrative office concerned, yet action in the matter eventually and finally must be by the General Accounting Office. The duties of the General Accounting Office are pursuant to permanent substantive law applicable generally, so that appropriation authority or other legislative authority does not require the express reenactment of or specific subjection to such accounting duties, but on the contrary it would be necessary for express and specific statutory provision to appear to remove from the jurisdiction attendant upon the performance of such accounting duties. The authority given by the appropriation provision was primarily administrative, the same as any other administrative authority. The purpose was to give an administrative authority and there was neither purpose nor need to exclude the accounting duties; and the permanent substantive law relating to accounting for public funds must attach to the administrative authority given by the appropriation provision. The one need not, must not, take from the other.

The real and practical question apparently involved concerns the performance of the administrative authority so as to meet accounting requirements. The basic administrative course is limited to matters within the law of the appropriation. The basic accounting

requirement is the examination of the matters to determine that the administrative course was within the law of the appropriation. Hence, in a claim for damages compromised under the appropriation authority there must appear facts showing that it was "by reason of the operations of the United States, its officers or employees, in the survey, construction, operation, or maintenance of irrigation works." The basic condition must always appear, that there was a claim of the character specified by the law; and probably therein lies the most of administrative difficulty. If there be doubt of the claim being within the law, the matter may be submitted to the Comptroller General for decision in advance of payment as authorized by law. Act of July 31, 1894, 28 Stat. 208. Likewise, the facts must support the amount claimed and thus also support the amount agreed upon in compromise.

The decision by this office November 2, 1923, Review No. 4967, in connection with the claim of George H. McFadden & Bro., to which the submission makes reference, negatived that there was authority to compromise or settle a claim for shortage of cotton shipped over the Yuma Valley Railroad of the Yuma project. The shipment of the cotton was between private parties and had no connection with the Government project. The permitting such transportation for private parties was itself of doubtful authority. The case illustrates the primary principle in the exercise of the administrative authority that the facts must first show a proper claim under the law before there may be a compromise.

In connection with your statement that "payments have been made without question until on November 2, 1923," your attention is invited to decision of March 15, 1922 (Review No. 686), sustaining settlement No. 16422, of September 10, 1921, by which was disallowed an item of $30, voucher No. 701, R. R. Vannoy, covering damages on account of an injury to a horse hired from the said Vannoy. In that decision it was held:

> Remotely, the damages may be said to have been caused by reason of the operations of the United States, in that there would not have been any horse hire, nor any damage by reason thereof, if work on the project was not being prosecuted. The proximate cause of the damage, however, was not the operations of the United States, its officers or employees, in the survey, construction, operation, or maintenance of irrigation works, but circumstances apparently entirely foreign to and in no way connected with such operations. There was no liability on the part of the Government under the act of June 5, 1920, or independently thereof warranting payment under the circumstances of this case.

With reference to your statement that the provision in question is "apparently broad enough to cover the matter of negligence of employees," etc., your attention is invited to the decision of June 15, 1915, to the Secretary of the Interior, involving whether the provision as contained in the act of March 3, 1915, 38 Stat. 859, au-

thorized the payment of compromised claims for damages incurred prior to March 3, 1915, wherein it was said:

> While this provision does not of itself expressly authorize the payment of the claim in question, it may well be regarded as a legislative construction of the reclamation act of 1902 as to the objects for which the fund provided in that act were intended to be available, particularly as in this provision the payment of damages of the kind here in question is referred to as included within the expenditure, which, it is declared, was authorized in the act of June 17, 1902, and not in addition thereto. Construction of existing law is primarily a judicial rather than a legislative function, but legislative construction is recognized by the courts, and the rules in relation thereto are fairly well established. It is well within the rule to recognize a legislative construction as confirming an otherwise authorized but possibly doubtful judicial construction. This act being the first act making specific appropriations on a fiscal-year basis, it is not unreasonable to conclude that Congress intended in that connection to specifically authorize what it regarded as within the general authority existent theretofore under the old plan.
>
> If it is concluded that Congress thus interpreted the reclamation fund as available for the payment of damages to private property resulting from the operation of its irrigation works, it must inferentially be concluded that Congress contemplated that there had been or would be damages to private property resulting from such operation for which the Government would be liable. Such a conclusion as to liability in fact, as well as in contemplation of the legislative body, is easily arrived at without doing violence to any established principle if we bear in mind that the damages in question were the result of acts done by direction of competent authority in the necessary and proper operations of the system and reasonably to be anticipated therefrom, and not the result either of accident or the negligence of employees.

The matter may be summarized by saying that the prime question for consideration is whether the action of the Secretary of the Interior in compromising and authorizing the payment of a claim for a given amount, under and pursuant to the provision in question, is such as not to be subject to review by this office.

The provision in question merely authorizes the compromise by the Secretary of the Interior of damages sustained by certain persons by reason of the operations of the United States, etc., and I find nothing in said provision suspending or superseding the jurisdiction of this office to settle and adjust all claims, demands, and accounts whatever in which the United States is concerned, either as debtor or creditor, as provided by section 236, Revised Statutes, as amended by section 305 of the act of June 10, 1921, 42 Stat. 24.

The approval or disapproval of the compromise is necessary by the Secretary of the Interior, or by an Assistant Secretary to whom such duty has been duly assigned, and the present regulations which appear to provide otherwise should be amended accordingly. Such claims, involving, as they do, doubtful questions of law and fact, should not be paid by disbursing officers. Since the compromise agreements must necessarily be made or approved by the Secretary of the Interior, no reason appears, after their transmission to Washington for that purpose, why they should thereafter be returned to the field or be transmitted elsewhere than to this office for settlement.

(A-7117)

ACCOUNTS, SPECIAL DEPOSIT—INTERNAL REVENUE COLLECTIONS

Receipts from offers in compromise, from offers for real estate, and from the net proceeds of distraint sales, are required, by section 1031 of the act of June 2, 1924, 43 Stat. 351, to be deposited by collectors of internal revenue in special deposit accounts. Accounts covering the special deposit transactions are required to accompany the regular accounts of the collectors of internal revenue, and all expenditures from the special deposit funds should be supported by vouchers which should show the authority for making the refunds.

Comptroller General McCarl to the Secretary of the Treasury, February 26, 1925:

I have your letter of December 20, 1924, as follows:

Reference is made to section 1031 of the revenue act of 1924, which provides that each collector of internal revenue will maintain with the Treasurer of the United States a special deposit account for the following classes of remittances:

(a) Sums offered in compromise under the provisions of section 3229, R. S., and section 33 of Title II of the national prohibition act.

(b) Sums offered for the purchase of real estate under the provisions of section 3208 of the Revised Statutes.

(c) Surplus proceeds in any distraint sale after making allowance for the amount of tax, interest, penalties, and additions thereto, and for costs and charges of the distraint and sale.

The amounts deposited in this fund are subject to check by the collector of internal revenue. In the case of rejected offers the collector's check is drawn in favor of the proponent and is forwarded to him.

In the case of accepted offers the collector draws his check, payable to the Treasurer of the United States or in favor of his regular depositary bank for credit in the account of the Treasurer of the United States, and deposits the proceeds as internal-revenue collections. Such internal-revenue collections are, of course, included in the regular collection accounts of the collector and are referred to you quarterly for settlement.

This office understands that there is no provision of law requiring collectors to render periodical accounts covering the special-deposit funds which are merely held in trust by them, and that the collection reports which are now rendered and which will cover all such funds from the time they become internal-revenue collections are all that are required.

Will you please state if the understanding of this office is correct?

Section 1031 of the revenue act approved June 2, 1924, 43 Stat. 351, 352, provides as follows:

SEC. 1031. (a) Section 3195 of the Revised Statutes is amended to read as follows:

"SEC. 3195. When any property liable to distraint for taxes is not divisible, so as to enable the collector by sale of a part thereof to raise the whole amount of the tax, with all costs and charges, the whole of such property shall be sold, and the surplus of the proceeds of the sale, after making allowance for the amount of the tax, interest, penalties, and additions thereto, and for the costs and charges of the distraint and sale, shall be deposited with the Treasurer of the United States as provided in subdivision (b) of section 3210."

(b) Section 3210 of the Revised Statutes is amended to read as follows:

"SEC. 3210. (a) Except as provided in subdivision (b) the gross amount of all taxes and revenues received under the provisions of this Act, and collections of whatever nature received or collected by authority of any internal-revenue law, shall be paid daily into the Treasury of the United States under instructions of the Secretary of the Treasury as internal-revenue collections, by the officer receiving or collecting the same, without any abatement or deduction on account of salary, compensation, fees, costs, charges, expenses, or claims of any description. A certificate of such payment, stating the name of the depositor and the specific account on which the deposit was made,

signed by the treasurer, assistant treasurer, designated depositary, or proper officer of a deposit bank, shall be transmitted to the Commissioner of Internal Revenue.

"(b) Sums offered in compromise under the provisions of section 3229 of the Revised Statutes and section 35 of Title II of the National Prohibition Act, sums offered for the purchase of real estate under the provisions of section 3208 of the Revised Statutes, and surplus proceeds in any distraint sale, after making allowance for the amount of the tax, interest, penalties, and additions thereto, and for costs and charges of the distraint and sale, shall be deposited with the Treasurer of the United States in a special deposit account in the name of the collector making the deposit. Upon acceptance of such offer in compromise or offer for the purchase of such real estate, the amount so accepted shall be withdrawn by the collector from his special deposit account with the Treasurer of the United States and deposited in the Treasury of the United States as internal-revenue collections. Upon the rejection of any such offer, the Commissioner shall authorize the collector, through whom the amount of such offer was submitted, to refund to the maker of such offer the amount thereof. In the case of surplus proceeds from distraint sales the Commissioner shall, upon application and satisfactory proof in support thereof, authorize the collector through whom the amount was received to refund the same to the person or persons legally entitled thereto."

Pursuant to the act of May 27, 1908, 35 Stat. 325, as supplemented by the act of May 10, 1916, 39 Stat. 86, offers in compromise, offers for real estate and the gross proceeds from distraint sales, and from other objects, were required to be covered into the Treasury as internal revenue collections. Refunds of rejected offers and surplus proceeds of distraint sales were made from appropriations provided for that purpose, the appropriation for the fiscal year 1925, act of April 4, 1924, 43 Stat. 72, being as follows:

To enable the Secretary of the Treasury to refund money covered into the Treasury as internal-revenue collections, under the provisions of the act approved May 27, 1908, $200,000.

No appropriation for the fiscal year 1926, "for refunding internal-revenue collections" has been made, because no appropriation will be necessary in view of the provisions of section 1031 of the act of June 2, 1924, quoted, *supra*. See page 464 of the hearing before the Subcommittee of the House Committee on Appropriations, Treasury Department appropriation bill, 1926.

By the terms of the act of May 27, 1908, 35 Stat. 325, as supplemented by the act of May 10, 1916, 39 Stat. 86, the gross "amounts of all collections of whatever nature" were required to be covered into the Treasury as internal-revenue collections, and, by reason thereof, there was necessarily a full accountability for all expenditures made under the appropriation for "refunding internal-revenue collections," whether such expenditures were on account of expenses in connection with distraint sales, on account of the return of rejected offers in compromise, or on account of rejected offers for real estate. In this connection it was said in decision of August 20, 1909, to the then Secretary of the Treasury, that—

Under the operation of this act collectors deposit all collections of every nature immediately as internal revenue collections, and Congress has provided the above appropriation to make refunds or to return money covered as internal-revenue collections which, under the provisions of the sections of the

Revised Statutes hereinbefore referred to, was authorized to be refunded or returned from the proceeds of sales. Refunds are now made from funds advanced to the collectors and the same is true as to the expenses incident to the sale of distrained or seized property.

It does not appear that the desire to make early refunds of surplus moneys derived from such sales would justify the proposed amendment, particularly in cases where the proceeds are not sufficient to meet the demands and charges of the United States. It can be seen that any excessive payment made by collectors for transportation of distrained or seized goods in such cases would be inimical to the interests of the Government.

To overcome the difficulties attendant upon the necessary procedure pursuant to the acts of May 27, 1908, and May 10, 1916, referred to, *supra*, and the annual appropriations made pursuant to those acts, the legislation here under consideration was enacted authorizing the moneys referred to in paragraph (b) of section 3210, Revised Statutes, as amended, *supra*, being so placed that refunds therefrom would not be dependent upon annual estimates and appropriations.

In answer to the question submitted, you are advised that a special deposit account is primarily for the purpose of accounting for moneys which can not be taken up in regular accounts because of uses which first must be made of such moneys. 21 Comp. Dec. 435. However, an account of the special deposit transactions is required to be rendered quarterly and in connection with the regular account, and payments of the character here in question, made from such special deposit funds, are required to be supported by vouchers, and such vouchers, among other things, are required to show specifically the authority for making the refunds. The account current covering the special deposit transactions also should list the receipts deposited to the credit of the special deposit accounts, and the nature and source of each receipt should be shown. Receipts from each distraint sale should be supported by a form of receipt voucher showing the gross amount received; and the proper and authorized expenditures in connection therewith are required to be evidenced and supported by vouchers and by subvouchers where necessary, as in the case of expenditures from appropriated moneys.

(A-7263)

JUDGMENTS, COMPROMISE—POST OFFICE DEPARTMENT

Under section 295, Revised Statutes, as amended, there is no authority to compromise a judgment due the Post Office Department from the assignee of an absconding postmaster when the full amount of the judgment may be collected.

Comptroller General McCarl to the Postmaster General, February 26, 1925:

There has been received your request dated December 31, 1924, for decision whether you may compromise a judgment of the United States against the assignee of Willie A. Hinton, absconding post-

master at Sontag, Miss., as as to allow the assignee and his attorney fees or compensation for their services, the claim of the United States being in such an amount as to practically exhaust the funds in the hands of the assignee.

It appears from the inclosures to the request for decision that Willie A. Hinton, then postmaster at Sontag, Miss., absconded on January 9, 1923, while post-office inspectors were engaged in checking over the accounts of the post office. During the continuance of the inspection, which appears to have been somewhat prolonged due to the fact that Hinton had secreted some of his official papers, relatives of the postmaster began the removal of certain merchandise from the general store operated by Hinton in connection with the post office. Certain creditors attached the remaining merchandise and same was turned over to James M. Douglas, a local merchant, to be sold for the common benefit of all of the creditors. In the meantime the post-office inspectors had determined that $1,543.47 of postal funds had been embezzled by Hinton, or $543.47 in excess of the penalty on his official bond. The question of the right of the United States with respect to the merchandise was taken up with Douglas and the other creditors, formal demand made for $543.47, the amount in excess of the official bond of Hinton, to be paid by the assignee, Douglas, out of the proceeds of the stock of goods, and this request being denied by the assignee, suit was entered in the United States District Court at Jackson, Miss., and resulted in a judgment on November 4, 1924, against the assignee for $543.47, with interest at 6 per centum per annum from January 9, 1923, until paid.

There was realized approximately $600, only, from the sale of the merchandise, and the suggestion that the judgment be compromised so as to allow the assignee and his attorney a fee appears to be due to the fact that payment of the judgment and interest will practically exhaust the fund and leave little or nothing to compensate the assignee and his attorney for services which the United States attorney stated "conserved the estate for the benefit of those entitled to the proceeds therefrom."

The authority to compromise judgments on account of a debt or damages due the United States through the Post Office Department is contained in Section 295, Revised Statutes, in language as follows:

> Whenever a judgment is obtained for a debt or damages due the Post Office Department, and it satisfactorily appears that such judgment, or so much thereof as remains unpaid, can not be collected by due process of law, the sixth auditor may, with the written consent of the Postmaster General, compromise such judgment, and accept in satisfaction less than the full amount thereof.

The authority conferred by this section on the sixth auditor became that of the auditor for the Post Office Department under the

act of July 31, 1894, 28 Stat. 205, 211, and by the act of June 10, 1921, 42 Stat. 23, 27, was transferred to and conferred on the Comptroller General of the United States and he is authorized to compromise judgments only when "it satisfactorily appears that such judgment, or so much thereof as remains unpaid, can not be collected by due process of law" and with the written consent of the Postmaster General.

The undisputed facts show that the judgment against the assignee of $543.47 with interest can be collected from funds in the hands of the assignee and it necessarily follows that the Comptroller General is not authorized to compromise the judgment against the assignee.

You are advised that there is no authority to compromise the judgment and the full amount thereof should be collected.

(A–7552)

CLASSIFICATION OF CIVILIAN EMPLOYEES—EFFECTIVE DATE OF INCREASE OF PAY UNDER REALLOCATION

An employee of the Bureau of Internal Revenue is not entitled to an increased rate of compensation under the reallocation of his position for any period prior to the beginning of the pay period current upon the date of receipt by the administrative office of the notice of his reallocation.

The term "administrative office" used in the decision of September 8, 1924, 4 Comp. Gen. 280, holding that changes in rates of pay under reallocation will date from the beginning of the pay period current upon date of receipt of the reallocation by the administrative office, will be construed to mean the particular bureau in a department on which is imposed the duty of making up the pay rolls, and not necessarily the department in which the bureau is located.

Decision by Comptroller General McCarl, February 26, 1925:

John Mahoney, an employee of the Bureau of Internal Revenue, has requested review of settlement 050736, dated November 11, 1924, disallowing his claim for $24.37, difference in salary between the rate of $3,000 and $3,600 per annum, minus retirement deductions, for the period July 1 to 15, 1924.

Under date of October 28, 1924, the Commissioner of Internal Revenue reported as follows:

Mr. Mahoney's salary was $3,600 per annum on June 30, 1924. The records show that his position was allocated by the Personnel Classification Board in Grade F 7 and that effective July 1, adjustment was made to $3,000, the maximum for Grade F 7.

Under date of July 21, the bureau was notified by the Classification Board that the position held by Mr. Mahoney had been allocated, on review, in Grade F 9. The bureau accordingly adjusted and restored his salary to $3,600 at which rate he has been paid subsequent to July 15.

Under date of December 13, 1924, the chief, appointment division, Treasury Department, reported as follows:

Referring to your letter of the 29th ultimo, in which you request a reply to your letter of the 19th ultimo, asking for a report on the claim of John

Mahoney, an employee of the Bureau of Internal Revenue, relative to the date of receipt of the notice of his allocation by the Classification Board, you are informed that all notices from that board are sent direct to the chief clerk of the department, who then transmits them to the office to which the employee is assigned. That office then recommends to the Secretary of the Treasury the change in grade as indicated by the classification sheet received by the board.

Upon informal inquiry in the appointment division of the Bureau of Internal Revenue, it is found that the reallocation of Mahoney to Grade 9, C. A. F., was dated June 30, 1924, and stamped as received by that office July 21, 1924, as stated in the letter of October 28, 1924. There was no evidence submitted as to when this allocation was received in the Department of the Treasury, chief clerk's office. The semimonthly pay rolls for the Bureau of Internal Revenue are made up in the appointment division, Bureau of Internal Revenue, Treasury Department, recording the changes in personnel received since the last pay roll. Following this procedure the employee was paid the increased rate effective from the beginning of the pay period current when the notice of reallocation was received.

The decision of September 8, 1924, 4 Comp. Gen. 280, 281, laid down the following rule:

* * * Hereafter allocations may be given effect to only for the pay period current upon the date of receipt by the administrative office of the allocation, whether it be an original allocation or an allocation resulting from an appeal.

In decision of October 22, 1924, 4 Comp. Gen. 395, 397, the reason for the above stated rule was given as follows:

This referred to the effective date of any increase or decrease in the salary of an employee resulting from an allocation or reallocation. It was the adoption of a practical accounting procedure due to the possibility of confusion arising from so many changes in allocation of positions based on large numbers of appeals by employees, * * *.

The Bureau of Internal Revenue had already been following the procedure set up in cited decisions from July 1, 1924, which resulted in the claimant being paid the increased rate from July 16, 1924. Accordingly, where payment of compensation was made under such rule as provided by the cited decisions, the employees are not entitled to any additional compensation at the increased rate under the reallocation for any period prior to the beginning of the pay period current from the date of receipt of the notice of reallocation by the administrative office.

In order to give the rule the practical effect that was intended, the term "administrative office" used in the decision of September 8, 1924, *supra*, will be construed to mean the particular bureau in a department on which is imposed the duty of making up the pay rolls from the changes in personnel and not necessarily the department as a whole in which the person is employed.

Payments heretofore made at increased or decreased rates from the date of receipt of the reallocation in the department, rather than the date of receipt in the particular bureau making up the pay rolls will not be disturbed.

In this case, as July 21, 1924, was the date notice of the reallocation was received in the Bureau of Internal Revenue, the increased rate was properly payable from July 16, 1924, and claimant is not entitled to the difference between the rate of $3,000 and $3,600 per annum for the period July 1 to July 15, 1924.

Upon review the settlement is sustained.

(A-7350)

WAR RISK INSURANCE—REINSTATEMENT

Where an applicant for reinstatement of a lapsed policy of war risk insurance tendered premiums within the time fixed by regulation but failed to furnish during his lifetime a statement of good health as required by regulation and the controlling statute, a showing as to the good health of the applicant made by the widow subsequent to the death of the applicant is not sufficient on which to reinstate the lapsed policy so as to authorize payments of insurance thereunder.

Comptroller General McCarl to the Director, United States Veterans' Bureau, February 27, 1925:

I have your letter of January 8, 1925, requesting decision whether the insurance policy of Charles B. Allen may be considered as having been reinstated so as to authorize payments of insurance thereunder upon the following statement of facts:

Charles B. Allen was commissioned as First Lieutenant, Medical Corps, on October 21, 1918, and on October 24, 1918, made application for $10,000.00 war risk insurance, naming his wife, Grace Mary Allen, as beneficiary. He was discharged from the service on December 6, 1918, and regularly paid premiums on his insurance to include April, 1924. On June 3, 1924, Allen remitted to this Bureau $10.80, the amount of one month's premium. It will be noted that his insurance lapsed at midnight, May 31, 1924, the expiration of the grace period allowed for payment of the premium due May 1, 1924, and that this premium was tendered during the month following the month of lapse.

Allen died June 21, 1924. His certificate of death states that death was caused by lobar pneumonia of two days' duration, and that influenza of five days' duration was a contributory cause of death. After Allen's death his widow tendered another premium in the sum of $10.80, which was returned.

Under date of January 26, 1921, the following regulations, known as Regulation No. 48-D, was issued relative to the application of delayed premiums to yearly renewable term and converted insurance accounts:

"1. In all cases where a premium is not paid on or before the last day of the grace period, said premium may be paid at any time during the calendar month following the month for which the premium was due and said premium may be regularly applied as premium payment to the unpaid month: *Provided*, That the insured at the time of tendering of the delayed premium is in as good health as at the expiration of the grace period and furnished a statement to that effect; nor later than the last day of the calendar month immediately following the month in which the delayed premium is tendered."

Section 408 of the war risk insurance act, as amended by the act of March 4, 1923, 42 Stat. 1525, in force during the period in question, provided in part as follows:

> In the event that all provisions of the rules and regulations other than the requirements as to the physical condition of the applicant for insurance have been complied with, an application for reinstatement of lapsed or canceled yearly renewable term insurance or application for United States Government life insurance (converted insurance) hereafter made may be approved: *Provided*, That the applicant's disability is the result of an injury or disease, or of an aggravation thereof, suffered or contracted in the active military or naval service during the World War: *Provided further*, That the applicant during his lifetime submits proof satisfactory to the director showing the service origin of the disability or aggravation thereof and that the applicant is not totally and permanently disabled. * * *

The facts fail to show, as required by this statute, a compliance with the provisions of the regulations that the insured furnished a statement of good health at the time he tendered the delayed premiums. The matter may be briefly summarized that the insured, Allen, tendered his premium within the time allowed after it was due and insurance had lapsed, but he failed to send with it as required by the regulations relating thereto a statement that he was then in as good health as when the grace period expired. The question thus becomes whether, there being no statement of the health condition at the time it should have been made, the tender of the premium only was ineffective. The purpose of a statement as to health condition is so that there be no increase of the insurance risk. This can only be determined from the insurance subject himself at the time. Statements of others after a fatality has occurred are on a different basis and are generally opinions based probably on close personal contact and observation, but nevertheless not the same as the living subject statement and in connection with which there may be a disclosure of latent disability. It may be added that the present submission does not disclose what action was taken by the bureau on the failure to send the health statement with the tender of premium. If the tender was otherwise acceptable, it would have been proper for the bureau to request the health statement, and there would have been no reinstatement in the meantime, and in all events there could have been no waiver of submitting the health statement. It follows that the tender of the premium could not have been accepted without the health statement, and the situation must be determined as being one of an incomplete tender, not authorized to be nor in fact accepted, and therefore there was no effective insurance and none is payable. Accordingly, neither the regulations nor the statute was complied with by the applicant for reinstatement during his lifetime. There is no authority for the acceptance of a statement of good health made by the widow of an applicant who fails to comply

with the statute during his lifetime. You are advised, therefore, that upon the facts submitted there may not be considered to have been a reinstatement of the policy such as to authorize payment of insurance thereunder.

(A–7180)

LEAVE OF ABSENCE—STOREKEEPER-GAUGERS OF THE INTERNAL REVENUE SERVICE

The provisions in the act of June 23, 1910, 36 Stat. 592, governing the granting of leave of absence to storekeepers, gaugers, and storekeeper-gaugers in the Internal Revenue Service on the basis of the actual number of days assigned to duty, are not repealed or modified by the act of December 6, 1924, 43 Stat. 704, authorizing the adjustment in the rates of pay of field employees, including storekeeper-gaugers in the Internal Revenue Service, to correspond to the rates established by the classification act of 1923, resulting in a change from a per diem to a per annum basis of payment.

Comptroller General McCarl to the Secretary of the Treasury, March 2, 1925:

I have your letter of January 31, 1925, requesting decision whether the change in the basis of paying the compensation of storekeeper-gaugers in the Internal Revenue Service from a per diem to a per annum basis under authority of the act of December 6, 1924, 43 Stat. 704, has any bearing on the act of June 23, 1910, 36 Stat. 592, granting cumulative leave of absence to storekeepers, gaugers, and storekeeper-gaugers in the Internal Revenue Service on the basis of the number of days actually assigned to duty.

The decision of January 8, 1925, 4 Comp. Gen. 599, held that the provisions of the act of December 6, 1924, *supra*, authorized the adjustment in the rates of compensation of storekeeper-gaugers based on the rates established by the classification act, resulting in a change from a per diem to a per annum basis, retroactively effective from July 1, 1924.

The prime purpose of the classification act was to classify and readjust the compensation of Government employees, and said enactment reflects no intent or purpose to repeal or modify prior enactments relative to leave of absence. See 4 Comp. Gen. 242.

It follows, therefore, that the authority in the act of December 6, 1924, to adjust the rates of pay of field employees, including storekeeper-gaugers in the Internal Revenue Service, to correspond to the rates established by the classification act, has no general bearing on the act of June 23, 1910, controlling the granting of leave of absence to storekeepers, gaugers, and storekeeper-gaugers in the Internal Revenue Service, but such leave act remains in full force and effect in the terms stated therein.

(A-1463)

PAYMENTS—POWER OF ATTORNEY

Where a person having a claim against the District of Columbia revokes the power of attorney granted another to represent him in prosecution of the claim subsequent to a decision by the Comptroller General allowing the claim, but prior to issuance of a check in payment thereof, the disbursing officer of the District of Columbia is not obliged to recognize the attorney named in the power of attorney, but may make the check in payment of the claim payable to the claimant and deliver it to him.

Comptroller General McCarl to J. R. Lusby, Disbursing Officer, District of Columbia, March 3, 1925:

I have your request of January 21, 1925, for decision as to whom delivery should be made of check payable on the claim of Nannie J. Myers for the sum of $1,967.83 for accrued annuity payments as a retired school-teacher of the District of Columbia.

It appears that Nannie J. Myers, on February 15, 1923, executed a power of attorney to Emery D. Smith, authorizing him to prosecute her claim under the retirement act, and "to intercede, adjust, apply for, present evidence, argue, appeal, or prosecute any claim * * * giving and granting to my said attorney full power and authority to do and perform all and every act and thing whatever requisite and necessary to be done in and about the premises as I might or could do if personally present at the doing thereof."

By decision dated April 11, 1924, 3 Comp. Gen. 744, the claim of Miss Nannie J. Myers was authorized to be paid. June 3, 1924, she revoked the power of attorney granted to Smith and there has arisen a controversy between the attorney and his former client, claimant herein concerned, as to whom the check in payment of the claim should be delivered. Appropriation for payment of the claim was provided by the act of December 5, 1924, 43 Stat. 675.

Your duty is to make payment to the person in whose favor the claim was granted. Under the circumstances here disclosed it is not obligatory on you to further recognize the attorney in this case in the matter of delivering the check. The power of attorney is in substance an authority to prosecute the claim, but contains no express authority to receive and indorse the checks or warrants that may be issued in settlement and adjustment of the claim.

Following the procedure required by section 3477 of the Revised Statutes the check should be made payable and sent to the claimant, Nannie J. Myers, under the usual procedure.

(A-6597)

PURCHASES—ELECTRIC CURRENT

Under a contract providing for the furnishing of electric current to the United States on a sliding scale basis, the method to be used in computing the cost of the current consumed where such current is furnished through several meters, is to apply the scale of rates to the reading of each individual meter, rather than to a consolidation of the readings of all the meters. Any previous rulings in conflict herewith will not be followed hereafter, unless the consolidated reading is expressly contracted for.

Decision by Comptroller General McCarl, March 3, 1925:

San Antonio Public Service Co. applied on November 21, 1924, for review of settlements 02740 disallowing its claims for alleged balances, amounting to $304.50, due for electric current furnished the United States Veterans' Bureau Vocational School, San Antonio, Tex., for the period November 27, 1923, to May 27, 1924, under two contracts dated March 24, 1923, for light and power, respectively. The dates of the several settlements, the period of service covered, and the amounts of the claims thereunder are as follows:

April 4, 1924, covering period November 27 to December 27, 1923	$62.66
April 15, 1924, covering period December 28, 1923, to January 29, 1924	68.57
June 7, 1924, covering period February 27 to March 27, 1924	65.27
June 18, 1924, covering period January 29 to February 27, 1924	63.56
July 23, 1924, covering period March 27 to April 26, 1924	40.12
September 19, 1924, covering period April 26 to May 27, 1924	4.32
	304.50

The several amounts totaling $304.50, which represent the difference between the price of the current, at sliding scale rates, computed on the basis of separate meter readings and the price computed on the basis of consolidated meter readings, were deducted by the administrative office in payment of monthly bills submitted by the company, and claims therefor were filed in this office. Disallowance was upon the ground that where under a contract providing for services on a sliding scale the current is furnished through several meters, the meter readings are to be consolidated and the sliding scale applied to the total consumption and not to the reading of each individual meter. This was in accordance with decision of this office August 14, 1923 (Review No. 3074), in the matter of the claim of the Douglas Traction & Light Co., based on the ruling of the Comptroller of the Treasury in 27 Comp. Dec. 762.

Two contracts were entered into, each dated March 24, 1923, the one for furnishing electric light, the other power, to the vocational school during the fiscal year commencing July 1, 1923, and ending June 30, 1924. The first named provided for:

Furnishing electric light to the U. S. Veterans' Bureau Vocational School at West Waco and Wooley Avenue, San Antonio, Texas, at the following schedule of rates:

For the first 25 kilowatts, @ 10¢ per KWHr.
For the next 75 kilowatts, @ 8¢ per KWHr.

For the next 900 kilowatts, @ 7¢ per KWHr.
For the next 2,000 kilowatts, @ 6¢ per KWHr.
All over 3,000 kilowatts, @ 5¢ per KWHr.
The above rates are subject to 10% discount if paid before the last discount date.
Minimum monthly charge per meter 50¢.
The rates specified herein are not in excess of those charged the general public for similar service and are subject to any changes made by a duly authorized State or Government commission during the period of the contract.

The second-named contract provided for:

Alternating current power for the purpose of running the machinery for instructional purposes at Veterans' Vocational School, San Antonio, Texas, at the following rates, it being understood that the demand for 3-phase power will not exceed a maximum of 40 H. P., and the demand for single phase will not exceed a maximum of 10 H. P. For the 1st 500 kilowatts, 5½¢ per KWH; for the next 9,000 kilowatts, 3½¢ per KWH.; for the next 500 kilowatts, 4½¢ per KWH.; all over 10,000 kilowatts 2½¢ per KWH. Minimum monthly charge per meter, 50 cents.

ALTERNATE POWER RATE

Factory power rate: This rate is applicable only to alternating-current motors and excludes D. C. motors, ceiling fans, electric irons, incandescent lights, and other appliances. The rate is as follows: 2¢ per kilowatt hour for the first 1,000 kilowatt hours and 1½¢ per kilowatt hour for all current used in addition, plus $2.00 per mo. per kilowatt demand. The demand is figured on the following basis: From 1 to 10 kilowatts rated capacity where only one motor is used 90% of the rated capacity of the motor. From 1 to 10 kilowatts rated capacity where more than one motor is used, 80% of the rated capacity of the motors. And in addition to the charge for the first 10 kilowatts for all installations above 10 kilowatts, 70% of the rated capacity of the motor.

THE ABOVE RATES ARE SUBJECT TO 10% DISCOUNT IF PAID BEFORE LAST DISCOUNT DAY

The rates specified herein are not in excess of those charged the general public for similar service and are subject to any changes made by a duly authorized State or Government commission during the period of the contract.

The claimant company in its request for review states that it is a universal and established custom in San Antonio to apply a sliding scale only to the electricity furnished through one meter and not to the aggregate amount furnished through several meters although furnished to one consumer. It also states that the buildings now occupied by the Veterans' Bureau were formerly used as a military school, the buildings of which were scattered and were on different sides of streets, and the electric wiring was such that they were compelled to maintain several meters for each class of service; that the Government did not change this physical condition; that at the time the contracts were made the wiring was not such that a single meter could be set for each class of service; and that it can not be expected to incur the expense of installing and maintaining numerous meters, have them read and billed individually each month, and then be paid for the ultimate consumption on a schedule quoted for an individual meter.

In neither of the contracts is it specifically provided that the sliding scale of rates is to be applied to the aggregate of the sev-

eral meter readings. A minimum monthly charge, however, for each meter is specified. It is also provided that the rates specified are not in excess of those charged the general public for similar service and are subject to any changes made by a duly authorized State or Government commission during the period of the contract. The normal and practical procedure apparently is to apply the sliding scale of rates only to individual meter readings and not to the aggregate of the several meter readings. The Government is thus required to pay no more under its contract than individuals or the general public would be required to pay under similar circumstances. The consolidation of meter readings, under the facts here would appear to be an exceptional and unusual procedure, and as such to be expressly contracted for. This was not done, and the claim here in question is now allowed. Any previous ruling by this office contrary to the present decision will not hereafter be followed. See in this connection decision of the Court of Claims rendered January 26, 1925, in *Douglas Traction & Light Co.* v. *The United States.*

Upon review, $304.50 is certified due claimant.

(A-8142)

OFFICERS AND EMPLOYEES—TWO PERSONS HOLDING ONE POSITION

In the absence of express statutory authority for employment of substitutes, so long as a regular employee of the Government continues as such on the records of the administrative office, either on duty or absent on leave with or without pay, no other person may be appointed, temporarily or permanently, to the position he holds. Temporary details may be made of other employees to perform the work of an employee absent on leave.

If the appropriation providing for performance of the work of a regular employee is also available for employment of temporary personal services, there is no legal objection to the creation and allocation to the proper grade under the classification act of 1923 of a temporary position, with the approval of the Personnel Classification Board, separate and distinct from the permanent position held by the regular employee, the incumbent thereof to perform the work of the regular employee during his absence from duty.

Comptroller General McCarl to the Secretary of Agriculture, March 3, 1925:

I have your letter of January 24, 1925, as follows:

Reference is made to your decision of June 26, 1924, to the Civil Service Commission, relative to the classification act of 1923. The sixteenth question presented was as follows:

"Can two persons be legally employed in one position? For instance, A is employed in a certain position and obtains leave of absence. Can another person be employed temporarily to perform the work while A is on leave?"

And you held:

"Generally speaking, the question is answered in the negative. The classification act authorized no changes in this respect. There may be exceptional cases which may not be determined in this decision in the absence of facts."

The above question is predicated on "leave of absence," and the inference is that the question relates to "leave with pay." Would your decision be the

same in a case where an employee was on "leave of absence without pay" for a definite period because of illness and it was necessary to request such leave because of the exhaustion of both sick and annual leave?

The question is important, because in some instances it is necessary that the work upon which the employee was engaged be continued. Under your present decision it would seem that it is necessary in such instances to require the resignation of the employee.

A position in the Government service in the District of Columbia with a salary fixed by law can not be held by more than one person at one time. In the absence of express statutory authority for employment of substitutes, so long as a regular employee of the Government continues as such on the records of the administrative office, either on duty, or absent on leave with or without pay, no other person can be appointed, temporarily or permanently, to the position he holds. 15 Comp. Dec. 855; 20 *id.* 584; decision of October 4, 1921, 2 MS. Comp. Gen. 135. The classification act of 1923 authorizes no change in this rule.

There is, however, no statutory prohibition against the temporary detail or assignment of another employee to perform the work of a regular employee absent on leave. If the appropriation providing for the performance of the work of a regular employee is also available for employment of temporary personal services, there would be no legal objection to the creation and allocation to proper grade under the classification act of 1923, of a temporary position, with the approval of the Personnel Classification Board, separate and distinct from the permanent position held by the regular employee, the incumbent of the temporary position to perform the work of the regular employee during his absence from duty.

(A-7279)

GRATUITIES, SIX MONTHS' DEATH—ARMY ENLISTED MEN

The dependent mother of a deceased enlisted man of the Army, where previously designated by him to receive the gratuity provided for in the act of December 17, 1919, 41 Stat. 367, may be paid an amount equal to six months' pay at the rate the deceased was receiving at the date of his death, if there be no widow and payment to the surviving children of the deceased is prohibited by the act of March 2, 1923, 42 Stat. 1385.

Under the act of March 2, 1923, 42 Stat. 1385, the amount equal to six months' pay of an enlisted man who died while in the Army, not the result of his own misconduct, may be paid to a married child, or an unmarried child over 21 years of age, of decedent, only on evidence that such child was actually dependent upon deceased at the time of his death.

Decision by Comptroller General McCarl, March 5, 1925:

There is before this office for consideration the claim of Mrs. Viola A. Mathews for six months' pay at the rate received by her son, the late Victor C. Mathews, sergeant, Quartermaster Corps, United States Army, at the date of his death at Lake Charles, La., on

November 15, 1923. The medical officer's report shows death was in line of duty and was not the result of the decedent's own willful misconduct.

The act of December 17, 1919, 41 Stat. 367, provides:

That hereafter, immediately upon official notification of the death from wounds or disease, not the result of his own misconduct, of any officer or enlisted man on the active list of the Regular Army or on the retired list when on active duty, the Quartermaster General of the Army shall cause to be paid to the widow, and if there be no widow to the child or children, and if there be no widow or child to any other dependent relative of such officer or enlisted man previously designated by him, an amount equal to six months' pay at the rate received by such officer or enlisted man at the date of his death. The Secretary of War shall establish regulations requiring each officer and enlisted man having no wife or child to designate the proper dependent relative to whom this amount shall be paid in case of his death. * * *

The act of March 2, 1923, 42 Stat. 1385, provides:

None of the funds herein, heretofore, or hereafter appropriated shall be used for payment of the six months' pay (authorized by the act of December 17, 1919, to be paid to certain specified beneficiaries of officers or enlisted men of the Regular Army who died from wounds or disease not the result of their own misconduct) to any married child or unmarried child over twenty-one years of age of a deceased officer or enlisted man who is not actually a dependent of such deceased officer or enlisted man.

The statute *in pari materia* applicable to the Regular Navy and Regular Marine Corps is the act of June 4, 1920, 41 Stat. 824, which provides:

That hereafter, immediately upon official notification of the death from wounds or disease, not the result of his or her own misconduct, of any officer, enlisted man, or nurse on the active list of the Regular Navy or Regular Marine Corps, or on the retired list when on active duty, the Paymaster General of the Navy shall cause to be paid to the widow, and if there be no widow to the child or children, and if there be no widow or child, to any other dependent relative of such officer, enlisted man, or nurse previously designated by him or her, an amount equal to six months' pay at the rate received by such officer, enlisted man, or nurse at the date of his or her death. The Secretary of the Navy shall establish regulations requiring each officer and enlisted man or nurse having no wife or child to designate the proper dependent relative to whom this amount shall be paid in case of his or her death. * * *

In a letter to the Secretary of the Navy dated December 22, 1924, 4 Comp. Gen. 554, certain general observations were made relative to the facts that must appear to support a conclusion of dependency under the above acts as follows:

With reference to the degree and presumptiveness of dependency the laws contemplate two major classes: First, widow and unmarried minor child (or children), presumed in law to be dependent; and, second, any other dependent relatives previously designated, as to which there is no legal presumption of dependency. The very nature of the law and the end sought to be accomplished thereby discloses the intent that the degree of dependency while material in each case is not necessarily the controlling element. The words "dependent relatives" were used not to restrict payments to a relative dependent in fact upon the deceased or as to whom the deceased was necessarily the chief support, but, among other things, to limit the class of relatives eligible for designation and to receive payments, and such class would naturally include only those bearing such intimate relationship to the deceased as would involve at least a moral obligation to assist in the event of need. Those who would therefore be considered as beneficaries are a widow or unmarried minor child (or children); dependent mother, father, brother

or sister of the whole and half blood, upon a showing of needy condition, or aunts, uncles, and other relative standing *in loco parentis* shown to be actually dependent upon deceased.

That dependency in some degree must exist in each case is clear and as stated the dependency of a widow or unmarried minor child (or children) may be presumed, but in cases involving some "other dependent relative" previously designated no such presumption exists and the condition of dependency must be established by a reasonable showing of existing or possible future need at time of designation to be established in the event of death in the service by a showing of verified fact, including that of periodical assistance from the deceased in keeping with his or her income from all sources. Dependency should appear in each case of those remote relatives in such degree as will permit a reasonable conclusion from the facts of record that there is or may be actual dependency of more or less permanency, but not necessarily for chief or immediate support, except in cases of aunts, uncles and others *in loco parentis*. It is possible that moral responsibility for future support would support the designation, but that may be rebutted by the circumstances of dependency existing at date of death. The fact of contribution is always material, and would be deserving of special consideration in cases of regular contribution of a fair part of decedent's income, the extent thereof being proper for consideration in drafting the regulations for issuance by you.

While it is impossible to prescribe just what facts must appear to support a conclusion of dependency, the foregoing is stated as indicative of the view of this office for use in the examination and settlement of claims and accounts involving the six months' death gratuity; and until more effective regulations can be promulgated throughout the remainder of the fiscal year, if necessary, payments and settlements may be made accordingly.

* * * * * * * *

* * * In such connection there would seem for consideration the advisability and practicability of identical regulations by the War and the Navy Departments.

It would seem the better practice to secure as complete a record as possible during the lifetime of the officer, enlisted man, or nurse, so that the matters of relationship and dependency can be more readily determined from the facts appearing in the application or voucher required of the beneficiary, the form of which application or voucher could be identical for all services. To aid in such a procedure, the idea of having all designations made periodically or previous designations corroborated from time to time at once suggests itself as desirable.

Under date of June 26, 1924, The Adjutant General's Office, War Department, reported as follows:

The records of this office show that the late Sergeant Victor C. Mathews, R-759201, Quartermaster Corps, designated the following-named persons, in the order mentioned, as his beneficiaries under the act of Congress approved Dec. 17, 1919: Mrs. Laura L. Mathews, wife (divorced), Coffeyville, Kansas; Vera Viola Mathews (daughter), married, present name not known, Coffeyville, Kansas; Miss Gladis I. Mathews (daughter), Kansas State Hospital, Osawatomie, Kansas; Mr. James H. Mathews (father), 901 West 10th Street, Coffeyville, Kansas; Mrs. Viola A. Mathews (mother), 901 West 10th Street, Coffeyville, Kansas.

The claimant is the person last designated by deceased to receive the six months' pay provided in the act of December 17, 1919, and has submitted affidavits and certificates of credible parties from which the following facts, relating to the persons more preferred than she in the order of their designation, are accepted as established:

Mrs. Laura L. Mathews was divorced from deceased about 20 years before his death and was not dependent upon him in any degree at the date of his death.

(Mrs.) Vera Viola Mathews (Putnam) is the daughter of deceased. She is about 28 years of age, is married, and was not actually a dependent of the deceased at the date of his death.

Miss Gladys I. Mathews is the daughter of deceased and was about 26 years of age at the date of his death. She has been a charity inmate of the Osawatomie State Hospital of the State of Kansas since August 19, 1921, and is entirely incapable of managing her own affairs. She was not actually a dependent of deceased at the date of his death.

Mr. James H. Mathews was the father of deceased and died on or about July 25, 1923.

Inasmuch as Mrs. Laura L. Mathews, the former wife of deceased, is not his widow and was not his "dependent relative" at date of his death, and his children, Vera Viola and Gladys I. Mathews, were more than 21 years of age and were not actually dependents of deceased on that date, none of said persons is entitled to be paid the six months' pay provided for in the act of December 17, 1919. The wife and children if otherwise entitled are not required to be designated, and their gratuitous and unnecessary designation, if not entitled under the law, as in this case, will not affect the right of "any other dependent relative" previously designated, if such relative is otherwise within the law.

In support of her claim the mother has submitted an affidavit attested by two witnesses that she is 70 years of age, that she reared her son's two daughters for him, that for several years before his death the deceased contributed to her support, and that she was looking forward to his retirement, in the near future, that she might have his comfort and support during the remaining years of her life. The older daughter asserts that claimant is the only one who has been dependent on the deceased and that he contributed to her support. It appears that claimant is the legal guardian of the younger daughter, who is mentally incompetent.

That the mother and father of deceased were aged persons who had reared the children of deceased; that the designation seems to have been made shortly after the passage of the act of December 17, 1919; that a needy condition of both parents existed at date of designation; and that contributions were made by decedent to the father and mother before the father's death and subsequently to the mother is established by the evidence. The necessities of the father and mother and the contribution to both, together with their advanced ages, doubtless prompted the designation of both that in the event of death of either the survivor might receive the benefit of the gratuity.

Such designation in the situation here presented will not be questioned, though it is apparent that payments under the law may be made more expeditiously and with certainty if in the future frequent designation or affirmation of a former designation shall be required and the designation shall be limited to one "other dependent relative" as to whom the facts at date of designation show a condition in harmony with the observations heretofore quoted from the decision of December 22, 1924, 4 Comp. Gen. 554. In accordance with that decision payment of the six months' pay may be made to the claimant in this case unless it is prohibited by the fact that deceased was survived by two children now living.

The act of December 17, 1919, directs that payment be made to some other previously designated dependent relative, "if there be no widow or child." In this case there are two children, but neither may be paid the gratuity because of the proviso contained in the act of March 2, 1923. This proviso was incorporated in that act in the form of permanent legislation at the request of the War Department. Hearings before the subcommittee of the Committee on Appropriations, United States Senate, War Department appropriation bill, 1924, pages 145, 146. The language used was that suggested by the War Department and clearly indicates that the only object of the proviso is to prohibit payment of a gratuity to surviving children of the classes described who are not actually dependents of deceased officers and enlisted men of the Regular Army at the date of their death.

It has been generally recognized by decisions of the accounting officers that the policy prompting the enactment of provisions such as that contained in the act of December 17, 1919, is to insure the material welfare of some dependent relative, designated by law or by an officer or enlisted man, to a limited extent and for a limited period after the death of the officer or enlisted man, and to designate with a degree of certainty the order of succession to the right to receive the gratuity granted. 16 Comp. Dec. 595; 18 *id.* 660; 22 *id.* 524; 1 Comp. Gen. 547; 4 *id.* 554.

In order that the policy prompting their enactment may be given full effect the provision in the act of December 17, 1919, and the provision in the act of March 2, 1923, must be construed as directing payment of the six months' pay to some "other dependent relative" previously designated by an officer or enlisted man if he is not survived by a widow or a child to whom the payment may be made.

In accordance with that construction claimant is entitled to be paid an amount equal to six months' pay at the rate her late son was receiving at the date of his death, and settlement will be made accordingly.

(A-7544)

TRAVELING EXPENSES—USE OF OWN AUTOMOBILE

Vouchers for reimbursement for gasoline and oil used in traveling in the employee's own automobile on official business should not only show the quantities of gasoline and oil used, the unit price per gallon paid, and the places between which the travel was performed and the distance, but should show the make of the automobile and any unusual conditions existing at the time and place of travel.

Comptroller General McCarl to the Secretary of the Treasury, March 5, 1925:

I have your letter of January 15, 1925, wherein you request reconsideration of my decisions holding that when privately owned automobiles are used for the performance of official travel the make of the automobile should be shown on the vouchers for reimbursement of gasoline, oil, etc., consumed during such travel. You cite in particular A. D. 8036, dated January 14, 1924, the last paragraph of which holds:

> Vouchers for reimbursement for gasoline and oil used in traveling in the employee's own automobile on official business should show the quantities of gasoline and oil used, the places between which the travel was performed and the distance, the unit price per gallon paid, and the make of the automobile used * * *.

The travel regulations of the Bureau of Internal Revenue relating to the use of privately owned conveyances for official travel, as quoted by you, provide:

> Charges for use of own conveyance can not be allowed as a travel expense in the accounts of any officer or employee. (20 Comp. Dec. 666, 696; 21 id. 219; 22 id. 325, 378; 74 MS. Comp. Dec. 652.) Charges for such necessary incidental expenses incurred in connection with the use of own conveyance as are readily ascertainable, as for gasoline, oil, or horse feed, used on trip, can be allowed, but only to the extent of the actual cost thereof as evidenced by vouchers. Charges which are speculative in character, such as repairs, can not be allowed. A commuted rate charge can not be allowed in any case. (21 Comp. Dec. 1; 74 MS. Comp. Dec. 653; 75 id. 98.)

You state in your letter having reference to employees of the Bureau of Internal Revenue that under the above regulations—

> * * * It is not required that the make of automobile used nor the actual amount of gasoline and oil consumed be stated. This phase of the matter has been met by allowing one gallon of gasoline for each ten miles traveled and one quart of oil for each ten gallons of gasoline purchased. * * *

Since the regulations provide that a commuted rate charge can not be allowed in any case and that only the actual cost of gasoline, oil, etc., used on the trip can be reimbursed it would appear that the practice of allowing a certain amount of gasoline and oil per mile is in direct contravention to the bureau's regulations quoted above. It is not the intent of the law allowing reimbursement for actual expenses incurred by employees while traveling on official business to hold out the Government as being either generous or parsimonious. The purpose of this law is to reimburse the employee for extra expenses incurred by him when, by virtue of his position, he is called upon to perform duties involving travel. The basis for reim-

bursement is the actual outlay of moneys caused him during the official travel performed, and this fundamental basis can not lawfully be changed to a commuted rate per mile unless specifically authorized by law. If it is and has been the prevailing practice in the Bureau of Internal Revenue to allow a commuted rate of 1 gallon of gasoline for each 10 miles traveled and 1 quart of oil for each 10 gallons of gasoline purchased, in cases of privately owned means of conveyance such practice is objectionable and should be discontinued.

The object in requiring a showing as to the make of privately owned automobiles is not necessarily for the purpose of determining whether or not the amount of gasoline and oil consumed is excessive. It is to enable this office to properly audit the vouchers submitted for such reimbursement and results as much to the advantage of the employee as to that of the Government. It is a matter of common knowledge that different makes of automobiles consume varying amounts of gasoline and oil over the same number of miles traveled, and the fixing of a certain amount of each indiscriminately for all makes of automobiles tends to result in either a gain or a loss to the employee performing the travel which is contrary to the theory of reimbursement on an actual expense basis. If there be unusual conditions in connection with a particular travel causing the use of a greater or lesser amount of fuel than usual, it is proper to state on the vouchers the conditions in explanation of the charge as made.

The decision cited by you is therefore affirmed and amplified accordingly.

(A-7540)

COMPENSATION, DOUBLE—POSTAL SERVICE EMPLOYEES

The payment to village carriers or temporary laborers in the Postal Service of additional compensation for services as substitute post-office clerks, both positions being in the same department, is in the nature of payment for extra services and prohibited by sections 1764 and 1765, Revised Statutes, notwithstanding the salary or pay of the respective positions is fixed by law or regulation.

The employment of rural letter carriers or laborers in the Postal Service as substitute post-office clerks or substitute city letter carriers is prohibited when the aggregate rates of pay of the two positions exceed $2,000 per annum, irrespective of the actual amount received or of the fact that the employee may have been in a nonpay status as regards the position of rural carrier or laborer.

Decision of Comptroller General McCarl, March 6, 1925:

The Postmaster General applied January 20, 1925, for review of the action of this office in disallowing credit in the accounts of the postmaster at Cheraw, S. C., for payments amounting to $223.80,

made to Thomas A. Brewer, and amounting to $48.90, made to Donovan McManus, for services performed by them as substitute clerks in the Cheraw post office, both of the employees being village carriers at Cheraw. Review was also requested of a disallowance in the accounts of the postmaster at Tacoma, Wash., of credit for $6.43, paid to Archie M. Robinson, temporary laborer in the Tacoma post office, for services performed as substitute clerk.

The disallowance in each case was based on the act of May 10, 1916, 39 Stat. 120, as amended by the act of August 29, 1916, id. 582, which prohibits payment to a person receiving more than one salary when the combined amounts of such salaries exceed the sum of $2,000 per annum, unless specially authorized by law.

It has been held uniformly that the act cited refers to salaries and not to payments or amounts actually received, and to rate of the combined salaries rather than the aggregate amount received during a year, and that no payment of a part of a salary is authorized if the whole taken with the salary of another position or positions exceeds the limitation fixed by the statute. 3 Comp. Gen. 260. In other words, if the salaries of the positions, computed on the basis of the number of hours per day ordinarily worked, and the usual number of days per annum, amount to more than $2,000, the prohibition in the act of May 10, 1916, applies.

In the letter requesting review of the disallowances the Postmaster General requests decision whether the employment of village carriers as substitute clerks is authorized when the combined actual compensation received is not in excess of $2,000 per annum. As already pointed out, whether the act of May 10, 1916, applies is determined not by the actual amount received but by the combined amount of salaries of the positions, and it must be held that such employment is not authorized.

In cases in which the combined salaries do not exceed the rate of $2,000 per annum there is for consideration sections 1764 and 1765, Revised Statutes, which provide that no allowance or compensation shall be made for any extra services whatever and that no person whose salary, pay, or emoluments are fixed by law or regulation shall receive any additional pay for any other service whatever, unless authorized by law. While the salary of village carriers and the pay of substitute clerks are "fixed by law or regulations," as both positions are under the same department, the service as substitute clerk rendered by village carriers is in the nature of extra service and therefore prohibited. See 24 Comp. Dec. 350.

It must be held, therefore, that the disallowances were correct as made and the action heretofore taken is accordingly sustained.

The Postmaster General also requests decision whether he is authorized to employ rural letter carriers and post-office laborers as

substitute clerks and substitute city letter carriers when they are in a nonpay status as rural letter carriers or laborers.

The act of May 10, 1916, is designed to prevent dual office holding, using the prohibition of compensation as a means to that end. It is held, therefore, that said act applies to the case presented by the Postmaster General, and that the employment of rural letter carriers or post-office laborers as substitute post-office clerks and substitute city letter carriers when in a nonpay status as rural carriers or laborers is not authorized. Decision of April 30, 1924, A–1504, to the Secretary of the Treasury.

(A–7993)

PURCHASES, CANCELLATION BEFORE DELIVERY—RECLAMATION SERVICE

Where a purchase order was placed for the United States for certain goods, with the provision that delivery was to be completed on or before a fixed date, and no deliveries were made prior to, or on, such date, the subsequent cancellation of the purchase order does not impose any liability on the United States.

Decision by Comptroller General McCarl, March 6, 1925:

James B. Clow & Sons applied November 10, 1924, for review of settlement No. 051441–I, dated November 1, 1924, wherein the amount of $227.18 due them by the United States for pipe and pipe fittings furnished the United States Reclamation Service under contract dated January 21, 1924, was applied as a partial set-off against the indebtedness of the claimant to the United States of $875.00 on account of an improper payment to them of that amount made on voucher 324, March, 1919, accounts of W. M. Wood, major, Quartermaster Corps.

The improper payment was the amount allowed the claimant in an agreement executed December 5, 1918, as compensation for the cancellation of purchase order No. 16338, dated November 6, 1918. This purchase order was placed with the claimant by the Thompson-Starrett Co. as agent of the United States for 350 water closets at $22.00 each, shipment to be made on or before November 11, 1918. No shipment was made of any portion of the order and according to the report of the War Department the order was canceled on December 5, 1918, and the cancellation agreement of that date was executed providing for payment to the claimant of $875.00 in payment of the liability of the Government under the order.

Where an order has been placed for goods to be delivered within a specified time and no part of such goods is delivered during the time stipulated, the purchaser is under no obligation to accept and pay for the goods purchased. The failure to make shipment on or

before November 11, 1918, relieved the Government from any obligation that might have been placed upon it by the purchase order in question, consequently there was no authority for the payment of $875.00 made the claimant by Major Wood.

The claimant contends that it was notified through another firm by Thompson-Starrett Co. prior to the date of November 11, 1918, to hold up all work on the order, but the unsupported statement as to a telephone conversation on some indefinite date between it and another firm which had no authority to act for the Government can not be accepted in lieu of the report of the War Department hereinbefore referred to.

Upon review the settlement is sustained.

(A-5687)

MARINE CORPS PAY—AVIATION DUTY

Where an officer of the Marine Corps detailed to duty involving flying was killed in an airplane accident before having performed the minimum number of flights required during a calendar month by Executive order of July 1, 1922, issued pursuant to section 20 of the act of June 10, 1922, 42 Stat. 632, flying pay is payable to the date of his death if the facts show that the officer was participating in regular and frequent aerial flights at the time death occurred.

Decision by Comptroller General McCarl, March 7, 1925:

There is before this office for settlement the claim of James P. Hail, administrator, for amount due and unpaid at the date of death of Harold D. Hail, late second lieutenant, United States Marine Corps, wherein there is involved the question of allowance of 50 per cent additional pay for flying duty for the period June 1 to 10, 1924.

It appears that Lieutenant Hail was killed in an airplane crash at 9.55 a. m., June 10, 1924, at Garrisonville, Va. The commanding officer of Division 1 (VF Squadron 1), First Aviation Group, Marine Barracks, Quantico, Va., June 10, 1924, certified that Lieutenant Hail was detailed for duty involving actual flying in aircraft July 25, 1923, and under this detail he performed during the period in question four flights of an aggregate duration of 2 hours and 20 minutes. During the month of May, 1924, it appears he performed 35 flights and was in the air 22 hours 45 minutes.

Section 20 of the act of June 10, 1922, 42 Stat. 632, provides:

That all officers, warrant officers, and enlisted men of all branches of the Army, Navy, Marine Corps, and Coast Guard, when detailed to duty involving flying, shall receive the same increase of their pay * * * as are now authorized for the performance of like duties in the Army. * * * Regulations in execution of the provisions of this section shall be made by the President and shall be uniform for all the services concerned.

Section 13a of the act of June 4, 1920, 41 Stat. 769, provides, in part:

* * * Officers and enlisted men of the Army shall receive an increase of 50 per centum of their pay while on duty requiring them to participate regularly and frequently in aerial flights; * * *.

Paragraph 9 of Executive Order 3705–B, dated July 1, 1922, issued in pursuance of section 20 of the act of June 10, 1922, provides:

9. Each officer, warrant officer, or enlisted man of the Army, Navy, Marine Corps, or Coast Guard, who is detailed to duty involving flying, shall be required to make at least ten flights or be in the air a total of four hours during each calendar month; provided that an officer, warrant officer, or enlisted man so detailed, who is unable to meet these requirements during any calendar month for any reason other than sickness or injury, shall be regarded as having met them if he performs a minimum of twenty flights or is in the air a minimum of eight hours prior to the end of the following calendar month; provided further, that an officer, warrant officer, or enlisted man so detailed, who is unable to meet this alternative requirement for any reason other than sickness or injury, shall be regarded as having met this requirement if he performs a minimum of thirty flights or is in the air a minimum of twelve hours prior to the end of the calendar month thereto succeeding. Failure to comply with the foregoing requirements shall have the effect of suspending the detail to duty involving flying, but only for the period during which the foregoing requirements as to flights are not complied with; provided that, in the case of any officer, warrant officer, or enlisted man, who, by reason of sickness or injury incurred in the line of duty, is unable to comply with the foregoing requirements, his detail to duty involving flying shall be considered as temporarily suspended from the day following that on which the disability occurred; if the flight requirements are substantially met within the three months' period herein prescribed, the temporary suspension shall be considered nullified, otherwise it shall remain in effect until he resumes flights in conformity with the foregoing requirements. Each officer, warrant officer, or enlisted man, who is detailed to duty involving flying, and who is a qualified aircraft pilot, and who is fit for duty as such, shall make the flights herein required as pilot. Each officer, warrant officer, or enlisted man who is detailed to duty involving flying and who is a qualified aircraft observer, but is not a qualified aircraft pilot, shall make the flights herein required as observer.

The Executive order of July 1, 1922, fixes the minimum flying necessary to establish regular and frequent participation in aerial flights, viz, 10 flights, or a total of four hours in the air during each calendar month, and prescribes that failure to meet such minimum requirements in any particular month shall have the effect of suspending the detail to duty involving flying, with a provision for compliance with the requirements by increased flights in the two succeeding months. It further provides that when the failure to meet the requirements is due to sickness or injury incurred in line of duty the detail to duty involving flying shall be considered as temporarily suspended from the day following that on which the disability occurs.

There is no provision in the Executive order covering cases of death in aviation accidents, and the requirements for 10 flights, or a total of four hours in the air during each calendar month, can have no application thereto.

The officer in this case was detailed to duty involving flying, and his flying log to date of death shows he was assigned to and was in the performance of duty requiring regular and frequent participation in aerial flights on a *pro rata* basis as established for a calendar month by the Executive order. The regulations not being applicable otherwise, flying pay is allowable under the law during the period June 1 to 10, 1924.

(A–7865)

CLASSIFICATION OF CIVILIAN EMPLOYEES—APPROPRIATION UNIT—TREASURY DEPARTMENT

The phrase "bureau, office, or other appropriation unit," in the average provision, restricting payment for personal service in the District of Columbia under the classification act of 1923, contemplates primarily a separate appropriation heading or item specifically provided in the appropriation act and is not applicable to administrative divisions created or established either under other express statutes or as a matter of administrative convenience.

The appropriation "Public Debt Service, 1925," as made in the act of April 4, 1924, 43 Stat. 68, appropriating for the Treasury Department, constitutes one "bureau, office, or other appropriation unit" within the meaning of the average provision, necessitating the adjustment of salaries of all employees paid thereunder as being in one appropriation unit, and therefore the average provision is not affected by transfer of employees between the administrative divisions established thereunder, viz: Division of Paper Custody, Division of Public Debt Accounts and Audit, and Division of Loans and Currency.

Comptroller General McCarl to the Secretary of the Treasury, March 7, 1925:

I have your letter of February 2, as follows:

Under date of January 8, 1925, the Secretary approved the realignment of certain work within the Public Debt Service. Specifically involved are (1) the transfer of certain control accounts over Bureau printing through the medium of blank paper, from the Division of Paper Custody to the Division of Public Debt Accounts and Audit, and (2) the transfer of the receipt, examination, certification and delivery for destruction, of the mutilated product of the Bureau, from the Division of Paper Custody to the Division of Loans and Currency. The duties and essential procedure will not be changed in the transfers.

For the work in connection with the control accounts two clerks are now employed in the Division of Paper Custody, one in Grade 4 at $2,040, and one in Grade 2 at $1,680. Each such salary is the maximum of the grade and was fixed for the employees concerned on July 1, 1924.

In connection with the mutilated work, six clerks are employed, one in Grade 4 at $1,860, the average salary for the grade, and five in Grade 1 at $1,440, which rate is $120 in excess of the average fixed for the grade; the rates for the employees concerned were fixed on July 1, 1924.

At the time the work and essential records are transferred it is desired to transfer the clerks now engaged on the work, and, under new jurisdiction, for them to continue to perform the same duties. The Divisions concerned are different appropriation units although the expenses of such units are all paid from the same appropriation. In the Division of Public Debt Accounts and Audit, and in the Division of Loans and Currency, to which it is proposed to transfer the employees concerned, the average of the salaries of the total number of persons in each of the grades affected is now exceeded.

Your opinion is requested as to whether the employees in question may be transferred with the work as indicated above without such employees suffering a reduction in salary.

Your letter mentioned the following administrative divisions:

1. Division of Paper Custody.
2. Division of Public Debt Accounts and Audit.
3. Division of Loans and Currency.

Transfer of work with the clerks assigned thereon is proposed from 1 to 2 and 3. Your question is whether the clerks thus transferred must be paid the minimum salary in administrative divisions 2 and 3, where in the salary average is excessive as a result of the exceptions to the average provision appearing in the appropriation act of April 4, 1924, 43 Stat. 64, for the Treasury Department covering fiscal year 1925. See also appropriation act of January 22, 1925, 43 Stat. 764, for the Treasury Department, covering the fiscal year 1926.

There is for consideration herein the phrase "bureau, office, or other appropriation unit." The word "other" shows that there must be primarily an "appropriation unit"; that is, a heading or item specifically provided in the appropriation act, and that the words "bureau" and "office" are descriptive of appropriation units or headings or items. Accordingly, in the absence of separate appropriation units or headings or items in the appropriation act itself the average provision has no relation whatever to administrative divisions or units that may be created or established by administrative officers either under other express statute or as a matter of administrative procedure or convenience.

I do not find in the appropriations for the Treasury Department for the fiscal year 1925 or 1926 any specific or separate appropriation units or headings or items for the divisions you have mentioned in the submission. It has been ascertained that these divisions, together with the office of Commissioner of Public Debt and office of Register of the Treasury, have been created in the administrative organization of employees appropriated for under the major heading "Public Debt Service," 43 Stat. 68. Under this general heading for the present fiscal year appear two items for personal services in the District of Columbia, one for $3,416,000 and the other for $9,100. A third item is provided for the field service. The two items for personal service in the District of Columbia constitute one appropriation unit within the meaning of the average provision. 4 Comp. Gen. 167, 168, 342, 497. It is understood that the employees in the five divisions established administratively under the Public Debt Service are paid from the first-mentioned item and that the salary average has heretofore been computed and maintained on the assumption that each of the five administrative divisions or units constituted an "appropriation unit." This was clearly erroneous. The appropriation "Public Debt Service, 1925," constitutes one "bureau, office, or other oppropriation unit" within

the meaning of the average provision, and immediate steps should be taken to adjust the salaries accordingly.

You are advised, therefore, that the transfer or reassignment of employees between the administrative divisions or units within the appropriation unit "Public Debt Service," if not involving promotion or demotion in a grade or change in grade, is not affected by the average provision.

(A–7955)

CLASSIFICATION OF CIVILIAN EMPLOYEES—ALLOCATIONS OF TEMPORARY POSITIONS

The proper allocations of temporary positions under the provisions of the classification act of 1923 should be finally settled and determined between the administrative office and the Personnel Classification Board before appointments are made thereto.

A temporary employee under the Department of Justice who received no compensation during the period of her employment for the reason that the proper allocation of her position had not been finally settled and determined between the administrative office and the Personnel Classification Board prior to the termination of her employment, may be paid for the entire period of her employment at the minimum salary rate of the grade to which the Personnel Classification Board finally allocated the position held by her.

Comptroller General McCarl to the Attorney General, March 9, 1925:

I have your letter of February 7, 1925, as follows:

Under date of July 12, 1924, Miss Buleah K. Pangle was appointed for temporary service as typist in this department. The duties performed by her were identical with those performed by all the typists in the division to which she was assigned. These positions had been allocated by the department to grade 2 of the clerical administrative and fiscal service of the "classification act of 1923," and these allocations had been approved by the Personnel Classification Board. Inadvertently the report to the Personnel Classification Board concerning the appointment was delayed. On September 13, 1924, a description of the duties performed by Miss Pangle was submitted to the Personnel Classification Board with the recommendation that the position held by her be allocated to the same classification grade as the positions held by the other typists in the division. Under date of September 23, 1924, the department received notice from the Personnel Classification Board that the position held by Miss Pangle had been allocated to grade 1 of the clerical, administrative and fiscal service. In the meantime Miss Pangle's services had been terminated. The department promptly appealed from the Personnel Classification Board's allocation, and under date of February 5, 1925, received notice from the board that the allocation of Miss Pangle's position had been changed from grade 1 of the clerical, administrative and fiscal service to grade 2 of that service. Miss Pangle has received no compensation for the services rendered by her, and in view of your decision dated September 8, 1924, 4 Comp. Gen. 280, in which it was held that allocations "may be given effect to only for the pay period current upon the date of receipt by the administrative office, whether it be an original allocation or an allocation resulting from an appeal," the question is presented whether, in view of the circumstances herein cited, the department is authorized to pay Miss Pangle a salary at the rate of $1,320 per annum.

The decision of September 8, 1924, 4 Comp. Gen. 280, to which you refer, was intended to apply to "revised or changed allocations" of employees who had already been receiving compensation on the reg-

ular pay rolls of the department under an allocated position. The rule there laid down fixed the effective date of any increase or decrease in the salary rate of an employee resulting from an allocation or reallocation. 4 Comp. Gen. 397.

In the present case it is not a matter of increasing or decreasing the salary rate of the employee, but the final determination of what was the correct grade in which the temporary position held by the employee should have been allocated and the initial rate of compensation thereunder from the effective date of employee's appointment.

The proper procedure must be that all allocations of temporary positions should be finally settled and determined between the administrative office and the Personnel Classification Board before appointments are made thereto. 4 Comp. Gen. 239, 242.

As the services have been rendered and the employee has received no compensation therefor, payment is authorized to Miss Pangle for the entire period of her service at the salary rate of $1,320 per annum, the minimum of grade C. A. F., 2, wherein the Personnel Classification Board finally allocated the position she held.

(A–7057)

MEDICAL TREATMENT IN CONTRACT HOSPITALS—VETERANS OF ANY WAR

Contract hospitals are not "existing Government facilities" within the meaning of the second part of subsection 10 of paragraph 202 of the World War veterans' act of June 7, 1924, 43 Stat. 620, such as may be used for the treatment of veterans of any war, military occupation or expedition, not dishonorably discharged, irrespective of the nature and origin of their disabilities.

Comptroller General McCarl to the Director, United States Veterans' Bureau, March 10, 1925:

Reference is had to your request of February 20, 1925, for a decision on the following question:

Whether the words "government facilities" in the second part of subdivision 10 (sec. 202, act of June 7, 1924) includes contract hospitals and authorizes hospitalization of honorably discharged veterans of any war, military occupation or expedition.

The authority to provide additional hospital facilities by contract is found in section 10 of the act of June 7, 1924, 43 Stat. 610, in the following language:

In the event Government hospital facilities are insufficient or inadequate the director may contract with State, municipal, or, in exceptional cases, with private hospitals for such medical, surgical, and hospital services and supplies as may be required, and such contracts may be made for a period of not exceeding three years and may be for the use of a ward or other hospital unit or on such other basis as may be in the best interest of the beneficiaries under this act.

Section 202, subsection 10, of the act of June 7, 1924, 43 Stat. 620, provides:

That all hospital facilities under the control and jurisdiction of the bureau shall be available for every honorably discharged veteran of the Spanish-American War, the Philippine Insurrection, the Boxer rebellion, or the World War suffering from neuropsychiatric or tubercular ailments and diseases paralysis agitans, encephalitis lethargica or amoebic dysentery, or the loss of sight of both eyes regardless whether such ailments or diseases are due to military service or otherwise, including traveling expenses as granted to those receiving compensation and hospitalization under this act. The director is further authorized, so far as he shall find that existing Government facilities permit, to furnish hospitalization and necessary traveling expenses to veterans of any war, military occupation, or military expedition since 1897, not dishonorably discharged without regard to the nature or origin of their disabilities: *Provided*, That preference to admission to any Government hospital for hospitalization under the provisions of this subdivision shall be given to those veterans who are financially unable to pay for hospitalization and their necessary traveling expenses.

It will be noted that this section of the World War veterans' act contains two distinct provisions—the first renders available "all hospital facilities under the control and jurisdiction of the bureau" for the treatment of certain veterans of specified wars suffering from particular diseases. See decision of January 5, 1925, 4 Comp. Gen. 586, and unpublished decision of January 21, 1925, A–5301.

As to the second provision of subsection 10, section 202, *supra*, the right of veterans of any war since 1897 to treatment, irrespective of the nature and origin of their disabilities, is dependent upon a finding by the director that "existing Government facilities" permit of such treatment, and as the authority to contract with State, municipal, or private hospitals found in section 10 of the act is granted only when "Government hospital facilities are insufficient," it is evident that the act did not contemplate the use of contract hospitals to furnish the treament authorized under the second part of subsection 10 of paragraph 202 of the World War veterans' act. Your submission is answered accordingly.

(A–8266)

SUBSISTENCE EXPENSES—FRACTIONAL DAYS—POST OFFICE INSPECTORS

The rule to the effect that an officer or employee who is absent from his official station on official business for a period of 10 hours or less between the hours of 8 a. m. and 6 p. m., is not in a travel status within the meaning of the laws authorizing reimbursement of subsistence expenses, either on an actual expense basis or a per diem in lieu of basis, is applicable to inspectors of the Post Office Department whose traveling expenses are provided by the act of June 5, 1920, 41 Stat. 1052.

Comptroller General McCarl to the Postmaster General, March 10, 1925:

There has been received your letter of February 27, 1925, requesting review of the action of this office in disallowing the claim of post office inspectors C. W. Linebaugh, L. H. Sides, George H.

Chase, and H. B. Ball for reimbursement of expenses stated to have been incurred by them for lunch at places other than their homes or official domiciles while engaged on official business involving an absence of less than 10 hours between the hours of 8 a. m. and 6 p. m.

To the extent that these claims are based upon the acts of March 3, 1875, 18 Stat. 452, and the act of April 6, 1914, 38 Stat. 318, they are identical in all essential features with the cases considered in decision of September 30, 1924, 4 Comp. Gen. 331, except that in the claims here under consideration there is not involved the question of allowing credit for payments made by a disbursing officer prior to July 1, 1924. In the said decision of September 30, 1924, it was held that an employee who is absent from his official station on official business for a period of 10 hours or less between the hours of 8 a. m. and 6 p. m. is not in a travel status within the meaning of the laws authorizing reimbursement of subsistence expenses; and you present no phases of the matter in so far as the above cited acts are concerned, not considered by this office when said decision and other decisions therein cited were rendered.

Much of the submission urges that it has not been established as a fact that a meal expense during an absence between 8 a. m. and 6 p. m. is not additional to such an expense if there had been no absence from official station. From this it would appear that the department has not correctly understood the principle involved. Travel status is not created by an expense, and an absence between 8 a. m. and 6 p. m. does not create a travel status merely because during that time the employee takes a meal. The being away during those hours has not in that respect changed the situation of the employee being at station. Presumptively such meal would have been there taken. If not, then the employee has simply made the being away the opportunity for taking the meal which would not have been otherwise taken. It must be accepted as sound reasoning that the normal condition relating to an employee in the matter of personal expenses has not been changed by the Government asking him to perform duty at another place during hours of the day he would practically perform duty at official station, including going and coming between office and home.

You suggest that the rule announced above may not be applicable to these claims because of a provision in the act of June 5, 1920, 41 Stat. 1052, which reads:

> Inspectors shall be paid their actual expenses not to exceed $5 per day while engaged on official business away from their homes and official domiciles. * * *

With reference to a similar contention made as to the rights of United States marshals under the provisions of section 12 of the act of May 28, 1896, 29 Stat. 183, as follows:

That the marshal, when attending court at any place other than his official residence, and when engaged in the service or attempted service of any process, writ, or subpœna, and when otherwise necessarily absent from his official residence on official business, shall be allowed his necessary expenses for lodging and subsistence, not exceeding four dollars per day and his actual necessary traveling expenses. * * *

it was held in decision of January 16, 1925, A–4482, that the authority granted under said provision was not greater or different in effect than that granted in the act of April 6, 1914, and that all such acts are alike in the essential feature of providing an allowance when traveling on business away from the official station. See also decision of January 26, 1925, A–7143, with reference to a provision in the act of March 4, 1923, 42 Stat. 1454, as follows:

That all customs officers and employees, including customs officers and employees in foreign countries, in addition to their compensation shall receive their necessary traveling expenses and actual expenses incurred for subsistence while traveling on duty and away from their designated station * * *.

In holding that the rule announced in 4 Comp. Gen. 331, *supra*, was applicable in the case of customs officers and employees claiming reimbursement under said provision, it was said:

* * * The acts authorizing reimbursement of traveling expenses, including the act of March 4, 1923, permit reimbursement of necessary traveling expenses for subsistence only when an employee is traveling on duty away from his designated station or post of duty; and it is within the jurisdiction of the accounting officers in passing upon the legality of expenditures to determine from the facts of each individual case whether or not an employee is in such a status. The effect of the decisions in question is not to deprive an employee of expenses incurred while traveling on duty away from his station, but to preclude reimbursement of expenses incurred for subsistence while merely going about his duty between the hours of 8 a. m. and 6 p. m., it being held that an employee making short trips between said hours is not traveling on duty away from his station and, therefore, is not in a travel status within the meaning of the laws authorizing reimbursement of subsistence expenses. In such instances it is immaterial that the employee has actually incurred an expense for a midday meal. The employee not being in a travel status, reimbursement to him for his actual expenses under such circumstances would amount to a gratuity or an increase in his compensation which is not authorized under the law.

It does not follow from the fact that an employee is not in a travel status that he can not be reimbursed for his transportation expenses. Allowance of transportation charges in cases where the business is of such a character that an employee is not in a travel status and not entitled to subsistence is justifiable as expenses incident to the Government business. See 26 Comp. Dec. 154; 3 Comp. Gen. 601.

There appears nothing in the provision of the act of June 5, 1920, hereinbefore quoted, to require or justify excepting post-office inspectors from the application of the rules and principles heretofore announced with reference to traveling expenses of officers and employees of the Government generally. Said enactment may be considered as permitting actual expenses only to be allowed, instead of a commutation as by a per diem amount. For reasons herein stated the disallowances in question must be and are sustained.

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(A-7970)

LEAVE OF ABSENCE—TEMPORARY RURAL LETTER CARRIERS ACTING AS WITNESSES

A temporary rural letter carrier is not entitled to leave of absence with pay while absent from duty testifying as a witness for the Government before a grand jury, but is entitled to receive the usual witness fees and mileage authorized by law.

Comptroller General McCarl to the Postmaster General, March 11, 1925:

I have your letter of February 7, 1925, requesting decision whether leave of absence with pay was authorized to be granted Harry T. Stewart, a temporary rural letter carrier in the Postal Service, for December 16, 1924, on which day he was absent from duty acting as a witness for the Government before a grand jury.

Section 850 of the Revised Statutes provides as follows:

> When any clerk or other officer of the United States is sent away from his place of business as a witness for the Government, his necessary expenses, stated in items and sworn to, in going, returning, and attendance on the court, shall be audited and paid; but no mileage, or other compensation in addition to his salary shall in any case be allowed.

Section 734, Postal Laws and Regulations, 1924, provides in part as follows:

> A rural carrier serving in court as a witness for the Government * * * will be allowed leave with pay during the period of such service in addition to the annual leave to which he is otherwise entitled * * *.

Sections 718 et seq. of the Postal Laws and Regulations, 1924, provide for regular, substitute, and temporary rural carriers. The distinction between substitute and temporary carriers is not very clearly shown, but you state that the position of temporary carrier is without civil-service status, may be terminated at will, and that the matter of selection of persons to serve in that capacity is left to the postmasters. The temporary carriers are employed to take the place of the regular carrier absent on leave or during a vacancy in the regular position, and are paid the same rates as the regular carrier only for the actual time on duty. They are entitled to no leave of absence. The annual appropriations for the Postal Service contain an item "For pay of rural carriers, substitutes for rural carriers on annual and sick leave." For the present fiscal year, see act of April 4, 1924, 43 Stat. 89. The authority to employ a substitute or temporary carrier is, therefore, the absence of the regular carrier. There exists no authority to employ a temporary carrier because of the absence of another temporary carrier subpœnaed to testify in behalf of the Government or absent for any other reason. The employment of the second temporary carrier relates to the absence of the regular carrier. The first temporary carrier, during his absence for any cause, is not available for employment in the capacity of a temporary carrier and therefore ceases to be "a clerk or other officer of

the United States" within the meaning of section 850, Revised Statutes, 25 Comp. Dec. 546. Nor would the temporary carriers be entitled to leave of absence with pay under section 734, Postal Laws and Regulations.

You are advised, therefore, that Harry T. Stewart was not entitled to be paid for December 16, 1924, as a temporary rural carrier, but was entitled to receive the usual witness fees and mileage authorized by law.

(A-7985)

WAR RISK INSURANCE—OFFICERS' RESERVE CORPS OF THE ARMY

Premiums collected, or payments of insurance made, prior to September 13, 1924, on policies of war-risk insurance issued to members of the Officers' Reserve Corps of the Army based solely upon attendance at camps of instruction or training in time of peace, which policies were held invalid by decision of September 13, 1924, 4 Comp. Gen. 297, will not be disturbed. but there is no authority to collect premiums or pay insurance installments on such policies subsequent to that date.

Comptroller General McCarl to the Director, United States Veterans' Bureau, March 11, 1925:

I have your letter of February 10, 1925, requesting decision as to the validity of, and liability of the United States under war-risk insurance, policies issued to members of the Officers' Reserve Corps of the Army prior to September 13, 1924, effective date of decision of this office holding "that neither the war-risk insurance act nor the World War veterans' act, 1924, authorizes the issuance of war-risk insurance policies to members of the Officers' Reserve Corps, based solely upon attendance at a camp for instruction or training in time of peace." 4 Comp. Gen. 297.

You also state the following specific case:

In the case of Chester Robinson Dow, second lieutenant, Infantry, Officers' Reserve corps, to whom was issued policy K-416265 for $3,500 of insurance on the 30-payment life plan, quarterly premiums have been paid to December, 1924. Your decision is requested as to the authority of this bureau to accept the last quarterly premium which was paid subsequent to your decision of September 13, 1924, and any future premiums on this and other like policies of war-risk insurance now held by members of the Officers' Reserve Corps.

It is assumed your submission relates exclusively to policies issued prior to September 13, 1924, to members of the Officers' Reserve Corps of the Army who have had no active military service, other than attendance at a camp of instruction or training in time of peace theretofore considered by you as active military service. Active military service by members of the Officers' Reserve Corps of the Army of a nature contemplated by the controlling statute may be considered as having validated policies issued prior thereto based solely on attendance at a camp of instruction or training in time of peace.

Original constructions of a statute by decisions of the accounting officers of the Government are ordinarily effective from the date of statute construed and not from the date of the decision. In other words, it is the controlling statute and not the decision in such cases that determines the matter. Accordingly, as policies of war-risk insurance not authorized by the provisions of the war risk insurance act and the World War veterans' act are invalid, no liability of the United States may be considered as existing thereunder. However, in view of all the circumstances, it will be held that the decision of September 13, 1924, was effective only from its date so far as collections and payments under the policies are concerned. Therefore all collections and payments under all of such policies made prior to September 13, 1924, effective date of the decision of this office, will not be disturbed. 2 Comp. Gen. 743, 744. Collections of premiums and payments of insurance installments are not authorized subsequent to September 13, 1924.

In the case of Chester Robinson Dow and similar cases you are not authorized to now collect unpaid premiums for periods subsequent to September 13, 1924.

(A–6483)

NAVY PAY—ABSENCE DUE TO INSANITY

The law gives no right of pay to an enlisted man of the Navy for the period of time he was absent without proper authority whether under conditions of responsibility or irresponsibility, but under irresponsible conditions, as in the case of an insane enlisted man who absented himself without authority, pay to date of beginning of his unauthorized absence may be allowed. 3 Comp. Gen. 434, modified.

Decision by Comptroller General McCarl, March 12, 1925:

William C. Dunbar, guardian of Hiram H. Kahle, has requested review of settlement No. 020130, dated May 20, 1924, disallowing his claim for pay of his ward as machinist's mate, first class, United States Navy, during the period from June 27, 1922, to October 9, 1923.

The official records show Kahle to have been enlisted in the Navy on November 18, 1920, for four years, and to have been assigned to the U. S. S. *Sloat*. He disappeared from that vessel and naval control on June 26, 1922, and was noted on the records as a deserter. He remained absent from naval control and duty with his whereabouts unknown to the naval authorities until July 27, 1923, when the Bureau of Navigation, Navy Department, was notified that he was a mental patient in Boise, Idaho. He was examined by a naval medical board August 20, 1923, and was found to be suffering from anemia, pernicious, origin in the line of duty, with mentality "below

par." The recommendation was that he be discharged from the United States naval service, and on October 9, 1923, the mark of desertion was removed as erroneously entered and he was given a written discharge from the Navy because of physical disability.

Affidavits executed by Dorothy G. Meyers, sister of Kahle, and by three practicing physicians residing at Boise, Idaho, have been submitted by which it is purported to show that he was mentally irresponsible at the time he absented himself from naval control and duty without authority and that such condition continued during the entire period of his absence.

It appears that Kahle returned during July, 1922, to the home of his sister, who was a trained nurse, and was thereafter during the period in question continuously under her care, guidance, and protection. Obviously his status in the Navy was known to her, but there appears nothing to show that she made any effort to advise the Navy Department of his whereabouts or condition, such information having been received therein by reason of his case having been reported to the Veterans' Bureau for compensation in July, 1923.

The laws and regulations governing the pay for an enlisted man in the Navy are to the effect that no pay or allowances accrue to such enlisted man who without proper authority absents himself from his organization, station, or duty, and such is the case where there is absence because of sickness or disability and irrespective of the condition being one of responsibility or irresponsibilty.

The criminal responsibility or lack of responsibility of an enlisted man deserting the naval service is a question distinct from the question of the right to pay during the period of absence. If there is criminal responsibility for absence without permission from proper authority, forfeiture of pay earned but not paid follows, as a matter of course, and is a part of the punishment prescribed by the statutes and regulations for the desertion. If there is a lack of criminal responsibility, there has been no crime committed, and since there is no punishment there is no forfeiture of pay earned but not paid prior to going absent without permission. 42 MS. Comp. Gen. 902; 27 Comp. Dec. 675; 3 Comp. Gen. 434, modified.

The approval of the recommendations of the medical board in the instant case and his consequent discharge merely negatives his intent to desert the naval service and absolves him from punishment as a deserter. At the time he absented himself from the service there was due pay in the amount of $33.28. This amount was included in the payment by the naval paymaster at the time he was discharged, and there is no further amount due claimant.

Upon review the settlement is sustained.

(A-7866)

ESTATES OF DECEDENTS—PENSION CHECKS OF INMATES OF NATIONAL HOME FOR DISABLED VOLUNTEER SOLDIERS

The drawing of a check by the treasurer of a National Home for Disabled Volunteer Soldiers upon money held by him in accordance with law for pensioners, inmates of the home, and the delivery of such check to the pensioner does not change the proceeds thereof from pension money to assets of the estate of the pensioner, where the pensioner died subsequent to receipt of the check without having cashed it. The amount represented by such check will, unless claimed by a widow, minor child, or dependent parent of the inmate within five years from date of his death, become the property of the home.

Decision by Comptroller General McCarl, March 12, 1925:

There are before this office for proper disposition 16 pension checks described below, each for $50, drawn to the order of David J. Morrison, now deceased, apparently by the treasurer of the Pacific Branch of the National Home for Disabled Volunteer Soldiers, of which home the pensioner was an inmate at the time of his death, November 25, 1924, said checks having been forwarded by Amy Morrison Ghent, executrix of the will of the deceased pensioner, requesting payment of the proceeds thereof.

The checks in question are numbered, dated, and drawn as follows:

Number	Date	Drawer	Symbol
13250	Nov. 18, 1922	Geo. T. Baggart	26076
16272	Dec. 18, 1922	" " "	"
19181	Jan. 18, 1923	" " "	"
22214	Feb. 20, 1923	" " "	"
25383	Mar. 19, 1923	" " "	"
43352	Sept. 18, 1923	" " "	"
44986	Oct. 18, 1923	" " "	"
47995	Nov. 20, 1923	" " "	"
54116	Jan. 18, 1924	" " "	"
0062904	Apr. 17, 1924	" " "	"
0065731	May 19, 1924	" " "	"
0069044	June 17, 1924	" " "	"
72425	July 17, 1924	" " "	"
75178	Aug. 18, 1924	" " "	"
80742	Oct. 17, 1924	" " "	"
83490	Nov. 17, 1924	" " "	"

The first 15 of the checks listed have been mutilated to varying degrees. The mutilation consists principally in the drawer's name being torn or cut off, making it impossible in most cases to identify either the name or the symbol number of the paying officer. The first five bear the special indorsement of the payee thereof "Pay to Uncle Sam for board and," with a notation beneath the signature on each such indorsement indicating the number of months he had been in the home at the time of receipt of the checks. The other checks are not indorsed. The last check dated November 17, 1924, is neither indorsed nor mutilated. It is stated, however, by the executrix that the payee did not reduce this check to possession during his lifetime.

Pension money due inmates of national homes for disabled volunteer soldiers is paid to the treasurer or treasurers of such home

in accordance with section 2 of the act of February 26, 1881, 21 Stat. 350, reenacted by the act of August 7, 1882, 22 Stat. 322, to be disbursed by said treasurer or treasurers for the benefit of the pensioner, without any deduction for fines or penalties. This section provided further that—

> Any balance of the pension which may remain at the date of the pensioner's discharge shall be paid to him; and in case of his death at the home, the same shall be paid to the widow, or children or in default of either to his legal representatives.

The act of July 1, 1902, 32 Stat. 564, restricting and limiting the heirs and next of kin who shall be entitled to receive any balance of pension money due a decreased member of a national home, provides as follows:

> Hereafter any balance of pension money due a member of the National Home for Disabled Volunteer Soldiers at the time of his death shall be paid to his widow, minor children or dependent mother or father in the order named, and should no widow, minor child, or dependent parent be discovered within one year from the time of the death of the pensioner, said balance shall be paid to the post fund of the Branch of said National Home of which the pensioner was a member at the time of his death, to be used for the common benefit of the members of the Home under the direction of the Board of Managers, subject to future reclamation by the relatives hereinbefore designated, upon application filed with the Board of Managers within five years after the pensioner's death.

The pension moneys paid by the disbursing clerk for the payment of pensions to the treasurer of a branch of the national home for disabled volunteer soldiers are deposited by said treasurer in the Treasury of the United States and carried in a special deposit account to be disbursed for the benefit of the pensioner as provided in the acts of 1881 and 1882, *supra*. It appears to be the usual practice for all or a part of the amount of the pension to be turned over to the pensioner each month either in cash or by check drawn by the treasurer of the home against his special deposit account.

Checks thus drawn by a treasurer of a National Home for Disabled Volunteer Soldiers are essentially different from checks drawn by the disbursing clerk for the payment of pensions, and the laws relating to the one case are not applicable to the other. In cases where a pension check is drawn direct to the pensioner without the execution of a voucher, in accordance with the act of August 17, 1912, 37 Stat., 312, it has been held that the delivery of the check is the pivotal fact which changes the character of the proceeds of the check from accrued pension to assets of the pensioner's estate. 19 Comp. Dec. 423; *id.* 529; 4 Comp. Gen. 310. This act, however, specifically provides in section 6 that nothing therein shall be construed as amending or repealing that portion of the act of August 7, 1882, 22 Stat. 322, cited *supra*, concerning the payment of pensions due inmates of the National Home for Disabled Volunteer Soldiers, and therefore has no application to checks drawn by a treasurer of

a branch of said home payable from proceeds of pension carried in his special deposit account.

At the time of his admission in the home the pensioner enters into an agreement, the provisions of which are outlined in the act of June 25, 1910, 36 Stat. 736, providing as follows:

> Hereafter the application of any person for membership in the National Home for Disabled Volunteer Soldiers and the admission of the applicant thereunder shall be and constitute a valid and binding contract between such applicant and the Board of Managers of said home, and on the death of said applicant while a member of such home, leaving no heirs at law, nor next of kin, all personal property owned by said applicant at the time of his death, including money or choses in action held by him and not disposed of by will, whether such property be the proceeds of pensions or otherwise derived, shall vest in and become the property of said Board of Managers for the sole use and benefit of the post fund of said home, the proceeds to be disposed of and distributed among the several branches as may be ordered by said Board of Managers, and that all personal property of said applicant shall, upon his death, while a member, at once pass to and vest in said Board of Managers, subject to be reclaimed by any legatee or person entitled to take the same by inheritance at any time within five years after the death of such member. * * *

The provisions of this act outline in specific language the procedure to be followed in the disposition of personal effects left by deceased pensioners dying at a branch of the National Home for Disabled Volunteer Soldiers, but it has been held that said act does not authorize the payment of pension money—that is, money held by the treasurer or in the possession of the inmate at the time of his death which can be identified as proceeds of pension—to any person other than a widow, minor children, or dependent parent. 19 Comp. Dec. 388. In other words, only a widow, minor child, or dependent parent can be regarded as a "legatee or person entitled to take" pension money "by inheritance" within the meaning of the provision last above quoted. And, as hereinbefore indicated, this rule applies to pension money that had been paid to the inmate by the treasurer of the home as well as to pension money in the custody of the treasurer. In the present case, the checks not having been cashed by the inmate, the money represented thereby was pension money in the custody of the treasurer of the home at the time of the death of the inmate and therefore, under the statutes hereinbefore cited, will become the absolute property of the home unless claimed by the widow, minor child, or dependent parent of the inmate within five years from date of his death.

The mutilation of 15 of the checks impairing their negotiability and the special indorsement on 5 of them, as indicated above, show a clear intention on the part of the pensioner not to accept the same and would preclude any presumption of payment to him of the amounts represented thereby. Regardless of his intention, however, and even had the checks been cashed, if the moneys in his possession at the time of his death could be identified as the proceeds of said

checks, they would have to be regarded as assets derived from pension and disposed of as pension money.

The 16 checks submitted can not be considered as having become a part of the estate of the deceased pensioner and accordingly they will be canceled and the amount thereof taken up as a charge in the treasurer's account and disposed of in accordance with existing laws governing the disposition of any balance of pension money due a member of a National Home for Disabled Volunteer Soldiers at the time of his death.

The claim of the executrix for payment of the amount represented by these checks must be and is disallowed.

(A-8208)

CLASSIFICATION OF CIVILIAN EMPLOYEES—MAXIMUM PER DIEM RATE FOR FIELD SERVICE

Under the provisions of the act of December 6, 1924, 43 Stat. 704, providing appropriations to enable adjustment of the rates of compensation in certain field services for the fiscal year 1925 to correspond to rates fixed by the classification act of 1923, the maximum per diem rate authorized to be paid for personal services in the Reclamation Service, one of the field services mentioned in the appropriation act, after December 6, 1924, is to be determined in accordance with the decision in 3 Comp. Gen. 877; i. e., by dividing by 360 the annual rate authorized by the classification act for a corresponding position. Payments made to field employees for services rendered on and prior to December 6, 1924, at rates authorized under laws in effect prior to said date, will not be disturbed.

Decision by Comptroller General McCarl, March 12, 1925:

In connection with the settlement of the accounts of J. B. Callahan, disbursing clerk, Department of the Interior, there is for consideration whether the maximum per diem rate authorized to be paid for personal services under the reclamation fund during the present fiscal year may exceed the rate fixed by the classification act of March 4, 1923, 42 Stat. 1488, for corresponding positions in the Government service in the District of Columbia.

The question is presented by the credits claimed for payment to Louis C. Hill, consulting engineer, Reclamation Service, for compensation at the rate of $30 per diem and expenses $4 per diem, for the period September 19 to October 11, 1924, inclusive, and additional part-time service on October 21 and 23, amounting in all to $778, per vouchers Nos. 5265 and 5266, dated October 14 and November 6, 1924, respectively.

The payments were charged to the appropriation "General investigations, Reclamation Service, 1923–December 31, 1924," act of March 4, 1923, 42 Stat. 1540, which provided for personal services and was made available until December 31, 1924.

The appropriation act of December 6, 1924, 43 Stat. 704, effective from July 1, 1924, included an item "Reclamation Service: For the Reclamation Service, $365,400; for general investigations, $7,620; in all, $373,020, payable from the reclamation fund," and contained the following general provisions:

That to enable the heads of the several departments and independent establishments to adjust the compensation of civilian employees in certain field services to correspond, so far as may be practicable, to the rates established by the Classification Act of 1923 for positions in the departmental services in the District of Columbia the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the service of the fiscal year ending June 30, 1925, namely:

* * * * * * *

The appropriations herein made may be utilized by the heads of the several departments and independent establishments to accomplish the purposes of this Act notwithstanding the specific rates of compensation and the salary restrictions contained in the regular annual appropriation acts for the fiscal year 1925 or the salary restrictions in other Acts which limit salaries to rates in conflict with the rates fixed by the Classification Act of 1923 for the departmental service.

In decision of January 3, 1925, 4 Comp. Gen. 582, it was held that this statute did not have the effect of extending the provisions of the classification act absolutely and permanently to the field force, but enabled for the fiscal year 1925 the adjustment in rates of compensation of employees in certain field services to correspond to the rates fixed by the classification act so far as may be practicable, and because of all the circumstances surrounding the delay in the enactment of the appropriation act such adjustment might be retroactively effective from July 1, 1924.

While the classification act in all its phases was not extended to the field service thereby, the authority in the appropriation act to adjust the rates of pay of personnel in the field services therein appropriated for requires that the duties and responsibilities of a position will determine the class to which such position belongs and the grade to which it shall be allocated. After determining the corresponding grade under the classification act to which a given field-service position should be allocated, the salary of the person holding such position should then be fixed in accordance with the rules laid down in the classification act. 4 Comp. Gen. 625, 626. As to the rule for determining the maximum per diem equivalent of the per annum rates fixed under the classification act, see 3 Comp. Gen. 877.

The rule for determining the salary rate of positions in the field service as announced in the preceding paragraph hereof is applicable to temporary positions as well as permanent positions. 4 Comp. Gen. 54; *id.* 296. Accordingly payment for services rendered subsequent to December 6, 1924, by a consulting engineer in the Reclamation Service at a per diem rate in excess of the per annum rate fixed under the classification act for corresponding service at the seat of Government would not be authorized.

Payments made to field employees of the Reclamation Service for services rendered on and prior to December 6, 1924, at rates authorized under laws in effect prior to said date, will not be disturbed.

(A-8288)

COMPENSATION—EMPLOYEE ABSENT ON FEBRUARY 28

Under the act of June 30, 1906, 34 Stat. 763, an employee of the Government Printing Office on an annual salary basis who was on leave without pay on February 28, 1925, is only entitled to twenty-seven thirtieths of a month's pay for the month of February.

Comptroller General McCarl to the Public Printer, March 12, 1925:

There has been received your letter of February 28, 1925, requesting decision as to what part of one month's pay is authorized to be paid for the month of February to an employee on an annual salary basis who was on leave without pay on February 28, having been in a pay status from February 1 to 27, inclusive.

The act of June 30, 1906, 34 Stat. 763, provides that annual compensation shall be divided into 12 equal installments, one of which shall be the pay for each calendar month; that in making payment for a fractional part of a month one-thirtieth of one of such installments or of a monthly compensation shall be the daily rate of pay; and that February shall be treated as if it actually had 30 days.

If an employee is in a pay status all of the month of February he is entitled to a full month's pay, being entitled to three- thirtieths of a month's pay for February 28. And, likewise, if he is in a nonpay status on February 28, three-thirtieths of a month's pay is chargeable on account thereof. See 20 Comp. Dec. 772.

Answering your question specifically, the employee referred to in your letter is entitled to twenty-seven thirtieths of a month's pay.

(A—4717)

DIPLOMATIC OFFICERS—RETIREMENT UNDER THE ACT OF MAY 24, 1924

The adoption of administrative tests to ascertain the fitness of prospective appointees to positions as secretaries in the Diplomatic Service, prior to the act of February 5, 1915, 38 Stat. 805, did not constitute such appointees employees in the "classified service" nor entitle them when promoted to the grade of ambassador or minister prior to February 5, 1915, to the benefits of the retirement act of May 24, 1924, 43 Stat. 145, as having been promoted from the "classified service." 4 Comp. Gen. 315, affirmed.

Comptroller General McCarl to the Secretary of State, March 13, 1925:

There has been received your letter of February 2, 1925, requesting reconsideration of decision of September 20, 1924, 4 Comp. Gen. 315, holding that secretaries in the Diplomatic Service who were

promoted to the grade of, or appointed to the position of, ambassador or minister prior to the enactment of the act of February 5, 1915, 38 Stat. 805, were not promoted from the classified service within the meaning of the act of May 24, 1924, 43 Stat. 140.

Two cases were cited in your first communication.

That of Mr. Arthur Bailly-Blanchard who, while holding the position of second secretary and secretary of embassy at the American Embassy in Paris, was on May 22, 1914, appointed minister to Haiti; and Mr. William W. Russell who, while serving as secretary of the legation at Caracas, was on March 17, 1904, appointed minister to Colombia, retired from the service in August, 1913, and again appointed minister on August 16, 1915.

Prior to the enactment of the act of February 5, 1915, the secretaryships of the Diplomatic Service were on a different status from members of the Consular Service, the latter being classified by the act of April 5, 1906, while secretaries in the Diplomatic Service were appointed secretaries or second or third secretaries of particular embassies or legations, and the salaries of such secretaries were dependent upon the posts to which they were assigned. See chapter 1, Title XVIII, Revised Statutes.

The act of February 5, 1915, was a radical change in the method of appointment and the fixing of compensation of secretaries in the Diplomatic Service. It provided that thereafter all appointments of such secretaries should be by commission to the offices of secretary of embassy or legation and not to any particular post and that such officers should be assigned to posts and transferred from one post to another by order of the President as the interests of the service might require; while section 2 provided:

> That secretaries in the Diplomatic Service and consuls general and consuls shall hereafter be graded and classified as follows with the salaries of each class herein affixed thereto. 38 Stat. 805.

Prior to the enactment of this statute the President by Executive order dated November 26, 1909, had promulgated regulations governing appointments and promotions in the Diplomatic Service, in which it was provided that examinations should be held to test the fitness of those appointed by the President for positions as secretaries of the various embassies and legations, but such order did not attempt to establish any uniformity in the service by allocating any such appointees to specific grades.

It is suggested by you that the term "classified service" as used by Congress in the act of May 24, 1924, *supra*, must have been employed, not merely to denote a branch of the service in which offices and salaries were graded and classified, but one to the personnel of which there had been applied certain tests for ascertaining their fitness for employment, and that in this sense secretaries of the

Diplomatic Service were entitled to be regarded as within the classified service not only subsequent to the passage of the act of February 5, 1915, but as far back as November 10, 1905. This office finds it impossible to concur in such view. It is to be presumed that all persons selected by the President to fill the offices of diplomatic secretaries were considered capable of filling the positions to which they were appointed, and the establishment of an administrative procedure by which such fitness could be determined, and those appointed could afterwards be transferred and/or promoted, did not affect their status. And it may be said that the fact that the Congress at a later date by express statute stipulated that secretaries in the Diplomatic Service " shall hereafter be graded and classified " negatives the presumption that they were theretofore in a classified status.

In framing the act of May 24, 1924, by which only those ministers and ambassadors who were promoted to the rank of minister or ambassador from the classified service are entitled to the annuity provisions of such act, it must be assumed that the Congress was cognizant of the fact that it had by legislative enactment specifically classified secretaries of embassies and legations, and that it was its intent to exclude all not promoted from the service as classified by it.

Therefore the decision of September 20, 1924, that only those promoted from secretaries to ambassador or minister subsequent to February 5, 1915, were " promoted from the classified service," must be and is affirmed.

(A-7177)

WAR RISK INSURANCE

The enactment of the World War veterans' act of June 7, 1924, 43 Stat. 607, will not be considered as having the effect of changing the lawful beneficiaries of a previously matured policy of war risk insurance so as to require the payment of the remaining unpaid insurance installments to another.

Where a policy of war risk insurance matured prior to June 7, 1924, in which the beneficiary was designated as wife of the insured when in fact she was not, the beneficiary should now be determined under the provisions of section 303 of the World War veterans' act of June 7, 1924, 43 Stat. 625, retroactively in effect as though no beneficiary had been designated.

Under the provisions of section 23 of the act of August 9, 1921, 42 Stat. 155, effective until June 7, 1924, and reenactment thereof in act of March 4, 1925, 43 Stat. 1308, retroactively effective from June 7, 1924, the rights of a person who was the wife and designated beneficiary at the time of issuance of the insurance and who remained the designated beneficiary in the policy until maturity, may not be defeated by reason of a divorce from the insured subsequent to the issuance of the policy and prior to its maturity.

Comptroller General McCarl to the Director, United States Veterans' Bureau, March 13, 1925 (as amended March 30, 1925):

I have your letter of December 26, 1924, presenting the facts in two cases and requesting decision whether, in the first case, insur-

ance can be awarded to the estate of the insured, and in the second case, whether the insurance can be awarded to the nominated beneficiary who was the wife of the insured when the policy was issued, but who was not his wife at the time of his death.

The facts are stated as follows:

1. A converted his insurance into a 20-year endowment policy, naming as beneficiary B, who he stated was his wife. He died July 5, 1923. The insurance, payable in thirty-six equal monthly installments, was awarded to B upon proof of marriage. Before the completion of payments it was discovered that his alleged marriage with B was void by reason of the fact that he had a former wife living from whom he had not been divorced. It is to be noted that a large portion of the monthly installments was not payable until after June 7, 1924.

2. C having converted his insurance into an endowment policy maturing at the age of 62, in which he named his then wife as beneficiary, died June 30, 1924. Previous to June 7, 1924, and subsequent to the designation, he was divorced from his wife but did not change the beneficiary of his insurance.

The war risk insurance act as amended by the act of June 25, 1918, 40 Stat. 615, provides as follows:

* * * The insurance shall be payable only to a spouse, child, grandchild, parent, brother, or sister, and also during total and permanent disability to the injured personally, or to any or all of them. * * *

Section 13 of the act of December 24, 1919, 41 Stat. 375, enlarged the permitted class to include "uncles, aunts, nephews, nieces, brothers-in-law, and sisters-in-law of the insured" and made the provision retroactive to October 6, 1917. This limitation on designation of beneficiaries, or establishment of a permitted class, was reenacted in section 300 of the World War veterans' act, June 7, 1924, 43 Stat. 624.

You state the policies here for consideration contain the following provisions, taken from section 16 of the act of December 24, 1919, 41 Stat. 367:

If no beneficiary within the permitted class be designated by the insured, either in his lifetime or by his last will and testament, or if the designated beneficiary does not survive the insured, then there shall be paid to the estate of the insured the remaining unpaid monthly installments payable and applicable as they become due, unless otherwise elected.

If the designated beneficiary survives the insured and dies before receiving all the installments payable and applicable, then there shall be paid to the estate of such beneficiary the remaining unpaid monthly installments payable and applicable as they become due, unless otherwise elected.

This insurance is granted under and subject to the provisions of the war risk insurance act and amendments and supplements thereto. * * *

Section 303 of the World War veterans' act, June 7, 1924, 43 Stat. 625, reenacts but materially amends this provision, retroactively effective to October 6, 1917, as follows:

If no person within the permitted class of beneficiaries survive the insured, or if before the completion of payments the beneficiary or beneficiaries shall die and there be no surviving person within said permitted class, then there shall be paid to the estate of the insured the present value of the monthly installments thereafter payable under the provisions of this title: *Provided*, That in cases where the estate of the insured would escheat under the laws of the place of his residence the insurance shall not be paid to the estate of the insured, but shall escheat to the United States and shall be credited

to the United States Government life-insurance fund or the military and naval insurance appropriation, as may be proper. This section shall be deemed to be in effect as of October 6, 1917.

Section 23 of the act of August 9, 1921, 42 Stat. 155, amended section 402 of the war risk insurance act by adding subsection (a) to read as follows:

Where a beneficiary at the time of designation by the insured is within the permitted class of beneficiaries and is the designated beneficiary at the time of the maturity of the insurance because of the death of the insured, such beneficiary shall be deemed to be within the permitted class even though the status of such beneficiary shall have been changed.

No retroactive effect was given to this provision and it was omitted from and repealed by the World War veterans' act of June 7, 1924. Accordingly, it was controlling only from August 9, 1921, to June 6, 1924, inclusive.

Section 601 of the World War veterans' act of June 7, 1924, 43 Stat. 629, 630, repeals the war risk insurance act as amended, but section 602 of the same act provides as follows:

The repeal of the several acts as provided in sections 600 and 601 hereof shall not affect any act done or any right or liability accrued, or any suit commenced before the said repeal, but all such rights and liabilities under said acts shall continue and may be enforced in the same manner as if said repeal had not been made; nor shall said repeal in any manner affect the right to any office or change the term or tenure thereof.

As a general rule, war risk insurance being statutory is subject to statutory changes unless specifically reserved in the statute. The primary rule must be that rights under policies of war risk insurance are to be determined in accordance with the statute in force when the policy of insurance matures by death or permanent total disability. That is, where the policy matured prior to June 7, 1924, and the rights of the beneficiary or beneficiaries under the provisions of the war risk insurance act have accrued, the enactment of the World War veterans' act will not be considered as having the effect of changing the beneficiary or beneficiaries requiring payments of remaining insurance installments to another. That is, I believe, all that the saving clause in the repealing provision intended in so far as any question here involved is concerned.

There may be exceptions to this primary rule which will be for submission and consideration on the particular facts.

One exception here for consideration seems to exist in the retroactive effect given to section 303 of the World War veterans' act. The statute specifically provides that it shall be "deemed to be in effect as of October 6, 1917." Accordingly, where the beneficiary is for determination under the provisions of section 303 of the World War veterans' act, no rights under the war risk insurance act may be said to have accrued under policies maturing prior to June 7, 1924, except as to installments of insurance actually paid prior to that date, and the remaining unpaid installments accrued

on and subsequent to June 7, 1924, must be paid in accordance with the provisions of the World War veterans' act.

1. In the first case, there may be actual or conclusive fraud if A fraudulently represented the designated beneficiary as being a person within the permitted class when in fact such person was not within the permitted class. But even so, such representation would not constitute a fraud sufficient to invalidate or avoid the policy, not going to the essence of the contract, resulting in no increase in the responsibility of the Government, and not affecting the insurability of the life on which the policy was issued, but merely causing a failure of the designated beneficiary within the permitted class. The result is the same as though no beneficiary had been designated. Although the policy matured by death of the insured prior to June 7, 1924, the determination of the proper beneficiary within the permitted class for the purpose of receiving unpaid installments of insurance is required to be in accordance with the provisions of section 303 of the World War veterans' act, under which insurance would be payable to the estate only in case there is no beneficiary within the permitted class authorized to take. Because of the fault of the insured, no payment should be made to the proper beneficiary of the amount heretofore illegally paid to B, the designated beneficiary, unless and until recovery has been made of such illegal payments.

2. Section 12 of the act of March 4, 1925, 43 Stat. 1308, amended the World War veterans' act by reenacting verbatim the quoted provision of section 23 of the act of August 9, 1921, 42 Stat. 155, retroactively effective from June 7, 1924. The situation is now the same as though the provision had continued in effect since August 9, 1921. Under this provision of law as carried into the policy, the right of the divorced wife who was the wife and designated beneficiary at the time of issuance of the policy and who remained the designated beneficiary in the policy until maturity of the policy may not be defeated by reason of the divorce terminating marriage relations with the insured subsequent to the issuance of the policy and prior to its maturity.

(A-8335)

POSTAL SERVICE EMPLOYEES—RECLASSIFICATION OF RAILWAY POSTAL CLERKS UNDER ACT OF FEBRUARY 28, 1925

Under the provisions of the act of February 28, 1925, 43 Stat. 1062, the status of unassigned railway postal clerks on January 1, 1925, is that of substitute whose rate of pay is $1,850 per annum, with no right to promotion while a substitute or to leave of absence with pay. All service as substitute railway postal clerk prior to January 1, 1925, will be credited in determining the automatic grade in which the clerk should be placed when given a permanent position subsequent to January 1, 1925, notwithstanding an advantage is given to substitute clerks appointed to regular

positions subsequent to January 1, 1925, over those appointed prior to that date.

The provision relative to travel allowance in lieu of actual expenses for railway postal clerks and the provision relative to traveling expenses for substitute railway postal clerks appearing in the act of February 28, 1925, 43 Stat. 1062, are effective from and after March 1, 1925.

It is within the administrative discretion of the Postmaster General to select for promotion to grade 7, the new and additional grade of railway postal clerks created by the act of February 28, 1925, 43 Stat. 1062, only those clerks in grade 6 in charge of all the tours in a terminal of Class B having 75 or more regular employees.

Comptroller General McCarl to the Postmaster General, March 13, 1925:

I have your letter of March 5, 1925, requesting decision of five questions under postal reclassification act of February 28, 1925, 43 Stat. 1062, in so far as it affects the railway postal service, as follows:

1. The status of unassigned railway postal clerks and the basis of their rights to service credit for promotion.

2. Whether substitute railway postal clerks can be credited for substitute service prior to January 1, 1925.

3. Whether the new maximum rate for travel allowance in lieu of actual expenses authorized for railway postal clerks is authorized from January 1 or from March 1, 1925.

4. Whether the new maximum rate of traveling expenses for substitute railway postal clerks is authorized from January 1 or from March 1, 1925.

5. Whether the Postmaster General may select the class of railway postal clerks eligible for promotion to the new and additional grade 7 created by the act of February 28, 1925.

The provisions of the act of February 28, 1925, in so far as here applicable are as follows:

Section 1. That on and after January 1, 1925, postmasters and employees of the Postal Service shall be reclassified and their salaries and compensation readjusted, except as otherwise provided as follows:

* * * * * * *

That railway postal clerks shall be divided into two classes, class A and class B, and into seven grades with annual salaries as follows: Grade 1, salary $1,900; grade 2, salary $2,000; grade 3, salary $2,150; grade 4, salary $2,300; grade 5, salary $2,450; grade 6, salary, $2,600; grade 7, salary, $2,700.

* * * * * * *

Substitute railway postal clerks shall be paid for services actually performed at the rate of $1,850 per annum, the first year of service to constitute a probationary period, and when appointed regular clerks shall receive credit on the basis of one year of actual service performed as a substitute and be appointed to the grade to which such clerk would have progressed had his original appointment as a substitute been to grade 1. Any fractional part of a year's substitute service will be included with his service as a regular clerk in determining eligibility for promotion to the next higher grade following appointment to a regular position.

All original appointments shall be made to the rank of substitute railway postal clerk, and promotions shall be made successively at the beginning of the quarter following a total satisfactory service of three hundred and six days in the next lower grade.

In the readjustment of the service to conform to the grades herein provided, grade 1 shall include clerks in present grade 1, grade 2 shall include clerks in

present grade 2, grade 3 shall include clerks in present grade 3, grade 4 shall include clerks in present grade 4, grade 5 shall include clerks in present grade 5, and grade 6 shall include clerks in present grade 6.

That hereafter, in addition to the salaries provided by law, the Postmaster General is hereby authorized to make travel allowances in lieu of actual expenses, at fixed rates per annum, not exceeding in the aggregate the sum annually appropriated, to railway postal clerks, acting railway postal clerks and substitute railway postal clerks, including substitute railway postal clerks for railway postal clerks granted leave with pay on account of sickness, assigned to duty in railway post-office cars, while on duty, after ten hours from the time of beginning their initial run, under such regulations as he may prescribe, and in no case shall such an allowance exceed $3 per day.

Substitute railway postal clerks shall be credited with full time while traveling under orders of the department to and from their designated headquarters to take up an assignment, together with actual and necessary travel expenses, not to exceed $3 per day, while on duty away from such headquarters. When a substitute clerk performs service in a railway post office starting from his official headquarters he shall be allowed travel expenses under the law applying to clerks regularly assigned to the run.

The questions will be considered in the order above stated.

1. The act of March 3, 1917, 39 Stat. 1065, granted to substitute railway postal clerks the absolute right to promotion to grade 1 after performance of 313 days of substitute service. With reference thereto you state as follows:

> Under that law a considerable number of substitutes were appointed unassigned and promoted to grade 2, effective July 1, 1919. However, as no provision was made in the postal reclassification act of June 5, 1920, for unassigned clerks, those not yet appointed to permanent positions have been carried on the rolls at grade 2 with the status of substitute, except that they have been given the leave provided by law for regular railway postal clerks.

It is understood from your statement that as the act of June 5, 1920, did not provide for unassigned clerks they were of necessity returned to the status of substitutes and were paid as in grade 2, the maximum salary for a substitute railway postal clerk authorized by the provisions of the act of June 5, 1920, 41 Stat. 1050. Accordingly such clerks had the status of substitute January 1, 1925. The act of February 28, 1925, effective as to adjustment of salaries from January 1, 1925, provides only one rate of pay for substitutes of the railway postal service, viz., $1,850 per annum. There is no right to promotion while in the status of substitute, the right to credit for substitute service applying only in the matter of appointment to permanent positions and to promotion thereafter. Therefore the status of the employees designated by you as unassigned is that of substitutes with salary at the rate of $1,850 per annum from and after January 1, 1925, unless and until given appointment to permanent positions. They are not entitled to leave of absence with pay. 2 Comp. Gen. 782.

2. Prior to January 1, 1925, it appears to have been the practice in the appointment of substitutes to regular positions in the railway postal service to make the regular appointment to grade 2 if the appointee had attained grade 2 as a substitute, and to count all substitute service not exceeding two years for the purposes of the first

promotion after regular appointment in all cases. The act of February 28, 1925, authorizes a more liberal practice by providing specifically that substitute railway postal clerks "when appointed regular clerks shall receive credit on the basis of one year of actual service performed as a substitute and be appointed to the grade to which such clerk would have progressed had his original appointment as a substitute been to grade 1. Any fractional part of a year's substitute service will be included with his service as a regular clerk in determining eligibility for promotion to the next higher grade following appointment to a regular position." Under this provision it would be possible for a substitute with sufficient service as such to be appointed regular clerk in grade 3 or grade 4, and under certain circumstances in grade 5. This presents the question whether in administering said provision credit should be allowed for substitute service prior to January 1, 1925, and if so, whether all substitute service prior to January 1, 1925, should be credited regardless of the fact that to do so will give clerks on the substitute list December 31, 1924, with more than two years' substitute service an advantage over clerks who had had the same or more substitute service who were given permanent positions in grade 2 prior to January 1, 1925.

It is clear that Congress had no intention of depriving substitutes of all credit for substitute service prior to January 1, 1925, in determining the automatic grade in which they should be placed when given permanent positions subsequent to that time. A similar situation arose under a provision in the act of June 5, 1920, 41 Stat. 1049, relative to the substitute clerks in first and second class post offices and substitute letter carriers in the City Delivery Service. Clerks and carriers who were substitutes June 5, 1920, were given an advantage over those having the same length of substitute service who had previously been given permanent positions. The language of said provision was practically identical with the language of the provision here under consideration, except as to the branch of the Postal Service involved; and said provision in the act of 1920 was held to authorize allowing credit for all service performed as substitute in determining the grade to which a substitute might thereafter be appointed as regular. 27 Comp. Dec. 10. There is no authority for a different construction of the provision in the act of 1925 here under consideration, and it must be held that all substitute railway postal clerks receiving appointment as regular railway postal clerk after December 31, 1924, are to be credited with all actual service performed as substitute railway postal clerk in determining the grade to which the appointment as regular shall be made and the right to promotion thereafter. The inequality resulting from the provision in the act of June 5, 1920, relative to clerks in first and second class post offices and carriers in the City Delivery

Service was remedied by the provision of section 3 of the act of July 21, 1921, 42 Stat. 144, which authorized the crediting of substitute service for the purpose of promoting such clerks and carriers as had been appointed regulars from substitutes prior to June 5, 1920. The fact that railway postal clerks appointed regular from substitute prior to January 1, 1925, have not been given a similar right with respect to the counting of substitute service does not authorize depriving railway postal clerks appointed regular from substitute on or after January 1, 1925, of a right which the statute clearly gives to them.

3 and 4. The retroactive provision of the act of February 28, 1925, is expressly limited to reclassification and readjustment of salaries and compensation. Neither travel allowance nor traveling expenses constitutes salary or compensation within the meaning of this retroactive provision. The word "hereafter" used in the paragraph relative to travel allowance means after the date of the act. Accordingly the provision relative to payment of travel allowance in lieu of actual expenses of railway postal clerks generally and the provision relative to actual and necessary traveling expenses of substitutes is effective from March 1, 1925.

5. The act of February 28, 1925, created the new and additional grade 7 of railway postal clerks, but fails to provide expressly that class of clerks who are eligible for promotion thereto. With reference to the matter you state as follows:

> The department has in large terminals supervisors designated as clerk in charge of the entire terminal and takes the position that the new grade applies only to a clerk in charge of all the tours in a terminal that justify the position, which it has been decided would be those terminals having 75 or more regular employees.

As grade 6 is a selective grade and not an automatic grade, 4 Comp. Gen. 299, it is reasonable to assume that grade 7 was also intended as a selective grade to which promotion would not be automatic but dependent upon selection and approval by the appointing power. The statute provides that clerks in class B terminals having more than 20 employees shall be promoted successively to grade 5 and clerks in charge of tours in such terminals to grade 6. In the absence of any specific authorization or restriction as to promotions to grade 7, your proposal to restrict promotions to said grade to clerks in grade 6 in charge of all the tours in a terminal of class B having 75 or more regular employees would appear to be within your administrative discretion in the matter.

This decision is intended to relate only to the specific questions submitted and should not be considered as approving or disapproving any other provisions of the proposed instructions forwarded with your submission.

(A–8395)

POSTAL SERVICE EMPLOYEES—RETROACTIVE PROVISION OF RECLASSIFICATION ACT OF FEBRUARY 28, 1925

The provision in the act of February 28, 1925, 43 Stat. 1053, making the reclassification of postmasters and employees in the Postal Service and the readjustment of their salaries and compensation retroactively effective from January 1, 1925, is applicable to postmasters and employees coming within the provision who have been separated from the service between January 1 and February 28, 1925.

Comptroller General McCarl to the Postmaster General, March 13, 1925:

I have your letter of March 6, 1925, requesting decision whether the following retroactive provision in the act of February 28, 1925, 43 Stat. 1053, is applicable to postmasters and other employees of the Postal Service who were separated from the service after January 1, 1925, and before the approval of the act, February 28, 1925:

Section 1. That on and after January 1, 1925, postmasters and employees of the Postal Service shall be reclassified and their salaries and compensation readjusted, except as otherwise provided as follows:

In so far as reclassification and readjustment of salaries and compensation are concerned, the provision is clearly retroactively effective from January 1, 1925. The salaries of all postmasters and employees coming within the terms of the provision are required to be readjusted from January 1, 1925, and the fact that the postmasters or employees have been separated from the service since January 1, 1925, does not exclude them from the benefits of the statute for the period of their service on and after January 1, 1925.. The question is answered in the affirmative. See 4 Comp. Gen. 582.

(A–7572)

SUBSISTENCE EXPENSES—FRACTIONAL DAYS—CUSTOMS INSPECTORS

The travel regulations of the Treasury Department in so far as they fix the hours of departure and arrival essential to reimbursement for meals en route are predicated upon the customary hours of employment and to that extent are administrative and may be waived by the Secretary of the Treasury to permit reimbursement for meals taken by customs officers while absent from their headquarters for approximately 13 hours daily beginning at 1 p. m.

Comptroller General McCarl to the Secretary of the Treasury, March 14, 1925:

I have your letter of January 12, 1925, in which you inquire if Treasury Department regulations can be waived so as to allow under special circumstances charges of customs officers for dinner (lunch) when they depart from their official stations at 1 p. m.

You inclose a letter from collector of customs, Seattle, Wash., dated December 26, 1924, which states in part as follows:

The deputy collector of customs at Blaine submits the following detailed report of the assignment covered by these inspectors, and which indicates why it was necessary for the men to secure two meals daily when absent on these details, although they departed at 1.00 p. m.:

"This inspector leaves Blaine daily at 1.00 p. m., arriving Vancouver, B. C., Canada, at 3.00 p. m. From that time until 9.00 p. m. the inspector is free. At 9.00 p. m. the sleepers on the train are opened and the inspector is on duty in the depot examining the baggage of passengers who board said sleepers until 12.01 a. m., at which time the train leaves Vancouver. The inspector convoys the train to Blaine, examining the baggage of passengers in the day coaches, bonding and examining check baggage and checking express matter with the manifest. The train arrives at Blaine at 1.45 a. m., and by the time the inspector is through his work at Blaine it is anywhere from 2.00 to 2.30 a. m. Practically speaking this inspector works a shift of thirteen hours. If this inspector goes to bed and sleeps eight hours, it is at least 10.30 or 11.00 a. m. when he eats breakfast, and it would be absurd if he were then compelled to eat again before leaving Blaine. This office fails to see why this inspector should not be allowed two meals during his working hours on a 13-hour shift."

In absences under the circumstances just described the employee who is away from his official station for a period of 12 hours is in a travel status and is entitled to actual and necessary expenses as provided by the acts of April 6, 1914, 38 Stat. 318, and March 4, 1923, 42 Stat. 1454, unless precluded therefrom by valid regulations prescribed by the Secretary of the Treasury.

The only pertinent regulation appears to be the one to which you refer, which provides:

Subsistence expenses.

(10a) Meals en route: Charges for meals taken en route to and from official station will be allowed only in accordance with the following:

* * * * * * *

Dinner when departure is before 1 p. m.

In so far as the regulations relate to the time and manner of employment and performance of prescribed duties, or affect employees whose duties are such as to place them beyond the scope thereof, it would seem they are administrative and can be waived or exceptions made thereto by the head of the department. See 21 Comp. Dec. 482 and authorities there cited. It would appear that the provision of the regulations here involved was intended to govern employees who serve under the usual daily hours of employment, and if you should specifically waive said provision in the case of these customs inspectors whose hours of service are unusual in that their regular working day is from about 1 p. m. to about 1.45 a. m., such action would be considered as being within your administrative discretion and reimbursement would be authorized for the necessary expenses shown to have been actually incurred for two meals taken away from designated post of duty between the hours of 1 p. m. and 1.45 a. m. in the cases mentioned in the collector's letter, supra.

(A-8391)

POSTAL SERVICE EMPLOYEES—RURAL MAIL DELIVERY SERVICE—SALARY AND EQUIPMENT MAINTENANCE ALLOWANCE

In this decision various questions are decided under section 8 of the act of February 28, 1925, 43 Stat. 1063, relating to the salary and equipment maintenance allowance of regular and temporary or substitute carriers of the Rural Mail Delivery Service. For points involved see decision.

Comptroller General McCarl to the Postmaster General, March 14, 1925:

I have your letter of March 9, 1925, requesting decision of several questions under section 8 of the act of February 28, 1925, 43 Stat. 1063, relating to carriers in the Rural Mail Delivery Service, providing as follows:

> Sec. 8. That the salary of carriers in the Rural Mail Delivery Service for serving a rural route of twenty-four miles six days in the week shall be $1,800; on routes twenty-two miles and less than twenty-four miles, $1,728; on routes twenty miles and less than twenty-two miles, $1,620; on routes eighteen miles and less than twenty miles, $1,440; on routes sixteen miles and less than eighteen miles, $1,260; on routes fourteen miles and less than sixteen miles, $1,080; on routes twelve miles and less than fourteen miles, $1,008; on routes ten miles and less than twelve miles, $936; on routes eight miles and less than ten miles, $864; on routes six miles and less than eight miles, $792; on routes four miles and less than six miles, $720. Each rural carrier assigned to a route on which daily service is performed shall receive $30 per mile per annum for each mile said route is in excess of twenty-four miles or major fraction thereof, based on actual mileage, and each rural carrier assigned to a route on which triweekly service is performed shall receive $15 per mile for each mile said route is in excess of twenty-four miles or major fraction thereof, based on actual mileage.
>
> Deductions for failure to perform service on a standard rural delivery route for twenty-four miles and less shall not exceed the rate of pay per mile for service for twenty-four miles and less; and deductions for failure to perform service on mileage in excess of twenty-four miles shall not exceed the rate of compensation allowed for such excess mileage.
>
> In addition to the salary herein provided, each carrier in Rural Mail Delivery Service shall be paid for equipment maintenance a sum equal to 4 cents per mile per day for each mile or major fraction of a mile scheduled. Payments for equipment maintenance as provided herein shall be at the same periods and in the same manner as payments for regular compensation to rural carriers.
>
> A rural carrier serving one triweekly route shall be paid a salary and equipment allowance on the basis of a route one-half the length of the route served by him. A rural carrier serving two triweekly routes shall be paid a salary and equipment allowance on the basis of a route one-half of the combined length of the two routes.

The questions are quoted and answered as follows:

> 1. Is a temporary carrier or a substitute carrier when serving a route to be paid the exact salary and equipment maintenance that a regular carrier would receive for the same service?

The act of March 2, 1907, 34 Stat. 1215, after granting rural letter carriers leave of absence with pay, provides:

> * * * the substitutes for carriers on vacation to be paid during said service at the rate paid the carrier: * * *

There has been no subsequent change in this statutory provision which has been incorporated in section 725, Postal Laws and Regulations, 1924. Annual appropriations for the Post Office Department provide for pay of substitutes for rural carriers on annual and sick

leave. Temporary substitute carriers and temporary carriers are classes of carriers fixed by regulation, and the regulations provide that their pay shall be at the same rates and in the same manner as substitutes and regular carriers, respectively. Sections 725 and 729, Postal Laws and Regulations, 1924. The act of February 28, 1925, does not expressly fix the pay of substitute and temporary rural carriers, nor in any manner alter the previously existing rules for paying them. As to salary, therefore, a substitute or temporary carrier when serving the route is entitled to the exact amount of salary the regular carrier would receive for the same service. It is expressly provided that the payment for equipment maintenance shall be computed on the basis of "per mile per day for each mile or major fraction of a mile scheduled." This indicates that no more than one equipment maintenance payment may be made as incident to the same route for the same period of time. And as the substitute or temporary carrier must necessarily furnish his equipment it must be held that when he is performing the service of the route he is entitled to be paid the same amount for maintenance equipment as would have been paid to the regular carrier if he had performed the service.

2. When a route is served by a temporary carrier or a substitute carrier during the absence of a regular carrier on annual or sick leave with pay, or absence of the regular carrier without pay, is the regular carrier to be paid the maintenance allowance, and the temporary carrier or substitute carrier also to receive the maintenance allowance for the same period, making a double payment of the maintenance allowance therefor?

Applying the statements made in answer to the previous question, substitute or temporary carriers are entitled to the equipment maintenance payment while serving the routes in the absence of the regular carrier either on leave with or without pay. The regular carrier is not entitled to the equipment maintenance payment during leave of absence with or without pay.

3. Is the equipment maintenance as paid to regular rural carriers subject to a deduction of 2½% on account of the retirement fund?

Retirement deductions under section 8 of the act of May 22, 1920, 41 Stat. 618, are required to be computed on the "basic salary, pay, or compensation" of the employee, and section 2, *id.*, page 615, provides that—

The term "basic salary, pay, or compensation" wherever used in this Act shall be so construed as to exclude from the operation of the Act all bonuses, allowances, overtime pay, or salary, pay, or compensation given in addition to the base pay of the positions as fixed by law or regulation.

The equipment maintenance allowance payable to rural carriers is an allowance and therefore not subject to the retirement deductions. 27 Comp. Dec. 152.

4. Do the provisions of section 8 of the act, that the salary of carriers in the Rural Mail Delivery Service shall be as specified according to the length of the routes served, and that each rural carrier assigned to a route on which

daily service is performed shall receive $30 per mile per annum for each mile said route is in excess of 24 miles or major fraction thereof, based on actual mileage, with $15 a mile on triweekly routes, include the carriers on motor vehicle rural delivery routes?

Yes. There is nothing in the statute to limit the increase in compensation for the longer routes to carriers operating horse-drawn vehicles. The provisions of section 8 of the act of February 28, 1925, *supra*, supersede the provisions in the act of June 5, 1920, 41 Stat. 1051 and 1052, which specifically limited such increases to carriers assigned to horse-drawn vehicle routes and allowed salaries in excess of $1,800 for certain carriers who furnished and maintained their own motor vehicle.

5. Are regular carriers who have been separated from the service or temporary or substitute carriers who performed service on rural routes between January 1 and February 28, 1925, the date of the passage of the act, entitled to the equipment maintenance for such service as they may have rendered during the period mentioned?

The retroactive provision of the act of February 28, 1925, refers specifically to the readjustment of "salaries and compensation." But while the payment authorized to be made for equipment maintenance is not salary and is in the nature of an allowance rather than compensation in the strict sense, it is so connected with and related to compensation that there would appear to be no doubt that it was the intent of the law that the provision therefor was to be effective from January 1, 1925, and that the allowance is payable with respect to all service rendered from and after said date regardless of whether the carrier who rendered the service is still in the service. Accordingly, the question is answered in the affirmative.

6. When rural carriers, whether regular, temporary, or substitute, fail to serve their routes in whole or in part on schedule days, is deduction for the total or partial failures to be made from the equipment maintenance?

Yes; for the same reason and in the same manner that salary is deducted. Section 735, Postal Laws and Regulations, 1925.

7. If by reason of adverse conditions, such as severe storms, the obstruction of roads, the absence of bridges, the prevalence of high water, etc., rural carriers fail to serve their routes in whole or in part, and, due to the conditions existing or to the efforts made by the carriers, it is concluded that no deduction from their salaries shall be made for service not performed, shall or shall they not receive the equipment maintenance?

Under such conditions the equipment-maintenance allowance may be paid "in the same manner as payments for regular compensation." The law provides that the equipment-maintenance payment shall be on the basis of the mileage scheduled rather than the mileage actually traveled.

8. Is it the contemplation of the act in stipulating that—

"In addition to the salary herein provided each carrier in Rural Mail Delivery Service shall be paid for equipment maintenance a sum equal to 4 cents per mile per day for each mile or major fraction of a mile scheduled. Payments for equipment maintenance as provided herein shall be at the same

period and in the same manner as payments for regular compensation to rural carriers."

that this equipment maintenance shall be paid on the basis of 365 days a year or only on the basis of the service scheduled; that is, 365 days, less 52 Sundays and 7 holidays, or a residue of 306 scheduled days of service?

The basis for computing the equipment-maintenance allowance should be on the service "scheduled," which is 306 scheduled days of service per annum.

(A-8394)

POSTAL SERVICE EMPLOYEES—SICK LEAVE—ACT OF FEBRUARY 28, 1925

The provision in section 11 of the act of February 28, 1925, 43 Stat. 1064, relative to sick leave for employees of the Postal Service is effective from February 28, 1925, the date of the act, but unused balances of accrued sick leave due such employees from the fiscal years 1923 and 1924 should be credited to them.

Comptroller General McCarl to the Postmaster General, March 16, 1925:

I have your letter of March 6, 1925, requesting decision as to the date from which cumulative sick leave due employees of the Postal Service should be reckoned, and whether unused balances of accrued leave should be credited to such employees, and if so, from what date it should be computed.

The questions arise under the provision in section 11 of the act of February 28, 1925, 43 Stat. 1064, which is as follows:

Sec. 11. Employees in the Postal Service shall be granted * * * sick leave with pay at the rate of ten days a year, exclusive of Sundays and holidays, to be cumulative, but no sick leave with pay in excess of thirty days shall be granted during any one fiscal year * * *.

The general rule is that a statute becomes effective on the date on which it becomes a law, in the absence of a clearly expressed intent to make it effective on some other date. See 26 Comp. Dec. 604. A part of the act of February 28, 1925, is made effective on and after January 1, 1925, by a special provision in the act to that effect. There is no such provision with reference to section 11; therefore, under the general rule stated above, it must be held that section 11 is effective from February 28, 1925, and cumulative sick leave due employees of the Postal Service should be reckoned from said date.

The restriction limiting cumulation of sick leave to three years which appeared in the act of June 5, 1920, as amended by the act of June 19, 1922, 42 Stat. 660, has been removed in the present law and also the limitation to the granting of not more than 30 days' sick leave with pay during any three consecutive years is now modified to limit the granting of not more than 30 days' sick leave during any one fiscal year.

Since the restriction on cumulation of sick leave has been removed Postal Service employees should be credited with the unused accrued sick leave, if any, which was available on February 28, 1925, under the former law; that is to say, with the unused portion, if any, of the 10 days which accrued during each of the fiscal years 1923 and 1924. See 3 Comp. Gen. 20. Sick leave that had lapsed under the law in force prior to February 28, 1925, is not revived by the act of said date.

(A–191)

TRANSFER OF DISCHARGED MEMBER OF NAVY TO FLEET NAVAL RESERVE—JURISDICTION OF THE GENERAL ACCOUNTING OFFICE

An executed discharge from the military or naval service legally issued by an authorized official can not be revoked, in the absence of fraud on the part of the officer or man discharged, so as to restore the person to whom it was issued to the service.

The transfer of an enlisted man of the Navy to the Fleet Naval Reserve can only be made when the service required by statute to entitle the man to such transfer is an accomplished fact, but where the records of the Navy Department *prima facie* show at the time of transfer the legal qualification therefor, the status thus created by such transfer will not be questioned in the settlement of his accounts, in the absence of fraud or gross mistake.

Questions of law or of fact involving the settlement of claims or accounts are, in the absence of a statute providing otherwise in a specific case, within the exclusive jurisdiction of the Comptroller General, and the powers and duties conferred upon that official in the settlement of such claims or accounts are required to be exercised without control or direction from any other officer of the Government.

Comptroller General McCarl to the Secretary of the Navy, March 17, 1925:

There has been received your letter of February 13, 1925, as follows:

> There is inclosed herewith copy of opinion of the Attorney General of the United States, dated 5 February, 1925, relative to the status of Willie P. Conway, A. C. M. M., U. S. N. R. F.

The case of Willie Perry Conway was the subject of decision by me August 31, 1923. By your letter of November 15, 1924, my attention was called to an opinion expressed by the Attorney General, the case was again fully considered and by decision of November 24, 1924, you were informed of the conclusion reached. These decisions treated of matters in the exclusive jurisdiction of the General Accounting Office—that is, the disbursement and accounting for public funds, and the action taken was final and conclusive upon the executive branch of the Government. This jurisdiction is required to be exercised "independent of the executive departments and under the control and direction of the Comptroller General of the United States" whose powers and duties are required to be performed "without direction from any other officer."

I take your letter to mean that you desire a further consideration of the case in view of the opinion of the Attorney General, dated February 5, 1925, with reference to a matter involving basically a disbursement of public moneys. While the opinion of the Attorney General, especially in view of the two considerations heretofore given by this office, would not appear to require further consideration of the matter, yet, understanding your letter to be a request for such further consideration and emanating from the Secretary of the Navy on a matter arising in his department, the deference to which such a request is entitled will be accorded.

It is observed that notwithstanding the aforesaid prior decisions of this office as to the nonavailability of appropriated funds for payment to Conway as proposed by your department, there seem to have been submitted to the Attorney General by your department, presumably pursuant to section 356, Revised Statutes, under which he is authorized to give an advisory opinion to the head of an executive department upon administrative matters merely, such representations as induced the expression of opinion dated February 5, 1925, which you now submit evidently in support of and as argument favorable to the view heretofore asserted by your department. In view of the fact that opinions of the Attorney General are advisory only and lack the force of a judicial determination, such opinions, while because of their high source are entitled to and are accorded by this office full consideration, must be accepted only as advocating the views and urging the action therein suggested. To accept such opinions as in any manner decisive or binding upon this office so as to control its action upon any matter properly for its decision would be in violation of the plain terms of the applicable statutes.

The facts of the Conway case have been heretofore stated and need therefore be but briefly summarized. Conway, while serving in an enlistment for four years entered into September 17, 1919, suffered an accident in a seaplane February 11, 1921, resulting in his own serious injury, the death of an enlisted man, and the destruction of the seaplane. An investigation seems to have been conducted and the board of investigation fixed the responsibility for the accident upon Conway. On May 6, 1921, a board of medical survey reported as to Conway that his

> * * * mental condition has cleared up except that he suffers an entire lapse of memory from the time he entered the plane until twenty-three (23) days later. The ultimate complete recovery of his mentality is doubtful. He is not considered fit for further military service, but is not a menace to the community at large.
>
> Present condition, unfit for service.
>
> Probable future duration, permanent.
>
> Recommendation, that he be discharged from the U. S. Naval Service.

On May 18, 1921, the Bureau of Medicine and Surgery forwarded the report of board of medical survey to the Bureau of Navigation approving the recommendation of the board; and on June 1, 1921, the Bureau of Navigation forwarded the report to the medical officer commanding U. S. Naval Hospital, Pensacola, Fla., with indorsement:

The recommendation of the Board of Medical Survey in this case is approved. Return papers with report of action taken.

It is said that the action of the Bureau of Medicine and Surgery and the indorsement of the Bureau of Navigation were "printed."

On June 10, 1921, the commanding officer United States Naval Hospital, Pensacola, Fla., returned the report with the following indorsement:

Returned. The above-named man was this date discharged from the naval service.

Apparently the suggestion that "printed" action was taken and the "printed" indorsement was forwarded has for its purpose to convey an impression that the recommendation and the direction were improvidently made and given. The fact that "printed" actions and indorsements have been provided establishes that that is the usual and proper method of disposing of such matters.

It appears that independently of this action on the report as to the physical condition of Conway leading to his ultimate separation from the service, the report of the board of investigation fixing responsibility for the accident on Conway was under consideration in another section of the Bureau of Navigation; that portion of the report holding Conway responsible for the accident was disapproved; and on June 14, 1921, a notice was sent to the medical officer at Pensacola canceling the approval of the discharge of Conway; that on June 27 the Chief of the Bureau of Navigation, over his own signature, announced disapproval of the recommendation; that officer, however, recognized that at that time Conway had been discharged and the purpose of his action was to correct the discharge issued from a discharge for physical disability "not in the line of duty" to show discharge "in line of duty." There was other action on the report of the board of investigation, including an action by the Secretary of the Navy June 14, 1921, to the effect that the injuries sustained by Conway were incurred in line of duty and were not the result of his own misconduct. On June 28, 1921, the Bureau of Navigation authorized the recruiting officer at Nashville, Tenn., to reenlist Conway "if physically qualified, and if not physically qualified, a recommendation for waiver be submitted to the bureau." On July 11, 1921, Conway requested reinstatement in the Navy and was informed by the Bureau of Navigation, through the recruiting officer at Nashville, July 23, 1921, that it was not possible to cancel the

discharge. He was accordingly reenlisted July 28, 1921. On August 22, 1921, the Secretary of the Navy determined that the discharge of Conway June 10, 1921, was issued in error; first, because the board of medical survey based its findings on the report of the board of investigation as to Conway's responsibility (its report and the basis of action was Conway's physical condition); second, that the approval of the recommendation of the board of medical survey was made before report of the board of investigation had been acted upon by the bureau; third, that on June 27, 1921, the Bureau of Navigation had canceled its approval of the recommendation for his discharge, adding that "there appears with the report of the board of medical survey an approval on a printed form and a disapproval typewritten and signed personally by the Chief of the Bureau of Navigation;" and fourth, that the question whether Conway should be discharged was pending in one section of the Bureau of Navigation when another section of the bureau approved the report of the board of medical survey and authorized his discharge, the following sentence appearing in this connection:

* * * As a result of the subsequent action of the chief of bureau cancelling the approval by the section chief and disapproving the report of the Board of Medical Survey, there is no approved report of the Board of Medical Survey which can be the basis for the discharge of Conway on account of medical survey given him on 10 June, 1921.

The Secretary thereupon held:

* * * that the discharge of Conway by medical survey on 10 June, 1921, was issued as a result of errors of fact existing at that time and is null and void. * * *

It was thereupon directed that the discharge be canceled and that Conway be "restored" to active duty and that he be taken up for pay from June 11, 1921.

With respect to this state of facts the opinion of the Attorney General which you now transmit contains the following:

Even if the act of your predecessor in cancelling Conway's discharge and reenlistment, directing that he be restored to duty under the enlistment of September 17, 1919, and that his service record be correspondingly corrected, was erroneous (I am not prepared to say that it was), nevertheless it was not so plainly contrary to both law and fact that the Secretary's subsequent act in transferring Conway to the Fleet Naval Reserve should now be regarded not as an exercise of judgment but rather as an inadvertence.

So long ago as April 10, 1869, 13 Op. Atty. Gen. 16, 18, the opinion was expressed that:

* * * Lieutenant Helms having in fact received an honorable discharge, and presuming this to have been given by competent authority, the subsequent cancellation of the certificate thereof, which was only an evidence of such discharge, did not operate to avoid the discharge itself nor make it capable of modification to the prejudice of the officer * * *.

In *United States* v. *Corson*, 114 U. S. 619, 621, it was stated:

In view of these adjudications, it is not to be doubted that the effect of the order of March 27, 1865, dismissing appellee from the service, was to sever his relations with the Army. Thenceforward and until, in some lawful way, again

appointed, he was disconnected from that branch of the public service as completely as if he had never been an officer of the Army. So that his right to pay as captain and assistant quartermaster of volunteers, from the date of his dismissal from the service by President Lincoln to the date of the order of President Johnson, depends entirely upon the question whether an officer of the Army, once lawfully dismissed from the service, can regain his position and become entitled to its emoluments by means of a subsequent order revoking the order of dismissal and restoring him to his former position.

This question must be answered in the negative upon the authority of *Mimmack* v. *United States*, 97 U. S. 426. The death of the incumbent could not more certainly have made a vacancy than was created by President Lincoln's order of dismissal from the service. And such vacancy could only have been filled by a new and original appointment, * * *.

Winthrop in his Military Law and Precedents, volume 2, page 848, in speaking of a discharge "by order" says:

* * * Such discharge is also final in detaching the recipient absolutely from the Army under the enlistment to which it relates, and, so far, from military jurisdiction and control, and (thus far also), remanding him to the status and capacity of a civilian. While an order for such a discharge may be recalled before it is executed, the discharge once duly delivered can not be cancelled or revoked, except where obtained by falsehood or fraud.

To the same effect are numerous opinions of the Judge Advocate General of the Army; see 1912 Digest of Opinions, page 455, where it is said:

An executed honorable discharge issued by competent authority can not be revoked unless obtained by fraud on the part of the soldier. * * * Mere mistake on the part of the officer executing it will not justify revocation. * * *

And on page 456 it is said:

A soldier was duly discharged pursuant to an order from the War Department. The order was issued under a misapprehension in regard to his actual status at the time—a mistake of fact—which if discovered would have deferred or prevented the issuing of the order. *Held* that the mistake of fact did not invalidate the discharge; that having been duly executed it could not be revoked.

And the very nature of the military status (as to which see *In re Grimley*, 137 U. S. 147) makes impossible any other conclusion. The beginning of the status, the change from a civilian to a military status, and equally the change from a military to a civilian status must be definitely fixed. After the change from the military to civilian status has occurred, it would seem too plain for argument that the military status can not again be assumed without the usual formalities of enlistment or appointment. Otherwise former members of the military and naval service could have no assurance that they were freed from their military status and were entitled to the rights and privileges of civilians. Using the illustration of the Supreme Court in *In re Grimley*, a person once legally and effectively freed from the bonds of matrimony can not again assume the marital status without observing the forms and ceremonies required by law. And the same is true with respect to the military status. This opinion, although only raising a doubt as to the correctness of the doctrine that an executed discharge from the military or naval

service legally issued by an authorized official can not be revoked except for fraud of the officer or man, even to this extent stands alone among a wealth of decisions, precedents, and the records of administrative practices of long standing and universal application. A departure from such a well-established doctrine can only be recognized by this office when such a departure is required by mandatory law.

I come now to the question of Conway's transfer to the Fleet Naval Reserve. The act of August 29, 1916, 39 Stat. 589, authorized the Secretary of the Navy to transfer

> * * * to the Fleet Naval Reserve at any time within his discretion any enlisted man of the naval service with twenty or more years' naval service, and any enlisted man, at the expiration of a term of enlistment who may be then entitled to an honorable discharge, after sixteen years' naval service * * *.

The act of July 1, 1922, 42 Stat. 799, provides:

> * * * That enlisted men of the Navy who would be eligible under existing law for transfer to the Fleet Naval Reserve after sixteen years' service at the expiration of the current enlistment in which serving, or who have completed sixteen years' service, may be transferred to the Fleet Naval Reserve at any time after the passage of this Act in the discretion of the Secretary of the Navy, and shall, upon such transfer, receive the same pay and allowances as now authorized by law for men transferred to the Fleet Naval Reserve at the expiration of enlistment after sixteen years' service * * *.

Conway's enlistment of September 17, 1919, had it been served to completion, with an extension of two years entered into May 22, 1922, would have brought him within this act. Having been discharged June 10, 1921, and reenlisted July 28, 1921, he did not and would not have the service required to establish eligibility for transfer under this law.

The Fleet Naval Reserve was created by statute and the qualifications for transfer are fixed and regulated by statute. It would be a strange doctrine indeed, subversive to all accepted rules of statutory construction that mandatory statutory requirements can be set aside by executive officers. The statute having fixed sixteen years for eligibility for transfer to the Fleet Naval Reserve, by what rule of law, on what hypothesis, can a transfer be justified where the service is fifteen years, 364 days? In Conway's case the law required the completion of sixteen years' service on expiration of the enlistment in which serving on July 1, 1922, and not having that service at the expiration of the enlistment entered into July 28, 1921, he was as ineligible for transfer to the Fleet Naval Reserve when his transfer was attempted as though he had never served in the Navy. This is not a case of inaccuracies in the record in his service, nor a case involving a change in the method of computing service. The record of his service is clear and plain. There was not the

service fixed by the statute to establish eligibility. A statute can not be set aside by "inadvertence" as seems to be suggested by the opinion of the Attorney General, and legal rights can not be created by the errors of administrative officers. The President "shall take care that the laws be faithfully executed"; and the Secretary of the Navy can not change the law or transfer an enlisted man to the Fleet Naval Reserve without the service precisely prescribed by statute. It is hoped this was not even intended to be suggested by the opinion of the Attorney General.

The soundness of the views of this office in this respect are so obvious that citation of authorities is unnecessary. It will be enough to refer to a recent case, that of *John Lawless, jr.*, v. *The United States*, decided by the Court of Claims, February 4, 1924, No. 50b, where in a case involving the status of an officer of the Naval Reserve Force, the court decided, notwithstanding the action of the Secretary of the Navy based upon an opinion of the Attorney General, that the status sought to be created did not exist because the formalities of the law were not observed. It is appropriate also to mention that the then Comptroller of the Treasury had originally held the procedure adopted was illegal but after the opinion of the Attorney General and in view of the war conditions permitted it.

It is so axiomatic as to hardly require statement that this office must settle claims and accounts on precisely the same basis as do the courts; if a claim is not based on law when filed in court, it is not based on law when presented to this office for settlement. While, therefore, this office recognizes the responsibility of the Secretary of the Navy in the conduct of the department under his charge, the settlement of claims and accounts resulting from his administration must be in accordance with the law under which the claims arise or the payments are made.

Many of the questions relating to fiscal action that confront this office especially from the naval and military services, have remotely some administrative action in its nature not directly involving payments, and the attitude has not of late been seriously assumed that such administrative action may control the preeminent fiscal questions so as to justify payments from public funds not authorized by law, but the attitude of the Navy Department now more recently appears to have been assumed that when an advisory opinion of the Attorney General is obtained, not, of course, with apparent reference to the fiscal question but rather, ostensibly, with reference to some collateral question, which opinion gives support to the administrative view or action, there is some such binding effect that the fiscal questions are controlled thereby. The propriety of expressing

opinion on a question within the jurisdiction of this office to determine, in view of the possible embarrassment should the question later confront the United States in the courts, is, of course, a matter for consideration by the Attorney General. The fallacy thereof is immediately apparent by simply recalling the fact that by statute such opinions of the Attorney General are advisory only and bind no one—not even the official requesting the opinion of the Attorney General—and the further fact, so far as the General Accounting Office is concerned, that the statutes specifically require its duties to be performed " without direction from any other officer " than the Comptroller General of the United States, and also provide his decision shall be final and conclusive upon the executive branch of the Government. For this office to accept any theory with reference to matters within its jurisdiction as thus appearing would permit to be accomplished indirectly that which may not lawfully be done directly, and would be no less than an abandonment of its duty.

In my letter to you of August 13, 1924, I touched upon the exclusive jurisdiction of this office in the matter of claims and accounts, and the fact that Attorneys General from the passage of the Dockery Act of July 31, 1894, 28 Stat. 206, had recognized the exclusive jurisdiction of the Comptroller of the Treasury in such matters and had declined to give opinions designed to influence the accounting officers, and more especially the Comptroller of the Treasury. This was the contemporaneous reaction and practice under the Dockery Act.

Administrative action not authorized by law, resulting from mistake or otherwise, may create such a condition as when fully explained will prompt the Congress to grant relief by an appropriation of funds, but may not be the basis for the use of funds appropriated for other purposes. In such connection, however, there is afforded the proper opportunity for the Congress to learn of the unauthorized administrative action creating the condition sought to be relieved, to enable it to take such action thereon as it may consider justified.

The case of Conway as presented may be one of hardship to him. It does not, however, appear that the department has endeavored to relieve the situation by the only apparent legal method, to wit, recognizing him in his enlistment entered into July 28, 1921.

On further consideration this office must adhere to the views heretofore announced and any payments to Conway as a transferred member of the Fleet Naval Reserve on his attempted transfer of July 10, 1922, will be disallowed in disbursing officers' accounts.

(A-8336)

PURCHASE OF MANUSCRIPTS

Manuscripts already prepared and in existence when the agreement to purchase is made, and which have not been prepared with any understanding, promise, or suggestion that such purchase would be made, may be purchased by the Federal Board for Vocational Education from its appropriation for salaries and expenses, but said appropriation is not available for the hire of a person not otherwise in the Government service to prepare a manuscript.

Comptroller General McCarl to the Federal Board for Vocational Education, March 18, 1925:

I have your request of March 3, 1925, for decision of a question presented as follows:

May the appropriations of the Federal Board for Vocational Education be expended for the purchase of manuscripts on vocational education subjects which have been prepared and submitted by persons not in the employ of the Government without contract having been made therefor?

From time to time experts in the various fields of vocational education throughout the country prepare material which on submission to the board is found to be of a type worthy of publication and distribution by the Government in the promotion of vocational education, under the act of February 23, 1917. Since the inception of the board no manuscript has been purchased or contracted for at a price greater than the nominal amount necessary to reimburse the author for expenditures for clerical and editorial help. The board has purchased such manuscript in the past and has also contracted for the preparation of such manuscript.

Since your recent decision, however, affecting contracts for personal services in the preparation of manuscript, the board does not wish to attempt to make a purchase which in any way would appear to be an evasion of your recent decision. Inasmuch as we are desirous at the present time of purchasing two manuscripts that have been submitted—one on vocational agricultural education and one on vocational trade and industrial education—the question is submitted for your decision, with the request that we be advised as early as possible.

The objections to the purchase of manuscripts arise from the provisions of section 4 of the act of August 5, 1882, 22 Stat. 255, which provides:

That no civil officer, clerk, draughtsman, copyist, messenger, assistant messenger, mechanic, watchman, laborer, or other employee shall after the first day of October next be employed in any of the executive departments, or subordinate bureaus or offices thereof at the seat of government, except only at such rates and in such numbers, respectively, as may be specifically appropriated for by Congress for such clerical and other personal services for each fiscal year; and no civil officer, clerk, draughtsman, copyist, messenger, assistant messenger, mechanic, watchman, laborer, or other employee shall hereafter be employed at the seat of government in any executive department or subordinate bureau or office thereof or be paid from any appropriation made for contingent expenses, or for any specific or general purpose, unless such employment is authorized and payment therefor specifically provided in the law granting the appropriation, and then only for services actually rendered in connection with and for the purposes of the appropriation from which payment is made, and at the rate of compensation usual and proper for such services * * *.

In applying the provisions of this act it has been found necessary to distinguish between manuscripts which were in existence when the agreement to purchase was entered into and manuscripts produced or prepared after the agreement to purchase or with the under-

standing that such an agreement or purchase would be made when completed. The first, constituting a purchase of a commodity, is not open to objection by reason of the act of August 5, 1882, *supra*, but the second constitutes the hire of personal services and is prohibited by the act of August 5, 1882, unless specifically appropriated for.

The only appropriation for the administrative expenses of your board is the permanent annual appropriation made by the act of February 23, 1917, 39 Stat. 929, 933, as follows:

> That there is hereby annually appropriated, out of any money in the Treasury not otherwise appropriated, the sums provided in sections 2, 3, and 4 of this act, to be paid to the respective States * * * and the sum provided for in section seven for the use of the Federal Board for Vocational Education for the administration of this act and for the purpose of making studies, investigations, and reports to aid in the organization and conduct of vocational education, which sums shall be expended as hereinafter provided.
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> * * * * * * * * *
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> * * * The Federal Board for Vocational Education shall have power to employ such assistants as may be necessary to carry out the provisions of this Act.
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> SEC. 7. That there is hereby appropriated to the Federal Board for Vocational Education the sum of $200,000 annually, to be available from and after the passage of this Act, for the purpose of making or cooperating in making the studies, investigations, and reports provided for in section six of this act, and for the purpose of paying the salaries of the officers, the assistants, and such office and other expenses as the board may deem necessary to the execution and administration of this act.

The purchase of manuscripts already in existence when the agreement to purchase is made, and which had been prepared without any understanding, promise, or suggestion that such a purchase would be made, would appear to be a proper charge under the appropriation for salaries and expenses of your board made by section 7 of the act of February 23, 1917, *supra*, provided, of course, they pertain to and tend to promote the authorized activities of your board. 19 Comp. Dec. 416.

Any agreement or arrangement in advance by contract or otherwise to prepare a manuscript is a hire of personal services, and in the absence of specific statutory authority therefor is prohibited by the act of August 5, 1882, *supra*. The only portion of the appropriation for the salaries and expenses of your board which authorizes personal services is that worded as follows: "and for the purpose of paying the salaries of the officers, the assistants." This evidently contemplates the payment of salaries to regular officers and employees and does not authorize the employment of personal services by contract or otherwise for indefinite periods without supervision, such as would be involved in the preparation of a manuscript. 26 Comp. Dec. 635; 3 Comp, Gen. 709. I have to advise, therefore, that you are not authorized to agree or contract in advance for the preparation or purchase of manuscripts not in existence when the agreement is entered into.

(A-7805)

MEDICAL TREATMENT—NAVAL RESERVE FORCE

The expenses incident to necessary medical and hospital treatment of members of the Naval Reserve Force on active duty when such services are rendered by civilian physicians and hospitals, due to the unavailability of medical and hospital facilities of the Navy, are chargeable to the same funds or appropriations as are those of members of the regular Navy. (Modified by 4 Comp. Gen. 1005.)

Comptroller General McCarl to the Secretary of the Navy, March 19, 1925:

There has been received your request of January 30, 1925, for decision as to the appropriation available for expenses incident to necessary medical and hospital treatment of members of the Naval Reserve Force on active duty when such services are rendered by civilian physicians and hospitals.

Under the terms of the act of July 1, 1918, 40 Stat. 712, members of the Naval Reserve Force when employed on active service are subject "to the laws, regulations, and orders for the government of the Regular Navy" and are entitled to receive "the same pay and allowances" as received by officers and enlisted men of the regular Navy. Reimbursement of civilian medical and hospital treatment of an officer of the Navy is prohibited by section 1586, Revised Statutes, unless—

* * * they were incurred when he was on duty, and the medicines could not have been obtained from naval supplies, or the attendance of a naval medical officer could not have been had.

Officers of the Navy are entitled by law to necessary medical care and treatment by the Bureau of Medicine and Surgery of the Navy, and, as a condition precedent to reimbursement for expenditures made for such treatment from civilian sources, it must be shown that the officers were in a duty status and that the medical and hospital facilities of the Navy were unavailable. 2 Comp. Gen. 269. The same showing is accordingly required as a precedent to reimbursement for expenditures for civilian hospital and medical treatment for members of the Naval Reserve Force.

In none of the appropriations made specifically for the Naval Reserve Force is there any specific provision for medical treatment, but in this respect the same is also true of appropriations specifically mentioning the enlisted men and officers of the Navy. However, section 4808, Revised Statutes, provides:

The Secretary of the Navy shall deduct from the pay due each officer, seaman and marine, in the Navy, at the rate of twenty cents per month for each person, to be applied to the fund for Navy hospitals.

The deductions so authorized are combined with funds from other authorized sources and form what is known as the "Naval Hospital Fund." The members of the Naval Reserve Force when on active duty being subject to the laws, regulations, and orders for the government of the regular Navy, and being entitled to the same pay

and allowances, are subject to the 20-cent deduction authorized by section 4808, Revised Statutes, *supra*, and are entitled to medical treatment under the same conditions as members of the regular Navy. 3 Comp. Gen. 301.

There is no specific appropriation for the medical or hospital care and treatment of officers and enlisted men of the Naval Reserve Force on active duty, and the appropriation "Naval Reserve Force" is not available therefor. The appropriation "Care of hospital patients," 42 Stat. 1146, for the fiscal year 1924, and which was provided for several years immediately prior to 1924, was not repeated in the act of May 28, 1924, 43 Stat. 197, for the fiscal year 1925; and the appropriation "Contingent, Bureau of Medicine and Surgery," 43 Stat. 196, is not available for the payment of civilian medical care and treatment of personnel of the Navy. 4 Comp. Gen. 176. The only fund known to this office available for the payment of such services for naval personnel is the naval hospital fund, and as the members of the Naval Reserve Force when on active duty contribute to this fund under identically the same conditions as do members of the regular Navy any necessary payments for civilian medical and hospital care and treatment for members of the Naval Reserve Force on active duty should be paid from the same fund.

Your submission is answered accordingly.

(A–6262)

RENTAL ALLOWANCE—OFFICERS OF THE RESERVE CORPS AND NATIONAL GUARD

Under section 6 of the act of June 10, 1922, 42 Stat. 628, as amended by section 2 of the act of May 31, 1924, 43 Stat. 250, and the Executive order of August 13, 1924, members of the Officers' Reserve Corps in attendance at service schools may be paid rental allowance on the same basis as officers of the National Guard. 4 Comp. Gen. 571, modified.

The time necessary for travel to and from schools of instruction, in addition to the time limits prescribed for actual attendance thereat, may be included for the purpose of payment of rental allowance to members of the Officers' Reserve Corps and officers of the National Guard in attendance at such schools. 4 Comp. Gen. 571; *id.* 661, amplified.

Comptroller General McCarl to the Secretary of War, March 20, 1925:

I have your letter of February 26, 1925, asking further consideration with respect to the rights to rental allowance of Reserve officers and National Guard officers, as defined in decisions of December 27, 1924, 4 Comp. Gen. 571, and February 6, 1925, 4 Comp. Gen. 661. You call attention to the fact that in decision of December 27, 1924, it was held that:

> For the purpose of this decision it will be understood that in no case will the order fix a period of active duty in excess of 60 days under section 37–a, a period of training or instruction in excess of 30 days under section 94 or 97 nor in excess of 3 months under section 99.

On January 15, 1925, you requested a reconsideration with respect to the limitation of three months placed by the decision of December 27, 1924, on the attendance of National Guard officers at service schools under section 99 of the national defense act, 42 Stat. 1035. Reconsideration was requested as at several service schools the course exceeded that period, the flying course at Brook's Field, Tex., being for a period of 4 months; the course at the Command and General Staff School, Fort Leavenworth, Kans., being for a period of 3 months and 10 days, and in some other courses the 3-months' period is exceeded by several days. To meet the requirements of these courses it was held in decision of February 6, 1925, that:

> The basic condition must be attendance at a military service school to pursue a regular course of study as authorized by section 99, 42 Stat. 1035. The enactment does not limit the period of the study and obviously this is dependent to some extent upon the course of study. The decision of December 27, 1924, called attention thereto and that for the purposes of the decision which concerned rental allowance it will be understood orders to such active duty under section 99 will fix a period not in excess of three months. This must be the general rule, but there may be the exceptional case of minor variation from the period of three months by reason of the length of the course of the particular school and where that is stated in the order, the service may be considered as temporary duty within the decision in question. The instances given in the submission of four months, three months and ten days and also several days in excess of three months are understood as representing the maximum of variation from three months and action will be governed accordingly.

Your submission of January 15, 1925, had reference to National Guard officers only. You now suggest that as Reserve officers attend service schools under the same conditions as do National Guard officers similar extension of time should be made for such duty under section 37–a of the national defense act.

For some years there has appeared a restriction in the appropriation under which active duty pay for members of the Officers' Reserve Corps is paid, see 43 Stat. 507, substantially as follows:

> No portion of this appropriation shall be expended for the pay of a reserve officer on active duty for a longer period than fifteen days, except such as may be detailed for duty with the War Department General Staff under section 3a and section 5 (b) of the Army Reorganization Act approved June 4, 1920, or who may be detailed for courses of instruction at the general or special service schools of the Army, or who may be detailed for duty as instructors at civilian military training camps, appropriated for in this Act, or who may be detailed for duty with tactical units of the Air Service, as provided in section 37a of the Army Reorganization Act approved June 4, 1920 * * *.

This is a restriction and limitation on the authority contained in section 37–a. In addition to the exception made in decision of December 27, 1924, as to members of the Officers' Reserve Corps on active duty for training under section 37–a of the national defense act for short periods not exceeding sixty days, what has been said with respect to officers of the National Guard attending service schools under section 99 of the national defense act may be applied to members of the Officers' Reserve Corps attending service schools

pursuant to law when their orders clearly show the duty to which ordered, the course to be attended, and the duration of the course. It should be understood this does not include any other form of training, what was said in the decision of December 27, 1924, being applicable to such other training only if the duration be sixty days or less.

Your letter states:

> For consideration in this connection is the fact that, while the period of instruction at any particular service school is uniform for all the officers in attendance thereat, the period of active duty of the individual officers attending such school varies by a few days because of the varying length of time consumed in travel to and from the school.
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> * * * * * * *
>
> Your decision is requested, therefore, as to whether the length of the school term or the entire period of active duty (school term plus travel time) should be considered in determining whether or not the duty period of any individual officer is within the limits prescribed with reference to permanent duty station.

As the amendment of section 99 of the national defense act, September 22, 1922, 42 Stat. 1035, specifically includes right to pay "for the necessary period of travel from and to his home station" such time in transit may be treated as included within the limits as herein and heretofore fixed.

Your letter contains the following paragraph:

> It is further requested that the status with reference to permanent station be decided where officers of the two classes are ordered to duty for periods in excess of the prescribed limits as well as where the duty periods are within such limits.

In this connection decision of December 27, 1924, states:

> It might be suggested that as the officers are in the status entitling to pay for a limited period and the station fixed is to continue during that entire period it is as permanent a station in a military sense as they can have, the order merely fixing the duration of duty, training, or instruction. This, however, would be narrower than the law contemplates, as the amended law clearly fixed the rental allowance to enable the officer to arrange his permanent living conditions, either on the basis of rental allowance or the assignment of adequate public quarters. Reserve officers or National Guard officers must maintain their permanent living arrangements, and the duty to which assigned is both in fact and under the law temporary, the station assigned for the purpose of that duty not being a permanent station within the meaning of the law. * * *

The language last quoted from your letter confuses the pronounced difference in the status of officers of the National Guard and members of the Officers' Reserve Corps. Officers of the National Guard are members of the militia. They are a part of the Army of the United States only when in the service of the United States and, except when in the service of the United States either under a call or draft, they are entitled to pay only when and to the extent the statute specifically provides. The periods heretofore fixed as to officers of the National Guard when entitled to pay under sections 94, 97, and 99 of the National Defense Act were fixed on the assumption that periods of service under those provisions of law

would not exceed the limits fixed. The practice for many years has been to limit encampment training in the National Guard under section 94 and under the earlier statutes applicable to the organized militia to 15 days per year; the limit of 30 days was fixed in the decision for this class of service to provide for possible excess of a few days. If the appropriations for the National Guard should make possible a longer period of encampment training than 30 days, it may then be necessary to consider what the situation of the officers will be with respect to permanent or temporary station, but until that situation arises the necessity for decision is not apparent. Camps of instruction under section 97 have not been of extended duration and should any be held or contemplated for a longer period than 30 days specific submission, giving the facts, should be presented that the matter may be properly considered. If attendance at a service school should exceed the time herein and heretofore fixed, the officer will be considered as on duty at his permanent station and his rights to rental allowance determined on the facts of the situation under the law and regulations applicable.

So far as members of the Officers' Reserve Corps are concerned, they are officers of the United States serving under commissions of limited duration, five years. The very nature of their relation is temporary when contrasted with the relation existing between an officer of the Regular Army and the Government. The provision respecting rental allowance and the construction of the term "permanent station" must, however, have application to them, and this provision must operate in the identical manner it does in the case of officers of the Regular Army. When, therefore, a member of the Officers' Reserve Corps is ordered to active duty other than for training for any period, for training duty in excess of 60 days, or training duty at a service school in excess of the periods herein and heretofore fixed, his rights to rental allowance will be determined by the facts existing and under the same rules as are applicable to officers of the Regular Army. It should be observed that the effect of the decisions of December 27, 1924; February 6, 1925, and herein is to permit citizens holding commissions in forces supplemental to the Regular Army to occupy public quarters when undergoing training for limited periods and receive the rental allowance as on duty at a temporary station, although the quarters so occupied are obviously adequate for the duty to which assigned, having been provided for that specific purpose. The reasons for the holding were set forth in decision of December 27, 1924. Such reasoning has no application when the officer is entitled to pay otherwise than as indicated in those decisions. A right to rental allowance will not be created by construction by this office of the terms "permanent sta-

tion" and "temporary duty station" to relieve the War Department of its duty under the law to provide for the assignment of adequate quarters where such are available.

The portion of your submission last quoted is answered accordingly.

(A-7144)

PURCHASES—COLUMBIA INSTITUTION FOR THE DEAF

Congress having for a number of years appropriated funds for the support of the Columbia Institution for the Deaf, and having in the act of June 5, 1924, 43 Stat. 392, specifically named that institution as included among the bureaus of the Department of the Interior, it is subject, so far as appropriated moneys are concerned, to all general laws applicable to a service or bureau of the Department of the Interior. Its contracts, when in excess of $100, must be advertised and executed in accordance with sections 3709 and 3744, Revised Statutes, and purchases of supplies of the kind listed on the General Supply Schedule must be made from contractors on that schedule. Effective April 1, 1925, all prior decisions in conflict with the holding herein will not be followed.

Decision by Comptroller General McCarl, March 23, 1925:

There is for consideration by this office the question whether contracts by the Columbia Institution for the Deaf are required to be advertised and executed in accordance with sections 3709 and 3744, Revised Statutes; also whether purchases of supplies by that institution are required to be made from the contractors on the schedules of the General Supply Committee when such supplies are listed on such schedules.

The act of June 5, 1924, 43 Stat. 392, provides:

> The purchases of supplies and equipment or the procurement of services for the Department of the Interior, the bureaus and offices thereof, including Howard University and the Columbia Institution for the Deaf, * * * may be made in open market without compliance with sections 3709 and 3744 of the Revised Statutes of the United States, in the manner common among business men, when the aggregate amount of the purchase or the service does not exceed $100 in any instance.

Section 3709, Revised Statutes, requires that all purchases and contracts for supplies or services "in any of the departments of the Government" shall be made by advertising for proposals, and section 3744, Revised Statutes, requires all contracts made by the Secretary of the Interior or by officers under him appointed to make such contracts, to be reduced to writing and signed by the contracting parties with their names at the end thereof.

While the Columbia Institution for the Deaf was originally incorporated as a private corporation, act of February 16, 1857, 11 Stat. 161, Congress has from time to time extended the jurisdiction of the United States over the institution and its operations. Section 4867, Revised Statutes, required all of its expenditures from appropriated funds to be reported to Congress; section 4868, Revised

Statutes, requires a report of the various activities to be made each year to the Secretary of the Interior; section 4863 requires the appointment on the board of directors of one Senator and two Members of the House of Representatives; and section 4861 prohibits the sale of any portion of the real estate of that institution except under authority of a special act of Congress.

While not technically a "department" in itself, Congress has by its various acts placed it under the jurisdiction of the Secretary of the Interior in so far as its appropriations and contracts are concerned. Appropriations for the major part of its support are made each year in the appropriations for the Interior Department and now, in the act of June 5, 1924, *supra*, the Congress has specifically named that institution as being included among the bureaus or offices of the Interior Department.

I am constrained to hold, therefore, that so far as restrictions on the expenditures of appropriated moneys are concerned the Columbia Institution for the Deaf is subject to all general laws applicable to a service or bureau of the Department of the Interior. Its contracts should accordingly be advertised and executed in accordance with sections 3709 and 3744, Revised Statutes, subject to the exceptions in the act of June 5, 1924, *supra*, and all purchases of supplies listed on the schedules of the General Supply Committee should be made from the contractors on that schedule.

All prior decisions in conflict with the holding herein will not be followed hereafter. As this changes a practice established under prior decisions it will be given effect to as of April 1, 1925, and expenditures incurred prior to that date will be considered under the decisions previously in force.

(A–8620)

COAST GUARD—RETIRED PAY OF A DISTRICT SUPERINTENDENT

Under the act of January 12, 1923, 42 Stat. 1131, a district superintendent of the Coast Guard with the rank, pay, and allowances of a lieutenant commander with over 40 years' service at date of retirement is entitled to retired pay computed upon the pay of a commander, notwithstanding the limitation in rank of district superintendents on the active list to not above that of lieutenant commander.

Comptroller General McCarl to the Secretary of the Treasury, March 23, 1925:

I have your letter of March 14, 1925, as follows:

District Superintendent William Edward Tunnell, U. S. Coast Guard, will attain the age of sixty-four years on March 24, 1925, and will therefore be retired from active service on that date by direction of the President, in conformity with the provisions of section 4 of the act approved April 12, 1902 (32 Stat. 100), as extended by section 3 of the act approved January 28, 1915 (38 Stat. 801).

District Superintendent Tunnell originally entered the Life Saving Service on January 1, 1884, and has served continuously and creditably in the Life Saving Service and in the Coast Guard since that date. He will, then, when retired, have had more than forty-one years' service. Section 3 of the act approved January 28, 1915 (38 Stat. 802), provides that in computing length of service "for any purpose" all creditable service in the Life Saving Service shall be included.

Section 3 of the act of January 12, 1923 (42 Stat. 1131), provides as follows: "That hereafter when a commissioned officer of the Coast Guard who has had forty years' service shall retire he shall be placed on the retired list with the rank and retired pay of one grade above that actually held by him at the time of his retirement * * *."

District Superintendent Tunnell is a commissioned officer of the Coast Guard (sec. 2 of the act approved January 28, 1915, 38 Stat., 801). He is the senior district superintendent, and as such has the rank, pay, and allowances of a lieutenant commander in the Coast Guard (sec. 8 of the act approved May 18, 1920, 41 Stat., 603, and act approved June 5, 1920, 41 Stat., 879).

It is requested that you advise me whether District Superintendent William Edward Tunnel, U. S. Coast Guard, should be retired on March 24, 1925, as a district superintendent with the rank of commander and with the retired pay of a commander in the Coast Guard of his length of service, or be retired as a district superintendent with his present rank of lieutenant commander and with the retired pay of a lieutenant commander in the Coast Guard. * * *

Aside from the commandant and engineer in chief, the highest rank of the line officers and engineer officers of the active list of the Coast Guard is limited to captain, act of January 12, 1923, 42 Stat. 1130, and of district superintendents, lieutenant commander, acts of May 18, 1920, 41 Stat. 603, and June 5, 1920, 41 Stat. 879. For the retired list section 3 of the act of January 12, 1923, 42 Stat. 1131, fixes the rank of commodore as the highest rank on the retired list, that rank to correspond in pay with that of a commodore in the Navy.

I understand the point which you desire decided is whether, with the limitation in rank of district superintendents to not above that of lieutenant commander, a rank with pay thereof higher than that of lieutenant commander may be given on the retired list.

It is within the jurisdiction of Congress to fix the pay of commissioned officers of the active list of the Coast Guard and to place a limitation thereon as to the maximum which may be paid for any corps thereof. It is equally within its jurisdiction to provide for the rates of retired pay. This has been exercised by limiting the pay on the active list to that of a certain rank and extending the pay for computation of the retired pay to that of the next higher rank. *Wood* v. *United States*, 15 Ct. Cls. 151; 107 U. S. 414.

A somewhat similar question was presented to the Comptroller of the Treasury in 1903, 9 Comp. Dec. 515, viz, that of an officer of the Navy who occupied the highest grade and relative rank as an engineer officer and for whom an act was passed providing that he be advanced on the retired list "to the next higher grade." The comptroller held:

* * * Since he already occupied the highest grade and relative rank as a retired engineer officer, it was not possible to give him a higher grade in that corps, and in order to give the act any effective operation it must be construed

as authorizing an advancement of one grade in rank above that which he occupied in the Engineer Corps at the date when he was retired. * * * (See also 13 Comp. Dec. 617.)

In the case of District Superintendent Tunnell there has been extended to him by the act of January 12, 1923, the right to have his retired pay as a district superintendent computed upon the pay of a commander in the Coast Guard.

(A-5440), (A-7625), (A-8310)

TRAVELING EXPENSES—REPEATED TRAVEL OF NAVAL OFFICERS

This decision treats with the issue as to whether or not certain travel performed by officers of the Navy was of a character as to entitle said officers to actual and necessary expenses under section 12 of the act of June 10, 1922, 42 Stat. 631. It gives a brief historical review of the statutes, regulations, and decisions relating to the payment of actual and necessary expenses for travel performed repeatedly between two or more places. For points involved see decision.

Decision by Comptroller General McCarl, March 25, 1925:

There are before this office for decision three cases in each of which the issue is whether or not certain travel performed by an officer of the Navy was of a character to entitle the officer to actual and necessary expenses under section 12 of the act of June 10, 1922, 42 Stat. 631. Because of the manner in which the several cases have been presented and the circumstances disclosed as to the travel a brief historical review of the statutes, regulations, and decisions relating to payment of actual and necessary expenses for travel "performed repeatedly between two or more places" seems appropriate, before consideration is given the individual cases.

The naval appropriation act of June 7, 1900, 31 Stat. 685, provided:

* * * That in lieu of traveling expenses and all allowances whatsoever connected therewith, including transportation of baggage, officers of the Navy traveling from point to point within the United States under orders shall hereafter receive mileage at the rate of eight cents per mile, distance to be computed by the shortest usually traveled route; but in cases where orders are given for travel to be performed repeatedly between two or more places in the same vicinity the Secretary of the Navy may, in his discretion, direct that actual and necessary expenses only be allowed. Actual expenses only shall be paid for travel under orders outside the limits of the United States in North America.

This proviso was repeated in identical language in the deficiency act of March 3, 1901, 31 Stat. 1029.

The naval appropriation act of March 3, 1901, 31 Stat. 1109, provided:

* * * That in cases where orders are given to officers of the Navy or Marine Corps for travel to be performed repeatedly between two or more

places in such vicinity as in the discretion of the Secretary of the Navy is appropriate, he may direct that actual and necessary expenses only be allowed.

The proviso was reenacted in the naval appropriation act of July 1, 1902, 32 Stat. 663, with the word "hereafter" inserted between the first word, "That" and the word "in," and governed payments of expenses for repeated travel until July 1, 1922, when section 12 of the act of June 10, 1922, 42 Stat. 631, became effective. The cases here for consideration are governed by the latter statute which is applicable to the Army, Coast Guard, Coast and Geodetic Survey, and Public Health Service, as well as to the Navy and Marine Corps, and provides:

Sec. 12. That officers of any of the services mentioned in the title of this Act, when traveling under competent orders without troops, shall receive a mileage allowance at the rate of 8 cents per mile, distance to be computed by the shortest usually traveled route and existing laws providing for the issue of transportation requests to officers of the Army traveling under competent orders, and for deduction to be made from mileage accounts when transportation is furnished by the United States, are hereby made applicable to all the services mentioned in the title of this Act, but in cases when orders are given for travel to be performed repeatedly between two or more places in the same vicinity, as determined by the head of the executive department concerned, he may, in his discretion, direct that actual and necessary expenses only be allowed. Actual expenses only shall be paid for travel under orders outside the limits of the United States in North America. Unless otherwise expressly provided by law, no officer of the services mentioned in the title of this Act shall be allowed or paid any sum in excess of expenses actually incurred for subsistence while traveling on duty away from his designated post of duty, nor any sum for such expenses actually incurred in excess of $7 per day. The heads of the executive departments concerned are authorized to prescribe per diem rates of allowance, not exceeding $6, in lieu of subsistence to officers traveling on official business and away from their designated posts of duty.

Early in the administration of the act of June 7, 1900, 31 Stat. 685, many officers questioned the jurisdiction of the Secretary of the Navy to determine what places are "in the same vicinity," and numerous claims were presented to the accounting officers of the Treasury for the difference between mileage at 8 cents per mile for repeated travel between places separated by considerable distances and amounts allowed by the Secretary of the Navy as actual and necessary expenses. In the decision of Assistant Comptroller of the Treasury Mitchell, dated November 21, 1900, 7 Comp. Dec. 227, a claim of that character, presented by Lieut. Commander W. C. Eaton, was allowed, the Comptroller of the Treasury having exercised the right of determining that the places between which repeated travel was performed were not in the same vicinity.

The then Secretary of the Navy, by his letter dated December 11, 1900, submitted to the Comptroller of the Treasury a similar claim of Lieut. E. T. Witherspoon, requested reconsideration of the general question involved in the Eaton decision, and stated the purpose of the statute, as follows:

The provision in the act of June 7, 1900, which gave the Secretary of the Navy discretion to allow only actual and necessary expenses in cases where

orders are given for travel to be performed repeatedly between two or more places in the same vicinity, was intended to prevent an abuse which has heretofore existed, whereby officers traveling repeatedly between two stations have put the Government to unwarranted expense. In some cases, the mileage being much more than the actual expenses, it became profitable business to make as many trips as possible.

In decision of January 31, 1901, 7 Comp. Dec. 376, Assistant Comptroller Mitchell expressed himself as "much impressed" with the Secretary's "remarks respecting the purpose of the act," and declared that "while the act may not authorize the Secretary to make a conclusive decision as to what places are in the vicinity of each other * * * his determination of that question is entitled to great weight, and * * * should not be disregarded except for the most cogent reasons." See also 9 Comp. Dec. 713; 11 *id.* 744.

The act of March 3, 1901, 31 Stat. 1109, so modified the act of June 7, 1900, 31 Stat. 685, that the conclusions of the Secretary of the Navy as to what places are "in the same vicinity" have not since been open to question. See in this connection *Willets* v. *The United States*, 38 Ct. Cls. 534, and 12 Comp. Dec. 719. The regulations that have been promulgated from time to time by the Navy Department and the decisions of the accounting officers have consistently recognized the purpose of the several acts, to be as stated by the Secretary of the Navy in his letter of December 11, 1900, and have been designed to promote that purpose and to forestall any attempt to revive the mischief or abuse the statutes were intended to remedy.

The Navy Regulations of 1920 are substantially like previous regulations on the subject and are as follows:

Art. 1809. To facilitate action by the department, officers on inspection, recruiting, or other duty that necessitates repeated travel between the same points shall keep an accurate account of their actual expenses and also the number of miles traveled by the most direct route, and submit both to the department with their claims for reimburesment or mileage.

Art. 1812. (1) No officer of the Navy or Marine Corps shall be paid mileage except for travel actually performed at his own expense and in obedience to orders.

(2) No allowance shall be made for traveling expenses within the United States unless the same be incurred under orders originally issued or subsequently approved by the Navy Department. All allowances made for this purpose must also be approved by the Secretary of the Navy.

* * * * * * *

(4) Orders of officers involving travel must designate the place from which and the point or points to which the travel is to be performed.

Art. 1815. (1) Claims for traveling expenses, incurred under orders which do not entitle claimant to mileage, shall be itemized and in duplicate and accompanied by original orders authorizing travel and a certified copy thereof, with all indorsements. All such claims shall be accompanied, when practicable, by receipted bills, and, when this is not practicable a certificate to that effect shall be shown on the claim. When vouchers ordinarily procurable, such as hotel bills, Pullman receipts, etc., are not submitted with the officer's claim he shall attach an explanation of his omission in this respect.

(2) Claims shall be confined absolutely to necessary expenses actually incurred. Automobile and carriage hire, when the necessity therefor is clearly shown, and incidental expenses incurred on account of travel shown to be reasonable and necessary, will be allowed. When expenses for telephone and telegraph are incurred, a certificate shall show that such messages were of an

official nature, and copies of telegrams sent shall be furnished. Charges for laundry or mineral waters, or for fees on Government vessels will not be allowed. The necessity for any delay en route shall be clearly shown, and in all cases a certificate that the amounts claimed have been actually expended shall appear on the claim.

(3) Officers in the United States shall submit their claims to the Bureau of Supplies and Accounts direct.

* * * * * * *

(5) Officers on inspection duty assigned to a particular district shall be allowed actual expenses in lieu of mileage for all repeated travel between headquarters and points within the inspection district, it being considered by the department that all points within inspection districts are in the same vicinity.

(6) All officers who have additional duties assigned them, requiring repeated travel from their regular station to other points, shall be allowed actual expenses in lieu of mileage, unless mileage is specifically authorized in their orders, the department considering that places are in the same vicinity when repeated travel is authorized.

* * * * * * *

(9) In the event of question arising as to any claim, such claim shall be forwarded by the Bureau of Supplies and Accounts to the * * * General Accounting Office for settlement.

* * * * * * *

(15) No claim shall be allowed for expenses which, considering the circumstances, appear unreasonable or unnecessary * * *.

For reference as to the application of above laws and regulations, or similar regulations, see 65 MS. Comp. Dec. 987, May 21, 1913; 78 *id.* 1125, September 29, 1916; 79 *id.* 880, December 16, 1916; 81 *id.* 401, April 24, 1917; 88 *id.* 1416, March 26, 1919; 90 *id.* 1385, September 10, 1919; 91 *id.* 969, November 8, 1919; *id.* 1686, December 12, 1919; *id.* 1919, December 22, 1919; 15 MS. Comp. Gen. 1280, November 29, 1922; 18 *id.* 1067, February 21, 1923; 26 *id.* 742, October 17, 1923; 32 *id.* 64, April 2, 1924; 41 *id.* 24, January 2, 1925; 1 D. M. Comp. Gen. 1162, March 13, 1924; 7 Comp. Dec. 376; 9 *id.* 351; *id.* 713; 11 *id.* 744; 12 *id.* 719; 13 *id.* 23; *id.* 390; 1 Comp. Gen. 726; 2 *id.* 572; 4 *id.* 507; *Billings* v. *United States*, 23 Ct. Cls. 166; *Steele* v. *United States*, 30 *id.* 7; *Willets* v. *United States*, 38 *id.* 534; and *McCauley* v. *United States*, 50 *id.* 105.

Adverting now to the cases here for decision, each will be designated by name of the officer concerned, and to the disclosed facts the law, regulations, and decisions hereinbefore set out will be applied.

I. A–7625. Thomas G. Roberts, commander (C. C.), United States Navy.

Commander Roberts applied October 30, 1924, for review of settlement No. 046910, dated September 26, 1924, wherein he was allowed $6 for travel expenses incurred in Washington, D. C., on June 4 and 5, 1924, and $5.70, the net amount found due him as mileage from Philadelphia, Pa., to Atlantic City, N. J., and return, for travel performed June 23 to 30, 1924. Claimant contends that the trip to and from Atlantic City for which he was allowed mileage constituted repeated travel, for which he is entitled to actual ex-

penses, and he asks that an additional $33.12 be paid to him on that basis.

Between November 9, 1922, and June 30, 1924, during which period all travel in question was performed, the officer was assigned as naval inspector of hull material, eastern district, Philadelphia, Pa., and member of Board on Hull Changes. Direction for repeated travel upon these duties was contained in orders issued to claimant at three month intervals. The orders are not indentical with respect to the places the officer was required to visit but the fourth paragraph of each order contained a direction that he submit on the last day of each month a written report to the Bureau of Navigation showing the amount obligated by him for transportation and subsistence for that month in connection with travel performed under the orders. Each order contained a direction to the claimant that if he considered necessary a renewal of the authority contained therein he should notify the Bureau of Navigation to that effect a sufficient time before expiration of the order, giving reasons why a renewal should be granted. The order of November 9, 1922, authorized the allowance of a flat per diem of $6 per day in lieu of actual and necessary expenses but subsequent orders authorized actual and necessary expenses not exceeding $7 per day for repeated travel. The unlike portions of the several orders and the indorsements thereon as to travel performed, are as follows:

NOVEMBER 9, 1922.

Between Philadelphia, Pa., and New York, N. Y., such places within the States of Pennsylvania and Maryland east of Meridian 78; such places within the State of New York, south of parallel 40° 15′; such places within the State of Delaware as may be necessary to visit in connection with your duties as naval inspector of hull material.

This authority for repeated travel will terminate 31 March, 1923.

* * * * * * *

I certify no travel was performed under these orders.

(Signed) T. G. ROBERTS.

MARCH 24, 1923.

Between Philadelphia, Pa., and Quincy, Mass., as may be necessary to visit in connection with your work as member of the Board on Changes.

This authority for repeated travel will terminate 30 June, 1923.

* * * * * * *

I certify no travel was performed under these orders.

(Signed) T. G. ROBERTS.

APRIL 9, 1923.

Between Philadelphia, Pa., and such places as may be necessary to visit in connection with your duties as naval inspector of hull material, Philadelphia district, Phila., Pa.

This authority for repeated travel will terminate 30 June, 1923.

* * * * * * *

I certify that travel was performed under these orders from Philadelphia, Pa, to Atlantic City, N. J., from June 27th to June 29th, inclusive, 1923.

(Signed) T. G. ROBERTS.

JUNE 27, 1923.

(Travel authorized as in order of April 9, 1923.)
This authority for repeated travel supersedes your orders of 9 April, 1923, and will terminate 30 September, 1923.

* * * * * * *

I certify no travel was performed under these orders.

(Signed) T. G. ROBERTS.

SEPTEMBER 19, 1923.

(Travel authorized as in order of April 9, 1923.)
This authority for repeated travel supersedes your orders of 27 June, 1923, and will terminate 31 December, 1923.

* * * * * * *

I certify that travel was performed under these orders from Philadelphia, Pa., to Washington, D. C., from November 9th to November 13th, inclusive, 1923.

(Signed) T. G. ROBERTS.

DECEMBER 8, 1923.

(Travel authorized as in order of April 9, 1923.)
This authority for repeated travel supersedes your orders of 19 September, 1923, and will terminate 31 March, 1924.

* * * * * * *

I certify that travel was performed under these orders from Philadelphia, Pa., to Washington, D. C., from February 24th to February 25th, inclusive, 1924.

(Signed) T. G. ROBERTS.

MARCH 7, 1924.

(Travel authorized as in order of April 9, 1923.)
This authority for repeated travel supersedes your orders of 8 December, 1923, and will terminate 30 June, 1924.

* * * * * * *

I certify that travel was performed under these orders from Philadelphia, Pa., to Washington, D. C., from April 13th to April 14th, inclusive, 1924; from Philadelphia, Pa., to Washington, D. C., from June 4th to June 5th, inclusive, 1924; and from Philadelphia, Pa., to Atlantic City, N. J., from June 23rd to June 30th, inclusive, 1924.

(Signed) T. G. ROBERTS.

The claimant's position is that each of the orders issued to him after the order of November 9, 1922, operated as an extension of that order; that the several orders together covered "the whole unbroken period of time from the beginning of the first orders to the end of the last"; that any travel repeated during that period constituted repeated travel for which he is entitled to actual and necessary expenses; and, consequently, that he is entitled to expenses for the travel to Atlantic City, N. J., and return in June, 1924, because he performed similar travel "about the same time" in the previous year.

The travel-expense voucher submitted in support of the claim was transmited to this office by the Bureau of Supplies and Accounts in accordance with article 1815 (9), Navy Regulations, 1920. It bears stamped indorsement "for settlement by the General Accounting Office. Not to be paid by a disbursing officer." The voucher has not been approved by the Secretary of the Navy, as required by article 1812 (2), Navy Regulations, 1920. It was received in this office August 5, 1924, with a form memorandum attached bearing the

typewritten signature of the Acting Paymaster General of the Navy and purporting to approve the voucher "for such amount as may be found due." The necessity for expenses claimed for "bus" and "taxi" fare is not "clearly shown," as required by article 1815 (2), Navy Regulations, 1920. (See in this connection 18 MS. Comp. Gen. 1067, February 21, 1923.)

The orders issued claimant and effective during the period covered by his claim, were by their terms each separate and distinct orders. The travel for which expenses are claimed was the only travel to and from Atlantic City performed under the order of March 7, 1924. It is a settled rule that a direction to allow actual and necessary expenses for repeated travel is controlling only over the travel performed during the period of the order and does not control reimbursement to be made for travel under any other separate and distinct order. 91 MS. Comp. Dec. 1686, December 12, 1919; 27 MS. Comp. Gen. 383, November 9, 1923; 3 Comp. Gen. 566; 4 *id.* 507. It is extremely doubtful if a direction in an order allowing only actual and necessary expenses would control reimbursement to be made for travel performed under an extension of the order. It is certain that a direction to allow actual and necessary expenses is not controlling unless the duty assigned requires travel between two or more points in the same vicinity at reasonably frequent intervals, irrespective of the period covered by the order.

It is not apparent from the orders issued to claimant that the travel to Atlantic City, N. J., was necessary to the performance of his duties. There is no discretion for the allowance of actual and necessary expenses for travel performed repeatedly between two or more places in the same vicinity, unless there is an order expressly requiring the travel, and it must clearly appear that the head of the department has determined the places between which the travel is performed *are* in the same vicinity before payment may be made. *Willets* v. *United States*, 38 Ct. Cls. 534; 12 Comp. Dec. 719; 91 MS. *id.* 1919, December 22, 1919; 1 D. M. Comp. Gen. 1162, March 13, 1924; 3 Comp. Gen. 566. All travel at the expense of the Government, whether involving the payment of mileage or of actual expenses, contemplates public necessity therefor, and if needless travel is performed, no necessity of public business so requiring, there is no authority for the reimbursement of the expenses of travel. *Perrimond* v. *United States*, 19 Ct. Cls. 509; 6 Comp. Dec. 170; 32 MS. Comp. Gen. 69, April 2, 1924.

The order of November 9, 1922, described in detail the district within which the Secretary of the Navy had determined repeated travel would be appropriate in connection with claimant's duties as inspector of hull material, and the order of March 24, 1923, designated Quincy, Mass., as one place outside of that district to which

repeated travel would be appropriate in connection with claimant's duties as a member of the Board on Changes. It is remarkable that during the entire period November 9, 1922, to June 30, 1924, while claimant was assigned to those duties he did not deem it necessary to perform a single trip to any point within the district described by the Secretary or to Quincy, Mass., but did perform three round trips to Washington, D. C., and two round trips to Atlantic City, N. J., which trips constitute the only travel performed by him under the orders quoted of which there is record.

It is clear the travel to and from Atlantic City, N. J., performed by claimant in June, 1924, was not repeated travel within the meaning of section 12 of the act of June 10, 1922, 42 Stat. 631; the voucher covering the expenses said to have been incurred has not been approved by the Secretary of the Navy, and the Bureau of Supplies and Accounts has refused to pay it; there is no reliable evidence that the travel was upon the public business and an informal inquiry of the Bureau of Navigation has not developed anything favorable to a conclusion to that effect. The voucher filed to support that portion of the claim relating to hotel expenses shows claimant was accompanied to Atlantic City, N. J., by his wife.

It must be held that claimant has neither established his right to actual and necessary expenses nor to mileage for the travel in question.

Upon review, the portion of settlement which disallowed claim for actual and necessary expenses for the trip to Atlantic City, N. J., is sustained; the portion which allowed mileage for the trip is modified, and it is directed that treasurer's check No. 46672, dated October 14, 1924, for $11.70, issued to claimant and returned by him with his application for review, be retained until acceptable evidence has been presented from which it can be established that the travel performed was of a nature which entitles claimant to mileage. Unless that evidence is presented within a reasonable time the check will be transmitted to the Secretary of the Treasury for cancellation and there will be certified for payment to claimant the net amount that may otherwise be found due him.

II. A–8310. Benjamin R. Holcombe, lieutenant, United States Navy.

Comdr. Frederick G. Pyne, Navy disbursing officer, has requested review of settlement certificate M–8524–N, dated June 30, 1924, wherein $222.14 was disallowed in his disbursing account because of payments made to Lieutenant Holcombe for actual and necessary expenses incurred by the latter during September and October, 1923, while on duty under orders dated July 16, 1923, at St. Louis and Bridgeton, Mo., with the naval air detail at the international air races, 1923.

The original orders directing performance of the duty are not attached to the application for review, and only one of the copies bears certificate that it is a true copy, but for purpose of this consideration copies of both orders are accepted as true copies. The pertinent portions are as follows:

16 JULY, 1923.

From: Bureau of Navigation.
To: Lieutenant Benjamin R. Holcombe, U. S. N., Bureau of Aeronautics, Navy Department.
Via: Chief of Bureau.
Subject: Temporary additional duty.

1. When directed by the Chief of Bureau of Aeronautics you will report to the officer in charge, naval air detail, international air races, 1923, at the Naval Air Station, Anacostia, D. C., for temporary duty as assistant for the preparation and execution of these races.
2. When directed by the officer in charge, naval air detail, international air races, 1923, on or about 10 September, 1923, you will proceed by air or rail to Bridgeton, Mo., for temporary duty in connection with the air races to be held on 1, 2, and 3 October, 1923.
3. When directed by the officer in charge, naval air detail, international air races, 1923, on or about 10 October, 1923, you will return to the Bureau of Aeronautics, Washington, D. C., by air or rail and resume your regular duties.
4. This is in addition to your present duties.

THOS. WASHINGTON.

16 JULY, 1923.

From: Bureau of Navigation.
To: Lieutenant Benjamin R. Holcombe, U. S. N., Bureau of Aeronautics, Navy Department.
Via: Chief of Bureau.
Subject: Repeated travel.
Reference: (a) Bu. Nav. Circular Letter No. 63–22, dated 19 December, 1922.

1. The Secretary of the Navy having determined that repeated travel between the below-mentioned points is appropriate, you are hereby authorized to perform such travel, from time to time, as may be necessary for the purpose indicated below, this being in addition to your present duties.

Between Bridgeton, Mo., and St. Louis, Mo., as may be necessary to visit in obedience to your orders of 16 July, 1923.

This authority for repeated travel will terminate 10 October, 1923.

* * * * * * *

3. As stated in reference (a), you will be entitled to reimbursement for expenses, other than the actual cost of travel, incurred in the execution of these orders, at a rate not exceeding $7.00 per day, as specified in the act of 10 June, 1922.

The application for review is as follows:

It is requested that the action of the General Accounting Office in disallowing the sum of $222.14 paid by me on Voucher No. 3200 to Lieutenant B. R. Holcombe, U. S. N., be reviewed and the disallowance removed.

The disallowance was made for the reason that:

"No evidence has been furnished that travel between these two points was necessary in the proper performance of the officers' duties. Furthermore, as St. Louis is only 17 miles from Bridgeton, apparently any travel involved was in the field of the officers' temporary duty, and does not give the right to reimbursement of living expenses, there being no provision of law for the payment of such expenses to an officer on temporary duty away from his station in the United States."

The public bill covered payment of actual expenses, under repeated travel orders, dated 16 July, 1923 (copy inclosed). The orders directed that Lieutenant Holcombe, having been detailed for temporary duty at Bridgeton, Mo., in connection with the international air races, perform repeated travel between Bridgeton, Mo., and St. Louis, Mo.

It is believed that the General Accounting Office was in error when it stated that there was no provision of law for the payment of expenses to an

officer on temporary duty away from his permanent station within the United States.

Lieutenant Holcombe's permanent station was the Naval Air Station, Anacostia, D. C. He was ordered to duty at Bridgeton, as stated before, in connection with the international air races. Bridgeton was the location of the flying field and St. Louis was the headquarters for the officers detailed. The officer in charge of the naval air detail at the international air races had his headquarters in the offices of the St. Louis Aeronautic Corporation in the Chamber of Commerce Building in St. Louis, Mo. All administrative work in connection with the naval air detail in the international races was conducted from those headquarters.

It was necessary that the officers of the naval air detail be at Bridgeton for the actual participation in the air races, and it was also necessary that they return daily to St. Louis to carry on the administrative work in connection with the international air races and to obtain subsistence and lodging, which could not be obtained at Bridgeton. In this connection the following third indorsement by the chief of the Bureau of Aeronautics is quoted:

"From: The Chief of the Bureau of Aeronautics.
"To: The Chief of the Bureau of Supplies and Accounts.
"Subject: Suspension in travel expense claims of certain officers under repeated travel orders, in connection with air races at St. Louis, Mo., and Bridgeton, Mo.

"1. Returned.

"2. The Secretary of the Navy authorized participation by the Navy in the international air races, 1923.

"3. These races were held at the flying field, Bridgeton, Mo.

"4. Bridgeton, Mo., is a town of about one hundred inhabitants.

"5. There are no hotels, boarding houses, or other living accomodations for visitors in Bridgeton, Mo., and those nearest are situated in the city of St. Louis, Mo.

"6. Bridgeton may be reached from St. Louis via railroad to Anglum, Mo.; thence by foot to Bridgeton. A street-car line from St. Louis to Bridgeton was constructed just prior to the races; and put into operation on the first day of the races.

"7. Due to the lack of housing facilities in Bridgeton all officers connected with the racing detail necessarily had to live in St. Louis and perform travel each day to and from Bridgeton.

"8. Food for luncheons was bought in St. Louis, prepared and cooked at the flying field in Bridgeton. Drinking water at the field having been pronounced by physicians as unsuitable for drinking purposes, water was hauled from Anglum, Mo.

"9. There are neither hotels nor boarding houses in Anglum, Mo.

"10. Lieutenant B. R. Holcombe, U. S. N., and Lieutenant James Fellis (SC), U. S. N., were sent to Bridgeton, Mo., about four weeks in advance of the races under orders to make all necessary arrangements for participation by the Navy in the races; to represent the Navy on the board of the St. Louis Aeronautical Organization, under whose auspices the races were held; to receive, collect, and purchase all necessary material, and to supervise the assembly and erection of all Navy planes entered in the races. Repeated travel between Bridgeton and St. Louis, Mo., was therefore, necessary in the execution of their duties, in addition to the necessity of living in St. Louis. It is estimated that each of these officers made in excess of seventy-five round trips between Bridgeton and St. Louis, Mo.

"(Sgd.) W. A. MOFFETT,
"*Rear Admiral, U. S. N.,*
"*Chief of Bureau of Acronautics.*"

As to the statutory right of Lieutenant Holcombe and other officers detailed with him to the international air races to be reimbursed for living expenses while on this duty, this right has always been recognized by the Comptroller General. The most recent decision received in this connection is that rendered by the Comptroller General January 2, 1925; No. A-6677, in the case of Captain H. R. Stanford (CEC), U. S. N., who was on duty in Washington, D. C., and was ordered to Fort Worth Texas, and to perform repeated travel between Fort Worth and other points in that vicinity.

While the main question involved in this decision was whether payment could be made on a mileage basis, in lieu of actual expenses only one round

trip being performed, the principle involved therein was that an officer on duty in Washington and ordered to another point for temporary duty and who performed repeated travel from his temporary duty station to other points was entitled to reimbursement.

The right of an officer to receive reimbursement for repeated travel from temporary duty stations was also outlined by the Comptroller General in 2 Comp. Gen. 673, wherein it is stated:

"An officer is not in a travel status after arrival at a temporary duty station and is not entitled to reimbursement for any expenses of subsistence at such temporary duty station. Orders to travel repeatedly from and return to his temporary duty station may be issued to him, as are orders to him to travel repeatedly from and return to his permanent station; that is, whether the duty station is temporary or permanent is not material in this connection."

Though the order directing Lieutenant Holcombe to duty with the naval air detail contained the formula "This is in addition to your present duties" it may be readily seen that while on duty at St. Louis and Bridgeton, Mo., the officer had no duties to perform in Washington, D. C. His duties at the former places constituted temporary duty and were not incidental to travel. 26 MS. Comp. Gen. 742, October 17, 1923.

The orders directed the officer to report at Bridgeton, Mo., and to perform repeated travel to and from St. Louis; yet, it is admitted in the application for review that the officer in charge of the air detail had his headquarters in the offices of the St. Louis Aeronautic Corporation in the Chamber of Commerce Building in St. Louis, and that Lieutenant Holcombe had very important administrative duties to perform at those headquarters. The rule is well settled that the terms of an order given for any purpose can not determine the character of travel or of service performed, but that question must be determined from the facts in each case. *Curry* v. *United States*, 47 Ct. Cls. 393, 398; *McGovern* v. *United States*, 36 *id.* 63; *Leach* v. *United States*, 44 *id.* 132; *Doyle* v. *United States*, 46 *id.* 181; *McCauley* v. *United States*, 50 *id.* 105.

A substantial portion of Lieutenant Holcombe's duties with the air detail was necessarily performed in St. Louis. The travel expense voucher, which does not appear to have been approved by the Secretary of the Navy as required by Art. 1812 (2), Navy Regulations, 1920, shows that of the 35 days, September 6 to October 10, 1923, the officer was on duty at St. Louis and Bridgeton, Mo., he had his breakfast, luncheon, and dinner in St. Louis on 21 days, and on the other days had breakfast and dinner at that place; it further shows he made a total of only 17 trips from St. Louis to Bridgeton and return.

It is clear that both Bridgeton and St. Louis were within the field or area of the officer's temporary duties. The fact that his station had two offices did not make his status that of an officer on duty at two stations; it merely required the performance of scattered duties at his temporary station. The order directing repeated travel be-

tween the two offices does not shift the burden of meeting the officer's expenses for subsistence to the Government. He would have incurred these expenses if there had been but one office at his temporary station. It does not appear that his subsistence expenses would have been less had his duties been confined either to St. Louis or to Bridgeton, Mo. In sections 5 and 6 of the act of June 10, 1922, 42 Stat. 628, as amended by the act of May 31, 1924, 43 Stat. 250, 251, Congress has provided the allowances it deemed proper to assist an officer in meeting his expenses for lodging and subsistence while on duty at either a temporary or a permanent station. Those allowances may not be augmented under section 12 of the act. Of course, if expense is incurred for car fare in traveling between two offices within the field of an officer's duty, he may be reimbursed for that expense; in the case of Lieutenant Holcombe it appears he was transported to and from Bridgeton without personal expense. See in this connection 13 Comp. Dec. 390; the case of *Willett*, 78 MS. Comp. Dec. 1125, September 29, 1916; the case of *Gray*, 79 *id.* 880, December 16, 1916; and the case of *Cotten*, 1 D. M. Comp. Gen. 1162, March 13, 1924. For an application of the same principle see 19 Comp. Dec. 17; 25 *id.* 575; 1 Comp. Gen. 629. The case is easily distinguishable from those decided in 2 Comp. Gen. 673 and 41 MS. *id.* 24, January 2, 1925, which are cited in application for review.

It must be held that payments for travel expenses made to Lieutenant Holcombe by Commander Pyne were without authority in law and the settlement wherein credit for those payments was denied is accordingly sustained.

III. A–5440. Adolphus W. Gorton, lieutenant, United States Navy.

Lieutenant Gorton has submitted directly to this office his claim for traveling expenses in the sum of $172, said to have been incurred by him during the period July 24, 1923, to August 14, 1923, inclusive. That sum was paid to him by check No. 14335, dated January 7, 1924, but by settlement No. M–8688–N, dated July 16, 1924, credit therefor was denied in the disbursing account of Commander F. G. Pyne, Navy disbursing officer, and a charge for the amount was subsequently entered in claimant's account by Lieut. R. A. Vollbrecht (S. C.), United States Navy, United States Naval Air Station, Anacostia, D. C., September 15, 1924.

While it is presented irregularly, there is sufficient information at hand to permit of a final disposition of the claim.

Of the sum claimed, $2.75 is for " dinner " and " supper at Washington, D. C.," on July 30, 1923, and the balance is for expenses incurred for lodging, meals, tips, etc., at Philadelphia, Pa., while the officer was on " temporary duty " at that place " in connection with the tests of the Navy NW–1 racing plane," under orders dated July

2, 1923. The orders were issued claimant at his permanent duty station, Naval Air Station, Anacostia, D. C., but clearly enjoined the performance of no duty at the permanent station while on duty at the temporary station. Repeated travel was neither authorized nor directed in the orders. Upon the completion of the temporary duty at Philadelphia, Pa., and when directed by the commandant fourth naval district, he was to proceed to New York, N. Y., and take passage to Southampton, England, via the steamship *Leviathan*, sailing on or about August 18, 1923.

Under date of July 10, 1923, there was issued to claimant an order in the customary form purporting to be signed by direction of the Chief of the Bureau of Navigation, which order after setting out that the Secretary of the Navy had determined that repeated travel between Philadelphia, Pa., and Washington, D. C., would be appropriate, authorized the performance of such travel as should be necessary " in connection with matters connected with the Schneider Cup Races," in which claimant was subsequently to participate, and authorized reimbursement of expenses incurred in the execution of the order, not exceeding $7 per day.

In an indorsement on his orders, claimant certifies he reported to the commandant fourth naval district, at 9 a. m. July 24, 1923, and to manager naval aircraft factory, at 9.30 a. m. the same date; he left Philadelphia, Pa., at 9 a. m. July 30, 1923, and arrived at Anacostia, D. C., at 12.30 p. m.; left Anacostia, D. C., at 8 p. m. and arrived in Philadelphia, Pa., at 11.40 p. m. same date. The temporary duty at Philadelphia was completed August 14, 1923, and claimant departed that place at 3 p. m., arriving at Anacostia, D. C., at 6.45 p. m. the same date, though he was not formally detached until August 17, 1923, when it appears he was en route to New York City. The orders of July 2, 1923, directed him to proceed to the latter place for other duties upon completion of the temporary duty at Philadelphia, and it does not appear from the orders that it was necessary for him to return to Anacostia, D. C., before proceeding to New York, N. Y.

In his letter of September 17, 1924, presenting his claim, Lieutenant Gorton explains his trips to Anacostia as follows:

> During the period in question, flight and ground tests of the NW–2 seaplane, together with speed runs and radiator tests were being conducted at the naval aircraft factory in Philadelphia. The propeller for this plane was sent to Anacostia, D. C., for testing and balancing, and whirling tests. My presence at these tests, inasmuch as I was detailed as the pilot of the plane, was obviously necessary at both places. Just prior to my sailing for England in connection with the racing of this plane, it was necessary for me to again return to Anacostia to finish uncompleted test work in connection with my regular duties at the air station at the latter place. It appears, therefore, that the necessity for the repeated travel is clearly set forth. * * *

It is noted claimant refers to seaplane NW–2, whereas his orders of July 2, 1923, refer to racing plane NW–1, but the discrepancy is not regarded as of consequence for purpose of this consideration.

Stating the situation briefly, claimant reported to Philadelphia, Pa., July 24, 1923, under orders for temporary duty and with authority, in case it should be necessary in connection with his duty, to travel to and from Washington, D. C. While in the performance of the temporary duty he made one trip to Anacostia, D. C., and return on July 30, 1923, which he asserts was necessary and required by his orders.

If this be correct his claim is not strengthened thereby. Actual and necessary expenses may only be allowed when two or more round trips are performed. *Willets* v. *United States*, 38 Ct. Cls. 534; 11 Comp. Dec. 43; 2 Comp. Gen. 72; 3 *id.* 566. Furthermore, if it could be established by claimant that he necessarily performed repeated travel under orders to and from Washington, D. C., there is no authority to allow him actual and necessary expenses incurred at his temporary and paramount duty station, Philadelphia, Pa.

The order upon which he chiefly relies to sustain his claim is dated October 18, 1923. This order also purports to be signed by direction of the Chief of the Bureau of Navigation; it expressly revoked the order of July 10, 1923, declared that the Secretary of the Navy had determined repeated travel between Anacostia, D. C., and Philadelphia, Pa., would be appropriate, and authorized claimant to perform such travel as might be necessary in connection with matters connected with the Schneider cup races. The order by its terms terminated August 15, 1923, more than two months prior to its issuance. Moreover, claimant had completed all duty in connection with the cup races and returned to his permanent station, Anacostia, D. C., on October 15, 1923.

There is an unsigned notation on the voucher upon which payment was made to claimant that approval by the Secretary of the Navy for the allowances paid is contained in abstract of the accounts of the Navy disbursing officer for the third quarter, 1924, but this is immaterial.

The order of October 18, 1923, intended to create for claimant a duty status which did not exist in fact; to recognize him as having been assigned to duty at Anacostia, D. C., that required him to perform repeated travel to and from Philadelphia, Pa.; and thus the United States would be obligated to defray his subsistence expenses for the period he was on temporary duty at the latter place.

As hereinbefore stated, the purpose of the several acts authorizing the Secretary of the Navy to prescribe actual and necessary expenses for repeated travel was to prevent an abuse which had

theretofore existed whereby officers traveling repeatedly between two stations upon a mileage basis had put the Government to unwarranted expense. For 25 years the purpose has been recognized in practice, and that practice will not be subverted at this late date by admitting the validity of an order issued under the circumstances that the order of October 18, 1923, was issued to claimant.

By decision rendered October 17, 1923, 26 MS. Comp. Gen. 742, it was held that claimant was not entitled to traveling expenses of $136.65 while on temporary duty in Philadelphia, Pa., under orders almost identical to his orders of July 2, 1923. Such decision can not be overcome by the arrangement in this case now appearing.

For the reasons stated, his claim must be disallowed.

(A–7769)

SETTLEMENTS, PARTIAL—CLAIMS, STALE

Where the Commissioner of Internal Revenue disallowed a claim for refund of a tax collected under the circulation tax act of February 8, 1875, 18 Stat. 311, and the claimant brought suit for only a part of the claim and recovered judgment for the amount of the suit, such recovery is a settlement of the whole demand and a subsequent application for the remainder will be disallowed.

Where a claimant has slept on its rights for 40 years the claim becomes stale, and the presumption arises that it was never valid or that it has already been paid.

Decision by Comptroller General McCarl, March 25, 1925:

Zion's Cooperative Mercantile Institution, of Salt Lake City, Utah, applied January 9, 1925, for review of settlement No. O–17889, dated January 2, 1925, disallowing its claim for $6,810.92. This is a tax claim arising under section 19 of the circulation tax act of February 8, 1875, 18 Stat. 311, which provides:

> That every person, firm, association other than national bank associations, and every corporation, State bank, or State banking association shall pay a tax of ten per centum on the amount of their own notes used for circulation and paid out by them.

Claimant paid a circulation tax of $16,810.92 for the years 1878 and 1879 under the above statute on certain obligations in the following form:

Salt Lake City, October 6, 1876.

Pay David O. Calder or bearer five dollars in merchandise at retail.

Five. Five.

To H. D. Clawson,
Sup't. Z. C. M. I.

G. H. Snell.

Subsequently claim for refund was made to the Commissioner of Internal Revenue for the entire amount of the tax paid, which was by him rejected. Claimant then brought suit in the Federal court of the Territory of Utah for $10,450 of the total tax paid and

obtained judgment for the amount in suit, from which an appeal was taken to the Supreme Court of the United States, where the judgment of the trial court was affirmed at the October term, 1883, in *Hollister, Collector*, v. *Zion's Cooperative Mercantile Institution.* 111 U. S. 62. In compliance with the decision and judgment of the court, the Commissioner of Internal Revenue in the year 1884 refunded the amount recovered with interest.

Claimant having slept upon whatever equities it may have had for 40 years, every presumption is now against recovery. Claimant's long silence is significant and brings this claim clearly within the rule of stale claims.

In a similar case it was held in 4 Comp. Dec. 276 that—

When a claimant has slept on his rights for more than thirty-two years he has been guilty of laches, and a presumption arises that the claim was never valid or that it has already been paid.

Claimant contends that the statute of limitations does not run against the right of the Commissioner of Internal Revenue to make refundment in this case which may be conceded, and it may also be conceded there is no statutory inhibition against the right of the General Accounting Office to consider the claim at this time; but it is settled law that accounting officers have no right to settle stale claims. *Waddel* v. *United States*, 25 Ct. Cls. 323; *Hume* v. *Beale*, 17 Wall. 336; *Marsh* v. *Whitmore*, 21 Wall. 178; *Sullivan* v. *Kennebec R. R.*, 94 U. S. 906; *Godden* v. *Kimmel*, 99 U. S. 201; *Speidel* v. *Henrici*, 120 U. S. 377.

But be this as it may, Comptrollers of the Treasury have frequently held that where a claimant has heretofore presented and has been allowed a claim for a part of an entire demand arising out of the same service and in the same right such partial allowance is a settlement of the whole demand, and a subsequent application for the remainder will be disallowed. 3 Comp. Dec. 128; 4 *id.* 328.

This question was settled by the Supreme Court of the United States in the case of *Baird* v. *United States*, 96 U. S. 430, where it was held that a recovery of judgment in the Court of Claims for part of what was due at the time suit was brought was a bar to a subsequent suit for the residue. *Bartels* v. *Schell*, 16 Fed. Rep. 341; *Gearing* v. *United States*, 48 Ct. Cls. 25; *Joice* v. *United States*, 51 Ct. Cls. 446; *Poole Engineering Co.* v. *United States*, 57 Ct. Cls. 235; *Philadelphia Steam Heating Co.*, 258 U. S. 120.

Since suit was only brought for a part of the original claim, it must be held that, except as to the amount in suit, claimant accepted the decision of the Commissioner of Internal Revenue as final.

For the above reasons the disallowance of this claim is affirmed.

(A-6693)

CONTRACTS, INCREASED COSTS—PURCHASES, OPEN-MARKET—PAYMENTS, DISCOUNT

Where a contract for the furnishing of fuel oil at a specified unit price per barrel, "discount 1 per cent 10 days," provided that in case of default to make deliveries the United States would make purchases in open market charging any excess cost because of such purchases to the defaulting contractor, the latter, in the absence of any provision in the contract that said discount was to be taken into account in determining such excess cost, is liable for the amount of the open-market purchases in excess of the contract unit price for the oil.

Where a contract provided for delivery f. a. s. pier, via barge, and contained no provision for keeping the water-way clear in the slip or dock, the United States is not legally liable for any expense incurred by the contractor in securing the services of a tug to clear a way through ice in the slip or dock in order to make delivery by barge in tow.

Decision by Comptroller General McCarl, March 26, 1925:

Request has been made for a review of settlement, per Certificate No. U. S. 606-W, dated October 1, 1924, of the claim (No. COL-048614) of the United States against Dingwall Petroleum Products Corporation, wherein said corporation was found indebted to the United States in the sum of $466.95, representing loss of 1 per cent discount of defaulting contractor's price for furnishing fuel oil under contract No. 11103, dated November 22, 1922, amounting to $366.95, and $100 charged for service of tug *A. A. Moran*, used in connection with contract No. 11104, dated November 22, 1922.

The facts on which said settlement was based appear to be as follows:

Under contract No. 11103, in which Maj. A. M. Wilson, Quartermaster Corps, was the contracting officer on behalf of the United States, the corporation was to furnish to Army Supply Base, Boston, Mass., 24,500 barrels (42-gallon barrels) of Bunker "C" fuel oil at the unit price of $1.61 per barrel, "Terms: 1 per cent 10 days," deliveries to be made as called for between November 23, 1922, and June 30, 1923, "Inspection at origin as to quality," "Bond waived," and payment to be made by finance officer, United States Army, at Fifty-eighth Street and First Avenue, Brooklyn, N. Y., to whom invoices were to be rendered. The said contract was entered into "In accordance with circular proposal RM-626-23-81, (Bid No. 4), dated November 4, 1922," the advertisement to which called for proposals subject to stated conditions and instructions, among which were the following:

The bidder is invited to state the discount which will be allowed if payment of invoice is made within ten (10) calendar days, within twenty (20) calendar days, and within thirty (30) calendar days, from and including date of delivery of material and supplies to carrier, when material and supplies are inspected and accepted at point of origin, or from and including date of delivery at destination, or delivery to the Government at a port of embarkation, when material and supplies are inspected and accepted at these points * * *.

* * * * * * *

If complete delivery is not made within the time herein specified, the United States shall have the option (a) of purchasing the articles that remain to be supplied, elsewhere, charging any excess in cost to the contractor, or (b) of cancelling the order.

And the proposal provided:

* * * In the event of failure on the part of the contractor either to accept award at the price bid or to furnish material strictly in accordance with the provisions of the contract or order, the Government reserves the right to procure suitable material from other sources in a manner deemed for its best interests, charging any loss or damage occasioned thereby to the contractor whose default makes such action necessary.

Call being made upon the contractor January 11, 1923, for delivery of 1,200 barrels of fuel oil under the contract, it developed that contractor was unable to comply therewith, and it was agreed that purchase be made in open market against the contract, the contractor to be charged with any excess cost. Open-market purchase was accordingly made of 1,188.94 barrels at $1.70 per barrel, amounting to $2,021.20, and the contractor was advised thereof January 24. Contractor remitted January 29 its check for $107 as the difference between its contract price of $1.61 per barrel and the purchase price of $1.70 per barrel on the 1,188.94 barrels. February 1 the depot quartermaster, Brooklyn, N. Y., acknowledged receipt of the check, stated it was believed the matter of discount had been overlooked, and requested remittance of an additional amount to cover 1 per cent discount of contract price of $1.61 per barrel on the 1,188.94 barrels; also, that in all future deliveries the discount be taken into consideration. February 3 contractor replied that the contract price was $1.61 per barrel, that the 1 per cent discount was strictly a concession for payment of invoice within 10 days, and that cash discounts are quite common practice, but never considered as being contract quotations. February 15 the quartermaster supply officer, Brooklyn, N. Y., took up the matter of the discount with the Quartermaster General.

Further open-market purchases were made against the contract, the defaulting contractor in each instance making remittance of the excess of cost of open-market purchase over its contract price of $1.61 per barrel, with the exception of remittance in the case of purchase order 5926, of May 8, 1923, from which it withheld $100 claimed to be due it under contract No. 11104.

In making the open-market purchases no discount was asked of the dealers by the Government agents nor was any discount offered by the dealers. The purchase orders placed with the dealers specified that terms were net.

With reference to the discount, the Judge Advocate General stated July 30, 1923:

The question here presented is whether the United States has, by reason of the contractor's default, suffered loss. If so, how much is that loss? It is evi-

dent that the Government has been required to pay more than the contract price, and therefore the loss may be computed as the difference between what the Government paid and what it would have been required to pay had the contractor fulfilled his engagement. This is a question of fact for computation from the evidence.

* * * It is recommended that the Quartermaster General be advised to compute the loss which the United States has sustained, including the one per cent discount for payment within ten days, and after demand and refusal by the contractor to make up this loss he should certify that amount for collection.

September 15, 1923, the quartermaster supply officer, Brooklyn, N. Y., requested the contractor to remit $366.95 to cover 1 per cent discount of its contract price as applied to the purchases made in open market against its contract, "as per attached tabulation"; and further:

It is also noted that you are withholding a sum of $100.00, representing a charge for the detention of tug and breaking ice in the slip at this station. As this office can not effect settlement of a claim of this nature, it is requested that remittance be also made in this amount. If you still consider this a just charge, it is suggested that you present a claim to the General Accounting Office, War Department Division, Washington, D. C., setting forth all facts.

October 18, 1923, contractor replied, contending that the Government's claim for the discount was not justified and that the $100 was justly withheld as due it under contract No. 11104.

December 14, 1923, the Chief of Finance transmitted the papers in the case to this office with the recommendation that under the provisions of section 236, Revised Statutes, as amended by section 305, act of June 10, 1921, 42 Stat. 24, an account be stated and necessary steps taken to collect the sum of $466.95 due the United States by the defaulting contractor.

The contract specified the unit price to be $1.61 per barrel, and the provision, "Terms: 1 per cent 10 days" is, in the absence of any other expressed qualification, construed to mean that allowance of the discount was conditioned upon payment being made to the contractor within 10 days from receipt of invoice. While it would be the duty of the Government's agents concerned to endeavor so to make payment that the Government would get the benefit of the discount, there could be no legal presumption that invoices would be paid within 10 days from their receipt, which was made a condition precedent to the allowance of the discount. Payment before delivery and acceptance of the fuel oil would be unlawful and circumstances could possibly arise that would make impracticable the payment of invoices within the discount period. The contract did not provide as an element of loss or damage to the Government, in case of default of the contractor, that the discount of 1 per cent would be considered, nor did the Government's agents, in mitigation of such loss or damage, make any attempt to secure a like discount from the dealers from whom the purchases were made in open market against the contract. It must be held, therefore, that

under its contract the defaulting contractor became liable to the Government for the excess cost of such open-market purchases over the cost computed on the basis of the defaulting contractor's unit price of $1.61 per barrel. Such excess cost has been paid by the defaulting contractor, less $100, which is has withheld as due it under contract No. 11104.

Under contract No. 11104, dated November 22, 1922, in which Capt. C. J. W. Blake, Quartermaster Corps, was the contracting officer on the part of the United States, the contractor was to furnish fuel oil f. o. b. to Arms Supply Base, Brooklyn, N. Y., "via barge," as called for between November 23, 1922, and June 30, 1923. It appears that on invoice No. 597, dated March 5, 1923, against the contract a charge of $100 was made for detention of tug *A. A. Moran* and in breaking a passage through the ice in slip or dock to make barge delivery at pier. Contractor stated, April 4, 1923, that the charge was not unusual under the conditions; that—

> * * * A customer calling for barge deliveries f. a. s. his dock is expected to provide open water for such delivery or assume the expense of clearing a passage. It is a fact that on this delivery the tug was delayed five hours, and we were required to pay additional amount of $100 for the service.

Payment of the $100 so charged was refused by the administrative officer.

According to report of the quartermaster supply officer, Brooklyn, N. Y., November 27, 1923, the tug was not secured by the contractor primarily for the purpose of breaking ice, but was used in towing the barge from the refinery to the Army base.

In letter of October 18, 1923, to quartermaster supply officer, Brookyln, N. Y., contractor stated in part:

> At the time the barge arrived you had admittedly no means or opportunity in clearing a passage. The tugging company is and was in no way interested in breaking ice and clearing a passage. That they did so was plainly to the advantage of the Government, as it saved your office considerable expense aside from the possibility of serious consequences because of your lack of oil.
>
> With the only idea of rendering service under this serious condition and because of your inability to effect a passage the service of the tug was indispensable.

The contract provided for delivery f. a. s. pier. It contained no provision in regard to keeping the waterway clear for delivery by barge, nor was the expense in question incurred upon the authority of the Government's agents. It does not, therefore, appear that the United States is under any legal obligation to pay said expense.

Upon review the settlement is modified to show that the sum due the United States is $100 (instead of $466.95), which amount should be remitted to this officer promptly by the debtor.

(A-7500)

CONTRACTS. TERMINATION—WAR DEPARTMENT

Where, in the settlement of a cancelled contract, the contractor released the United States from all claims, demands, etc., growing out of the contract except the right to prosecute a claim arising thereunder already filed under the Dent Act of March 2, 1919, 40 Stat. 1272, the fact that the reserved item was not properly for consideration under the Dent Act does not preclude the reopening of the prior settlement and disposing of the item reserved as properly coming under the contract.

Where a contractor agrees to furnish articles for a stipulated price, the United States is not ordinarily liable for the cost of a sample article, made by the contractor for the purpose of demonstrating his ability to perform the work.

Decision by Comptroller General McCarl, March 26, 1925:

The American Gas Accumulator Co. requested, January 14, 1925, review of settlement No. 055647-C, dated December 20, 1924, wherein there was allowed said company the sum of $10,192.50, as payment for 150 A-50 acetylene cylinders furnished the Bureau of Lighthouses' depot, Tompkinsville, N. Y., under contract dated May 13, 1924, from which amount there was deducted $2,845.26 on account of an alleged overpayment to said company in connection with a settlement based upon certain War Department contracts.

It is contended that the contractor had not been overpaid on account of the War Department contracts and that the action taken in the settlement in making the charge against an amount otherwise admitted to be due the company was therefore improper.

Under date of March 11, 1918, order 20747 was given the claimant company for 1 C. C. interrupter gear complete, for $52.36, for immediate delivery. The other contracts involved in the settlement in connection with which the alleged overpayment was made are as follows: May 7, 1918, contract 3821 for 1,000 double Lewis gun yokes, at $18.08 each, and 1,000 Duplex trigger controls, at $7.61 each, to be delivered within 120 days after receipt of order; May 7, 1918, contract 3826 for 1,000 single Lewis gun yokes, at $11.54 each, to be delivered within 120 days after receipt of order; and June 8, 1918, contract 4013, for 750 C. C. interrupter gears at $85.30 each, 200 to be delivered by July 1, 1918, and 200 per week thereafter until complete.

With the exception of two sample interrupter gears claimed to have been delivered in April, 1918, under order of March 11, 1918, for one such gear, and the trigger controls under contract of June 8, 1918, delivered in December, 1918, none of the material contracted for was ever delivered to the Government, performance under the other contracts having been suspended as a result of the armistice of November 11, 1918. By a termination settlement agreement dated June 8, 1919, it was agreed that the United States should pay the contractor the sum of $49,732.49 as the balance due in full settlement

under the order and contracts, with a release and reservation as follows:

> The Contractor does hereby for itself, its successors and assigns, remise, release and forever discharge the Government of and from all and all manner of debts, dues, sum or sums of money, accounts, reckonings, claims and demands whatsoever due or to become due in law or in equity under or by reason of or arising out of said original contract, except that nothing hereinbefore stated shall be construed to release the contractor's right to prosecute a claim already filed under the Act of March 2, 1919, for experimental work in the development of interrupter gears; which work was performed under an informal contract.

The claim thus specifically reserved from the operation of the release theretofore had been presented by claimant as item (1) of its claim for $53,452.91 which formed the basis of the settlement of June 8, 1919. Said claim was itemized as follows:

(1) Actual cost of materials, labor and overhead applicable to two interrupter gears	$2,681.80	
10%	268.18	
		$2,949.98
(2) Raw materials on hand		4,359.14
(3) Partly finished products on hand	33,720.87	
(4) Cost of special tools necessary and usable for these contracts only	8,228.03	
Together	41,948.90	
(5) 10% allowance on work in progress	4,194.89	
		46,143.79
		53,452.91

The amount allowed on said claim under the settlement of June 8, 1919, was paid by Capt. W. B. Pettus, A. S. A., on voucher 883, of his account for the month of July, 1919. The amount thus paid was made up of the following:

Item 1. Raw materials on hand	$4,359.14
Item 2. Partly finished products on hand	33,720.87
Item 3. Cost of special tools necessary and usable for these contracts only	8,228.03
Item 4. 10% allowance on item 2	3,372.09
Item 5. Payment for sample gear, order 20747	52.36
	49,732.49

It will be noted that the settlement disallowed the amount claimed as 10 per cent on item (4) of the claim, eliminated entirely item (1) of the claim and allowed an item of $52.36 which had not been claimed.

The order 20747 of March 11, 1918, called for the delivery of only one interrupter gear at a price of $52.36, but the contractor manufactured and delivered two such gears neither of which had been paid for when, due to the armistice, work was suspended on all contracts. In submitting claim by reason of the cancellation of the contracts, the vice president and general manager of the company, in an affidavit dated March 31, 1919, with respect to these two gears averred that:

No payment has been received on account of the articles referred to above, and it was arranged between this contractor and officers of the Bureau of Aircraft Production at Washington, D. C., that the cost of these two experimental Interrupter Gears should be and actually was covered by the fixed contract price for 750 C. C. Interrupter gears contracted for under Contract No. 4013, Order No. 21273, dated June 8 and 5, 1918, respectively.

It thus appears that the formal contract of June 8, 1918, was intended to supersede the informal agreement of March 11, 1918. That is to say, as a part of the consideration for the price of $85.30 per gear as fixed in the contract of June 8, 1918, for the 750 gears, the contractor waived and released its right to claim payment for either of the two gears furnished under the order of March 11, 1918. It is clear that if no contract for interrupter gears had been entered into after the order of March 11, 1918, for the sample gear, claimant would have been entitled to no reimbursement or compensation on account of the expenses incurred for experimental work or otherwise in the production of said gear other than on the basis of the stipulated price of $52.36. *United States* v. *Steamship Company*, 239 U. S. 88, also *Duesenberg Motors Corp.* v. *United States*, 260 U. S. 115, and *Baltimore and Ohio Railroad Co.* v. *United States*, 261 U. S. 166. It is also clear that if the contract of June 8, 1918, for the 750 gears had gone on to completion and the 750 gears had been paid for at the agreed price of $85.30 each, the contractor would have had no claim on account of the two gears delivered, or on account of the expenditures made by it in connection with the experimental work in the development of the gears. But as the said contract of June 8, 1918, was terminated by the Government before any of the 750 gears was furnished or paid for, it would have been proper for the claims board in the termination settlement of June 8, 1919, to have considered and allowed, as a part of the contractor's expenditures in connection with said contract, the amount shown to have been expended in the experimental work; but said board, presumably without a full knowledge of all the facts, advised claimant that said item was not for consideration by it as a claim arising under the formal contract of June 8, 1918, but should be presented to another board for consideration as a claim under the Dent Act of March 2, 1919, 40 Stat. 1272. Accordingly, the item was eliminated from the settlement of June 8, 1919, and the reservation with respect thereto was made as hereinbefore shown.

When the claim for this eliminated item was considered by the Board of Contract Adjustments under the act of March 2, 1919, relief was denied on the ground that as the informal agreement of March 11, 1918, was merged in the subsequent formal contract of June 8, 1918, for 750 C. C. interrupter gears no allowance could be

made under said act for the experimental work. The matter was thereupon referred to the Air Service Claims Board with the suggestion that the settlement agreement of June 8, 1919, be reopened for consideration of this item as a part of the claim under the formal contract, which suggestion that board refused to adopt. But upon appeal to the Secretary of War it was ruled that the expenditures in connection with the experimental work were properly to be considered as expenditures in preparation for carrying out of the formal contract of June 8, 1918, and the papers were then returned to the Air Service Claims Board for necessary action in accordance with the ruling of the Secretary of War; and the action of that board on the matter is embodied in the agreement of July 31, 1920, which provided for payment of $2,897.62, the amount then claimed, which was the amount originally claimed less the amount of the item of $52.36 paid in the settlement of June 8, 1919. Payment of said amount, less $17.73 due the United States for shortage of materials, or $2,879.89, was made by Maj. C. E. Gray, Quartermaster Corps, on voucher No. 2006, of his accounts for August, 1920, but credit for the payment was disallowed in the audit of Major Gray's accounts, and the amount thereof, less $52.36 as the contract price for the second gear delivered under order 20747, or $2,845.26, was deducted, in the settlement here under review, from the amount allowed for the acetylene cylinders furnished the Lighthouse Service.

Upon the facts now appearing it would seem to be clear that the first board erred in holding that the item of $2,949.98 was not for consideration by it and was for consideration as a Dent Act claim. Therefore the settlement agreement of July 31, 1920, made under the direction of the Secretary of War in the nature of a supplement to the settlement agreement of June 8, 1919, would appear to have been authorized unless the release hereinbefore quoted from the settlement agreement of June 8, 1919, precluded such action. Said release specifically reserved to claimant the "right to prosecute a claim already filed under the act of March 2, 1919, for experimental work in the development of interrupter gears." It will be noted that while the claim with respect to which the reservation is made is described as "a claim already filed under the act of March 2, 1919," the reservation of the right to prosecute said claim is not limited to a right to prosecute under said act. Hence, it would appear that the release was intended to and did reserve to the claimant the right to have its claim on account of the experimental work considered by any board or tribunal having jurisdiction or authority to consider and adjust said claim, and this appears to have been the view of the War Department as well as of the claimant. See in this connection case of *Gem Hammock and Fly Net Company* v. *United States*, decided by the Court of Claims January 26, 1925, No. C–963.

It follows, therefore, that the payment of $2,879.89 made by Major Gray under the settlement of July 31, 1920, was correct and proper, and accordingly the amount of $2,845.26 withheld from claimant in the settlement of December 20, 1924, will now be allowed and paid to it.

The check for $7,347.24 transmitted with the request for review will be returned to claimant and check for $2,845.26 in favor of claimant will issue in due course.

(A-8425)

POSTAL SERVICE EMPLOYEES—PROMOTION OF POST-OFFICE INSPECTORS UNDER THE ACT OF FEBRUARY 28, 1925

Post-office inspectors previously in grade 5, $3,200 per annum, as fixed by the act of June 5, 1920, 41 Stat. 1045, automatically placed in grade 4, $3,500 per annum, as fixed by the act of February 28, 1925, 43 Stat. 1055, are entitled to credit for all satisfactory service in either grade both before and after January 1, 1925, for the purpose of determining the right to promotion to grade 5, $3,800 per annum, as fixed by the later act, and the promotion may be made retroactively effective from January 1, 1925, if the inspector has had the required year's satisfactory service prior to that time.

Whether a post-office inspector has had satisfactory service entitling to promotion from grade 4 to grade 5 of the automatic grades established under the act of February 28, 1925, 43 Stat. 1055, is a matter of administration. There is nothing in the statute compelling the administrative office to make promotions on the basis of prior certificates of efficiency as to the service of individual inspectors or prohibiting a review of efficiency ratings made prior to January 1, 1925, as to service rendered prior to that time.

Comptroller General McCarl to the Postmaster General, March 26, 1925:

I have your letter of March 9, 1925, requesting decision whether post-office inspectors previously in grade 5 at $3,200 per annum, as fixed by the act of June 5, 1920, may, in addition to being automatically placed in grade 4 at $3,500 per annum as of January 1, 1925, under the provisions of the act of February 28, 1925, be given credit for satisfactory and efficient service in former grade 5 prior to January 1, 1925, for the purpose of promotion to the new automatic grade 5 at $3,800 per annum under the provisions of the later act.

Section 2 of the act of February 28, 1925, 43 Stat. 1055, provides as follows:

> That post-office inspectors shall be divided into six grades, as follows: Grade 1—salary, $2,800; grade 2—salary, $3,000; grade 3—salary, $3,200; grade 4—salary, $3,500; grade 5—salary, $3,800; grade 6—salary, $4,000, and there shall be fifteen inspectors in charge at $4,500: *Provided*, That in the readjustment of grades for inspectors to conform to the grades herein provided, inspectors who are now in present grades 1 and 2 shall be included in grade 1; inspectors who are now in present grade 3 shall be included in grade 2; inspectors who are now in present grade 4 shall be included in grade 3; inspectors who are now in present grade 5 shall be included in grade 4; inspectors who are now in present grade 6 shall be included in grade 5; and inspectors who are now in present grade 7 shall be included in grade 6: *Provided further*, That inspectors shall be promoted successively to grade 5 at the beginning of the quarter fol-

lowing a year's satisfactory service in the next lower grade, and not to exceed 35 per centum of the force to grade 6 for meritorious service after not less than one year's service in grade 5; and the time served by inspectors in their present grade shall be included in the year's service required for promotion in the grades provided herein, except as to inspectors in present grade 1.

Inspectors in old grade 5, $3,200 per annum, were automatically placed in new grade 4, $3,500 per annum effective on January 1, 1925. In other words, grade 5 (old) and grade 4 (new) are considered as identical on and after January 1, 1925. The statute expressly provides that "The time served by inspectors in their present grade shall be included in the year's service required for promotion in the grades provided herein, except as to inspectors in present grade 1." Under this provision the inspectors in grade 5 (old) 4 (new) are entitled to credit for all satisfactory service in that grade or grades, whichever way it may be considered, both before and after January 1, 1925, for the purpose of determining the right to promotion to new grade 5, $3,800 per annum, and the promotion may be made retroactively effective from January 1, 1925, if the inspector had had the required year's satisfactory service prior to that date.

The service entitling inspectors to automatic promotion under the prior act of June 5, 1920, 41 Stat. 1045, was designated as "satisfactory and efficient" and the service entitling the inspectors to automatic promotion under the new act of February 28, 1925, is designated as "satisfactory."

You ask the following question relative thereto:

* * * In the promotion of these employees to the new grade 5, at $3,800 per annum, must the record of satisfactory service already in existence be taken as final in determining their right to promotion or, in view of the passage of the new legislation changing the basis on which promotions are to be made, may it be determined anew whether or not the services of these employees have been "satisfactory" in the sense of entitling them to promotion to the new grade 5, at $3,800 per annum, under the terms of the present law.

It must be assumed that the "satisfactory" service required under the new act was intended to be of no higher standard than the "satisfactory and efficient" service required under the prior statute. It is understood that no standards have been fixed by regulation of the Post Office Department in this regard, but that the matter has been determined in individual cases upon completion of the year's service. This determination of whether service is satisfactory or not is a matter of administration, and there appears nothing in the statute of February 28, 1925, compelling the administrative office to make promotions on the basis of prior certificates of efficiency as to the service of individual inspectors or prohibiting a review of efficiency ratings heretofore made. The matter for determination in each case is whether the service has or has not been satisfactory for the required period.

(A-8477)

CLASSIFICATION OF CIVILIAN EMPLOYEES—UNIT OF APPROPRIATION—DEPARTMENT OF COMMERCE

The appropriation item "Wireless communication laws," under the major heading "Bureau of Navigation," Department of Commerce, act of May 28, 1924, 43 Stat. 229, constitutes a separate and distinct appropriation unit within the meaning of the average provision restricting payments for personal services under the Department of Commerce in accordance with the classification act of 1923. 4 Comp. Gen. 342, modified.

Comptroller General McCarl to the Secretary of Commerce, March 27, 1925:

I have your letter of March 11, 1925, requesting decision whether the appropriation item "Wireless communication laws," provided under the major heading "Bureau of Navigation" in the act of May 28, 1924, 43 Stat. 229, constitutes a "bureau, office, or other appropriation unit" within the meaning of the average provision restricting payments for personal services in the District of Columbia for the fiscal year 1925, in accordance with the classification act of 1923.

The decision of October 1, 1924, 4 Comp. Gen. 342, held that the total amount appropriated for personal services in the District of Columbia under the major heading "Bureau of navigation" constituted the bureau as a unit within the meaning of the average provision. The decision was rendered on the basis of the general proposition that ordinarily the bureau is a "unit" in the absence of a specific showing that the bureau is operating under two or more appropriations providing for dissimilar and unrelated activities. 4 Comp. Gen. 167; *id.* 497; 4 Comp. Gen. 678. There are three appropriation items under the major heading "Bureau of Navigation" providing for personal services in the District of Columbia, viz., "Salaries," "Preventing overcrowding of passenger vessels," and "Wireless communication laws." The first two clearly relate to the navigation of vessels and constitute a part of the same unit. The third item provides as follows:

Wireless communication laws: To enable the Secretary of Commerce to enforce the Acts of Congress "to require apparatus and operators for radio communication on certain ocean steamers" and "to regulate radio communication" and carry out the international radio telegraphic convention, examine and settle international radio accounts including personal services in the District of Columbia and to employ such persons and means as may be necessary, traveling and subsistence expenses, purchase and exchange of instruments, technical books, tabulating, duplicating, and other office machinery and devices, rent and all other miscellaneous items and necessary expenses not included in the foregoing, including the transfer from the office of the Director of Naval Communications to the Department of Commerce of mechanical and office equipment and supplies now in use in connection with the examination and settlement of international radio accounts, $180,278.

The act "To require apparatus and operators for radio communication on certain ocean steamers," dated June 24, 1910, 36 Stat. 629, as amended by the act of July 23, 1912, 37 Stat. 199, relates to radio communication on sea and the requirements for vessels with

relation thereto. The amount expended in the enforcement of this act, standing alone, might reasonably be considered as relating to navigation of vessels, but the appropriation item, to the extent of the greater portion thereof, also provided for the enforcement of the act "to regulate radio communication," dated August 13, 1912, 37 Stat. 302. This has to do with radio communication on land as well as on sea, the licensing of broadcasting stations, assignment of wave lengths to prevent interference, etc. Such activities are unrelated to the navigation of vessels.

With reference to the matter you state:

> The great bulk of the work of enforcing the radio communication laws has to do with the inspection of radio stations and the examination and licensing of operators of those stations. It has no direct or indirect connection with the administration of the navigation laws, which have to do with the operation of vessels.

In view of this additional specific showing and the further examination of the controlling statutes the appropriation "Wireless communication laws" will be considered as constituting a separate and distinct unit within the meaning of the average provision.

Decision of October 1, 1924, is modified accordingly.

(A–8420)

TRANSPORTATION OF HOUSEHOLD EFFECTS OF EMPLOYEES OF THE RECLAMATION SERVICE, GEOLOGICAL SURVEY, AND BUREAU OF MINES

In the absense of specific legislative authority therefor, the cost of packing, crating, hauling, and transportation of household effects of employees of the Reclamation Service, Geological Survey, and Bureau of Mines, Department of the Interior, upon permanent change of station may not be paid from appropriated funds. Payments made incident to a permanent change of station occurring on or prior to December 6, 1924, will not be disturbed, however, if otherwise regular. (Modified by 4 Comp. Gen. 941; *id.* 1069.)

Decision by Comptroller General McCarl, March 28, 1925:

In connection with the settlement of accounts for the Department of the Interior, there is for consideration the legality of the practice in the Reclamation Service, Geological Survey, and Bureau of Mines, of allowing employees reimbursement for packing, crating, hauling, and transportation of household effects, under bureau regulations, incident to permanent change of station of the employees.

As an example, there has been submitted to this office for credit in the disbursing officer's accounts amount shown on voucher No. 6379, in favor of Fred A. Lichtenheld, an employee of the Bureau of Mines, which includes an item of $15 for drayage of household effects from residence to freight depot, Washington, D. C., November 15, 1924, incident to order of the same date, changing the official sta-

tion of the employee from Washington, D. C., to Fort Washakie, Wyo.

The employee was, in addition, authorized to ship his household effects, not exceeding 5,300 pounds, between the two stations on Government bill of lading, under paragraphs 1049, etc., of the Administrative Manual of the Bureau of Mines.

Section 1765, Revised Statutes, provides as follows:

> No officer in any branch of the public service, or any other person whose salary, pay, or emoluments are fixed by law or regulations, shall receive any additional pay, extra allowance, or compensation, in any form whatever, for the disbursement of public money, or for any other service or duty whatever, unless the same is authorized by law, and the appropriation therefor explicitly states that it is for such additional pay, extra allowance, or compensation.

Packing, crating, and shipment of household effects at the expense of the Government where authorized by law, is an allowance, and where not so authorized would be an "extra allowance" within the terms of section 1765, Revised Statutes. 15 Comp. Dec. 731; 19 *id.* 758. In the latter decision it was held, quoting from the syllabus:

> Where an officer or employee of the United States, whose salary is fixed by law, is ordered to change his regular station for the convenience of the Government, the cost of transporting his household effects is a personal expense and not a proper charge against the Government.

The act of December 6, 1924, 43 Stat. 704, provided appropriations under specific headings, including the Reclamation Service, Geological Survey, and Bureau of Mines, to enable the heads of executive departments and independent establishments to adjust the compensation of civilian employees in the field service for which appropriations were made therein, to correspond so far as practicable to the rates established by the classification act of 1923, for positions in the departmental service in the District of Columbia.

As salaries fixed pursuant to the classification act are fixed by law within the meaning of section 1765, Revised Statutes, so also would salaries of field employees, for which appropriations were provided in the cited act, which are "fixed" to correspond to such rates, be considered as fixed by law. 4 Comp. Gen. 607. There is no provision in the appropriation act of June 5, 1924, 43 Stat. 415, 419, 420, appropriating for the Department of the Interior for the fiscal year 1925, which properly may be construed as authorizing reimbursing employees of the Reclamation Service, Geological Survey, or Bureau of Mines for costs of packing, crating, hauling, or transportation of household effects upon permanent change of station.

Furthermore, the fact that the Congress has specifically authorized the transportation of household effects of employees of several services under certain circumstances and conditions would indicate that such extraordinary allowances may not properly be made by

regulation or contract of employment alone, even where the compensation is not fixed by law or regulation.

Credit will not be allowed for payments made from Government funds to employees of the three services mentioned as reimbursement of expenses incurred for packing, crating, hauling, or transportation of household effects incident to permanent change of station occurring subsequent to December 6, 1924. But in view of the long-continued practice and the apparent ground for the assumption that the decisions holding such allowances unauthorized applied only to employees whose compensation was fixed by law or regulation, such payments incident to permanent change of station occurring on or prior to December 6, 1924, if otherwise regular, will not be disturbed. See decision of March 12, 1925. 4 Comp. Gen. 755.

(A–8551)

POSTAL SERVICE EMPLOYEES—REASSIGNMENT OF FOURTH-CLASS POST OFFICES

No reassignment of fourth-class post offices to a higher class on April 1, 1925, may be made on the basis of compensation of postmasters and receipts of their offices for the four consecutice quarters ended December 31, 1924, in accordance with the prior practice under the act of June 5, 1920, 41 Stat. 1046, but reassignments on the basis of compensation of postmasters and receipts of their offices for the year ended December 31, 1924, shall be made July 1, 1925, in accordance with the act of February 28, 1925, 43 Stat. 1053.

The compensation of postmasters who were in class 4 January 1, 1925, should be computed and paid for the quarters ending March 31, and June 30, 1925, in accordance with the rates prescribed in the act of February 28, 1925, 43 Stat. 1053, for fourth-class postmasters.

Comptroller General McCarl to the Postmaster General, March 28, 1925:

I have your letter of March 11, 1925, as follows:

The act approved June 5, 1920 (H. R. 14338), reclassifying postmasters and employees of the postal service and readjusting their salaries and compensation, provided in part as follows:

"That when the total compensation of any postmaster at a post office of the fourth class for four consecutive quarters shall amount to $1,000, exclusive of commissions on money orders issued, and the receipts of such post office for the same period shall aggregate as much as $1,500, the office shall be assigned to its proper class and the salary of the postmaster fixed according to the receipts."

The act approved February 28, 1925 (H. R. 11444), reclassifying the salaries of postmasters and employees of the postal service and readjusting their salaries and compensation, provides in part as follows:

"That when the total compensation of any postmaster at a post office of the fourth class for the calendar year shall amount to $1,100, exclusive of commissions on money orders issued, and the receipts of such post office for the same period shall aggregate as much as $1,500, the office shall be assigned to its proper class on July 1 following, and the salary of the postmaster fixed according to the receipts."

In accordance with the act approved June 5, 1920, when the total compensation of the postmaster of a fourth-class office for four consecutive quarters amounted to $1,000. exclusive of commissions on money orders issued, and the receipts of such post office for the same period aggregated as much as

$1,500, it has been the practice of the department to advance such fourth-class post office, assign it to the proper class and fix the salary of the postmaster according to the receipts, effective at the beginning of the second succeeding quarter.

In view of the specific provision in the act approved February 28, 1925, that the advancement of fourth-class post offices shall be based upon compensation and receipts for the calendar year instead of four consecutive quarters, and that such advancement shall be made on July 1, following, a decision is requested as to whether or not offices of the fourth class that met during the four quarters ended December 31, 1924, the requirements for advancement under the act approved June 5, 1920, shall on April 1, 1925, be assigned to their proper class, and if so, shall the salaries be fixed under the act of February 28, 1925?

The question for consideration is whether in those cases in which the compensation of a postmaster of the fourth class for the four consecutive quarters ended December 31, 1924, amounted to $1,000, and the receipts of the office for the same period aggregated as much as $1,500, the office may be advanced to a higher class on April 1, 1925, in accordance with the practice which prevailed under the provision in the act of June 5, 1920, 41 Stat. 1046, or whether in such cases the advancement must be deferred until July 1, 1925, in accordance with the provision of the act of February 28, 1925, 43 Stat. 1053.

The provision quoted in your letter from the act of February 28, 1925, specifically provides that the advance shall be "on July 1 following" the calendar year during which the requirements for advancement were met. Said provision became effective before April 1, 1925, and superseded the former procedure; therefore, no fourth-class post office is authorized to be advanced to a higher class on April 1, 1925, except as provided in the act with respect to unusual conditions.

The compensation of all postmasters who were in class 4 on January 1, 1925, should be paid for the quarters ending March 31 and June 30, 1925, in accordance with the rates prescribed in the act of February 28, 1925, for postmasters of the fourth class; and on July 1, 1925, all such postmasters who during the calendar year 1924 earned compensation amounting to $1,000, exclusive of commissions on money orders issued, will be advanced to a higher class, provided the receipts of the office for said calendar year aggregated as much as $1,500.

The question presented is answered accordingly.

(A–5766)

MILEAGE—MIDSHIPMEN OF THE NAVAL ACADEMY

Travel performed by a midshipman of the Navy under orders directing him to proceed to Indianapolis, Ind., "for temporary duty in connection with final Olympic tryouts," on completion of which to return to the Naval Academy, is not travel on public business entitling him to payment of mileage.

Decision by Comptroller General McCarl, March 31, 1925:

There is before this office for consideration the question as to whether H. B. Ransdell, lieutenant commander (S. C.), United States Navy, is entitled to credit for $69.90, the amount of voucher No. 3, fourth quarter, 1924, covering payment to R. H. Hollenbeck, midshipman, United States Navy, of mileage at the rate of 8 cents less 3 cents per mile for transportation furnished for travel performed from Annapolis, Md., to Indianapolis, Ind., and return, under order dated May 26, 1924, as follows:

From: Bureau of Navigation.
To: Midshipman R. H. Hollenbeck, 3d class.
Via: Superintendent, U. S. Naval Academy, Annapolis, Md.
Subject: Temporary duty.

1. Proceed to Indianapolis, Ind., on 2 June, 1924, for temporary duty in connection with final Olympic tryouts, on completion of which return to Naval Academy, Annapolis, Md.

/S/ A. G. Long.

The indorsements thereon show that Midshipman Hollenbeck left Annapolis June 2, 1924, arrived Indianapolis June 3, 1924; left Indianapolis June 8, 1924, and arrived Annapolis June 9, 1924.

The said payment was made under the provisions of section 12 of the act of June 10, 1922, 42 Stat. 631, providing:

That officers of any of the services mentioned in the title of this Act, when traveling under competent orders without troops, shall receive a mileage allowance at the rate of 8 cents per mile, distance to be computed by the shortest usually traveled route and existing laws providing for the issue of transportation requests to officers of the Army traveling under competent orders, and for deduction to be made from mileage accounts when transportation is furnished by the United States, are hereby made applicable to all the services mentioned in the title of this Act * * *.

By the act of June 30, 1876, 19 Stat. 65, it was provided that so much of the act of June 16, 1874, 18 Stat. 72, "as provides that only actual traveling expenses shall be allowed to any person holding employment or appointment under the United States while engaged on public business, as is applicable to officers of the Navy so engaged, is hereby repealed; and the sum of 8 cents per mile shall be allowed such officers while so engaged, in lieu of their actual expenses."

The act of March 3, 1901, 31 Stat. 1029, which prior to the act of June 10, 1922, governed the right of naval officers to mileage, provided:

* * * That in lieu of traveling expenses and all allowances whatsoever connected therewith, including transportation of baggage, officers of the Navy traveling from point to point within the United States under orders shall hereafter receive mileage at the rate of eight cents per mile * * *.

It is well established that the right of an officer to mileage for travel performed under orders depends upon his having traveled on public business. *Barker* v. *United States*, 19 Ct. Cls. 288; *Perrimond* v. *United States*, *id.* 509; *McCauley* v. *United States*, 50 *id.* 105; 16

Comp. Dec. 611; 17 *id.* 252. Hence the question for decision in this case is whether the travel in question was travel on public business.

The act of March 3, 1883, 22 Stat. 481, as amended by the act of July 19, 1892, 27 Stat. 245, provides:

> That hereafter no officer of the Navy shall be employed on any shore duty, except in cases specially provided by law, unless the Secretary of the Navy shall determine that the employment of an officer on such duty is required by the public interests, and he shall so state in the order of employment.

The said order does not contain the statement required by the above act as amended. Apparently the duty assigned therein was either not determined by the Secretary of the Navy as being required by the public interest or a midshipman was not considered an officer within the meaning of the act.

It is understood that "duty in connection with Olympic tryouts" has reference to tests being made to determine the qualifications or eligibility of candidates to enter as contestants in the Olympic games held in Paris in June or July, 1924.

The authorities of the Naval Academy and the Military Academy as well as civilian institutions of learning encourage their students to participate in athletic games and contests as an aid to physical development and maintenance of health, and also, in order to create and maintain a greater interest in athletics, permit and encourage such contests with individuals and teams from other educational institutions. It is understood that the Olympic games are conducted possibly on a larger scale and are international in character, having contestants entered in the different athletic contests from several countries.

No specific appropriation has been made for the payment of the traveling expenses, either in the form of mileage or actual expenses, for travel of the teams of the service schools to engage in athletic games with each other or with teams of other colleges or universities, or for travel of the students of the service schools in connection with the Olympic tryouts or games.

It has never been considered that the travel of the teams of the Naval and Military Academies in connection with the games and contests held with each other or with other colleges and universities was required by the public interests and it has not been the practice of the Navy or War Department to issue orders directing such travel. I see no reason why travel in connection with the "Olympic tryouts" has a different status in this respect. The fact that the Olympic games are international in character and that a candidate for contestant in such games is a midshipman does not make his travel in connection with the "Olympic tryouts" as on public business.

As it does not appear that the travel in question was on public business it is concluded that Lieutenant Commander Ransdell is

not entitled to credit for the payment in question or for other similar payments.

It has been the practice to allow naval cadets and midshipmen mileage for travel under the same conditions as other officers of the Navy. Digest Second Comp. Dec., vol. 3, sec. 814; 7 MS. Comp. Dec. 1136, December 16, 1898; 18 Comp. Dec. 141; *Fitzpatrick* v. *United States*, 37 Ct. Cls. 332.

Fitzpatrick was a naval cadet and had been ordered to travel from New Orleans, La., to Philadelphia, Pa. The accounting officers allowed mileage only from Annapolis, Md., to Philadelphia, Pa. The court allowed mileage for the entire distance less the amount already received. The question, however, as to whether a naval cadet was an officer of the Navy within the meaning of the mileage laws was not raised or discussed, the court apparently assuming that he was such an officer.

In *Weller* v. *United States*, 41 Ct. Cls. 324, it was held that a midshipman was not an officer within the meaning of sections 1229 and 1624, Revised Statutes, prohibiting the dismissal in time of peace of an officer in the military or naval service except in pursuance of the sentence of a general court-martial or in mitigation thereof. After reviewing the statutory history of midshipmen and naval cadets and of the Naval Academy and the similarity and difference of naval cadets, midshipmen, and cadets in the Military Academy, and decisions construing the term "officer," the court stated:

> It will thus be seen that our Naval Academy is a growth and an evolution, and in that respect somewhat different from the Military Academy.
>
> Its first pupils were officers already in the naval service, holding their warrants from the President. They have gradually ceased to be midshipmen in the active service belonging to the line, and are now naval students, the same as cadets at the Military Academy are military students.
>
> * * * * * * *
>
> We know of no reason why a midshipman at the Naval Academy at the present time should have privileges and rights denied to a cadet at the Military Academy, and we do not believe the law, properly construed, makes any such distinction. Neither of them holds either a commission or a warrant. Both are appointed by the President; those appointed at the Military Academy are called cadets and those at the Naval Academy are now called midshipmen.
>
> There may have been a time in the history of the Government and the Naval Academy when a midshipman should have been regarded as an officer in the Navy within the meaning of section 1229, and when the students at the Naval Academy were on a different footing in that regard than the students at the Military Academy, but the reason for so holding no longer exists. The act of March 3, 1883 (supra), changed the title of midshipmen in the Navy to ensign, and the act of March 3, 1899, leaves midshipmen out of the list of line officers of the Navy, so that now there are no midshipmen except those appointed to the Naval Academy and undergoing instruction therein or in connection therewith.

Cadets at the Military Academy have never been considered entled to mileage under laws providing mileage for officers of the Army.

There has been no authoritative decision holding that a midshipman was an officer within the meaning of the act of March 3, 1901, *supra*, providing mileage for officers in the Navy, and the question is a doubtful one. There is nothing in the language of section 12 of the act of June 10, 1922, that indicates that the word "officers" as applying to Navy officers was used in any different sense than in the said act of March 3, 1901.

It is not necessary in this case, however, to decide whether a midshipman is an officer in the Navy within the meaning of the said act of June 10, 1922.

(A–7604)

SUBSISTENCE, ITEMIZATION—FOREIGN SERVICE OFFICER

Where an officer of the Foreign Service in a travel status under an order authorizing reimbursement of actual and necessary expenses for subsistence not in excess of $5 per day only when properly "itemized and verified," submits charges which indicate that the alleged payments were not for necessary expenses actually incurred, but were prepared upon a "uniform basis" intended as a per diem at a rate not authorized by law, payment will not be allowed.

Decision by Comptroller General McCarl, April 1, 1925:

In connection with the settlement of the accounts of Frederick C. Chabot, Foreign Service officer, Caracas, Venezuela, there is for consideration whether he is entitled to credit for $195 representing expenses alleged to have been incurred for subsistence at Washington, at the rate of $5 per day during the period from October 3 to 21, and November 21 to December 10, 1924.

It appears that Mr. Chabot arrived at Washington September 26, 1924, and that from said date to and including October 2, 1924, he obtained meals and lodging at the Hotel La Fayette for which a receipt was submitted.

For the period here in question, he makes a uniform charge of $5 per day (breakfast $1, luncheon $2, and dinner $2) for subsistence. No charges are made for lodging and as to the charges for meals, he submitted neither receipts nor statement of facts tending to show why receipts could not be obtained.

The appropriation act of May 28, 1924, 43 Stat. 209, provides:

To pay the itemized and verified statements of the actual and necessary expenses of transportation and subsistence under such regulations as the Secretary of State may prescribe of diplomatic and consular officers and clerks in embassies, legations, and consulates, * * * or of such officers and clerks when traveling under orders of the Secretary of State, but not including any expense incurred in connection with leaves of absence, * * *.

The travel regulations (1918) governing travel of officers and employees of the State Department on official business provide:

1. A per diem allowance of $4 in lieu of actual and necessary expenses of subsistence, will be granted to all officers and employees when traveling on official business of the department and on duty away from their official head-

quarters; except diplomatic and consular officers and clerks to missions and consulates, traveling between their homes in the United States and their posts of duty, and under orders of the Secretary of State (except on leaves of absence), who will be allowed actual and necessary expenses for subsistence not in excess of the statutory rate of $5 for any one day, which must be fully itemized. * * *

The travel regulations for the diplomatic and consular officers and clerks in embassies, legations, and consulates and their families and effects provide:

59. Each item of expense chargeable to the Government must be stated separately, and items must not be charged collectively. The items must follow each other according to the order in which the expenses were incurred. Each day's charges should appear together in the manner shown in the sample form embodied in these regulations. * * *

During the period in question, Mr. Chabot was in a travel status and entitled to reimbursement of his actual and necessary expenses for subsistence not in excess of the statutory rate (act of April 6, 1914, 38 Stat. 318) of $5 per day only when properly "itemized and verified."

In connection with the charges for the period here under consideration, the Chief, Bureau of Accounts, Department of State, under date of January 14, 1925, addressed a letter to this office in which he stated that Mr. Chabot's expenses for subsistence during the period in question were in excess of any amount he would be able to procure by way of reimbursement from the Government, and for the sake of convenience did not deem it advisable to indicate just what amount in excess of the amount allowable had been expended, and, consequently, rendered his account for meals on a uniform basis, which was agreeable to the department, in as much as the amount charged did not exceed the sum actually expended. The chief of the bureau also stated that while the department did not believe that Mr. Chabot expended exactly the same amount on each day for breakfast, luncheon, and dinner, it did believe that he expended sums in excess of the uniform rate charged, and in the absence of evidence to the contrary, approved the account. He further stated that so long as an officer's expenditures appeared to be regular in every respect, the department did not feel at liberty to question the truthfulness of such expenditure.

Under date of February 5, 1925, Mr. Chabot certified as follows:

I, Frederick C. Chabot, formerly a Foreign Service officer of class 5, hereby certify that for each day from October 3 to 21, and November 21 to December 10, 1924, I expended funds for meals in excess of $1 for breakfast, $2 for luncheon, and $2 for dinner; therefore, the charges in this account are not excessive, but are charged on a straight basis rather than attempt to give the exact expenditure for each meal, and make the necessary deductions from the totals.

The foregoing statement considered in connection with the voucher as submitted, indicates that the charges were not in reimbursement of necessary expenses actually incurred while in a travel

status, but were prepared upon a "uniform basis" intended as a per diem, which is not authorized by law.

Credit for the amount in question will be disallowed.

(A-8672)

CLASSIFICATION OF CIVILIAN EMPLOYEES—ALLOCATION OF POSITION

Civilian positions in the District of Columbia, classed as "excepted" under Schedule A of the Civil Service Rules and Regulations, to which appointments may be made without examination or upon noncompetitive examination, are subject to the provisions of the classification act of 1923 and are required to be finally allocated by the Personnel Classification Board prior to appointment thereto by the administrative office.

Credit will not be allowed for any payments made as compensation for service between the date of appointment and the date of final allocation in the case of appointments hereafter made to positions which have not first been allocated by the Personnel Classification Board.

Comptroller General McCarl to the Director, United States Veterans' Bureau, April 1, 1925:

I have your letter of March 21, 1925, as follows:

On September 18, 1924, Thomas E. Brown was appointed under section 3 of Civil Service Rule 2 to the position of attorney in the office of the general counsel of this bureau, at $3,800 per annum, under which temporary appointment he has since served continuously. The letter of appointment, a copy of which is enclosed, bears the notation "The grade and salary under this appointment are subject to the approval of the Personnel Classification Board."

Based upon the allocation by the Personnel Classification Board of a position having similar duties, this bureau allocated the particular position to grade 4, professional and scientific service, and the temporary appointment was made at $3,800, the minimum rate of this grade. The salary of this position was advanced to $4,000 per annum, effective October 1, 1924.

Under date of February 3, 1925, the Personnel Classification Board allocated the position created for Mr. Brown to grade 3, professional and scientific, the maximum compensation of which grade is $3,600.

Subsequently, and on March 12, 1925, this bureau was advised by the secretary of the Personnel Classification Board of the change in allocation of this position from grade 3 to grade 4, the latter grade having a maximum compensation of $5,000.

Question now arises whether this attorney, who has received payment of compensation at the rate of $3,800 from September 15, 1924, the date of oath, and $4,000 from October 1, 1924, to February 15, 1925, is entitled to the salary payments already made, and if so, whether payments of salary should continue to be made for the subsequent period ended March 15, 1925, at the rate of $4,000, in view of the final approval of the Personnel Classification Board of the allocation of this position to Grade 4, professional and scientific service.

Persons may be appointed to "excepted" positions listed in Schedule A under section 3 of Civil Service Rule 2 without examination, or upon noncompetitive examination. Schedule A includes, under the heading "The entire classified service," the item "Attorneys, assistant attorneys, and special assistant attorneys." Such appointments may be permanent or temporary. The salaries of excepted positions in the District of Columbia, whether permanent or temporary, are required to be fixed in accordance with the terms of the classification act of 1923.

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The proper procedure in this case should have been that the allocation of the position to which Mr. Brown was appointed should have been finally settled and determined between the Veterans' Bureau and the Personnel Classification Board before the appointment was made. 4 Comp. Gen. 239, 242, and decision of March 9, 1925, 4 Comp. Gen. 743. Credit will not be allowed for any payments made as compensation for service between date of appointment and date of final allocation in the case of appointments hereafter made to positions which have not first been allocated by the Personnel Classification Board.

As in the case last cited, the changes in the allocation of the position in the present case will not be considered as increasing or decreasing the salary rate of the employee, effective on the beginning of the pay period current when the allocation or reallocation was received. 4 Comp. Gen. 480. But the final action of the board will be considered as determining what was the correct grade in which the temporary position held by the employee should have been allocated.

The compensation of the position occupied by Mr. Brown may be computed for the entire period of service from the date of appointment as in Grade 4, professional, at the rates therein fixed by the administrative officers.

It is noted that you give September 18, 1924, as the date of appointment and September 15, 1924, as the date of oath. Copy of appointment submitted is dated September 18, 1924. No compensation is payable for any period of time prior to the effective date of the appointment when the duties of the position were assumed. 3 Comp. Gen. 559.

(A-6202)

DISABILITY COMPENSATION TO BENEFICIARIES OF FOREIGN COUNTRIES

The fact that a veteran served in the military forces of another country either before or subsequent to his service at any time between April 6, 1917, and July 2, 1921, in the military forces of the United States, and is receiving disability compensation or other benefits from such other Government, does not preclude the payment to him of disability compensation otherwise due him under the World War veterans' act on account of active tuberculosis disease developing a 10 per centum degree of disability prior to January 1, 1925.

Comptroller General McCarl to the Director, United States Veterans' Bureau, April 3, 1925:

Consideration has been given to your letter of November 6, 1924, requesting decision as to the authority to make payments of disability compensation to persons otherwise entitled thereto on account of an active tuberculosis disease developing a 10 per cent degree of disability prior to January 1, 1925, when it is shown that the

person, either prior to the military service in the United States forces or else subsequent to discharge from the United States forces, served in the military service of one of the Governments associated with the United States in the World War and is now receiving pension or other benefit from such other Government on account of a tuberculosis disease alleged and claimed by him to have been incurred in the service of such other Government.

There is nothing in the World War veterans' act of June 7, 1924, 43 Stat. 607, or in any other law which makes the receipt by a veteran of disability compensation from any other source a bar to his right to receive from the United States Government the disability compensation provided by law. Therefore, the answer to the question here presented involves only a consideration of the conclusive presumption provisions in section 200 of the act of June 7, 1924, 43 Stat. 615–616, reenacted without change in the act of March 4, 1925, 43 Stat. 1304. Said provisions are as follows:

* * * That for the purposes of this section every such officer, enlisted man, or other member employed in the active service under the War Department or Navy Department who was discharged or who resigned prior to July 2, 1921, and every such officer, enlisted man, or other member employed in the active service under the War Department or Navy Department on or before November 11, 1918, who on or after July 2, 1921, is discharged or resigns, shall be conclusively held and taken to have been in sound condition when examined, accepted, and enrolled for service, except as to defects, disorders, or infirmities made of record in any manner by proper authorities of the United States at the time of, or prior to, inception of active service, to the extent to which any such defect, disorder, or infirmity was so made of record. *Provided*, That an ex-service man who is shown to have or, if deceased, to have had, prior to January 1, 1925, neuropsychiatric disease, an active tuberculosis disease, paralysis agitans, encephalitis lethargica, or amoebic dysentery developing a 10 per centum degree of disability or more in accordance with the provisions of subdivision (4) of section 202 of this Act shall be presumed to have acquired his disability in such service between April 6, 1917, and July 2, 1921, or to have suffered an aggravation of a preexisting neuropsychiatric disease, tuberculosis, paralysis agitans, encephalitis lethargica, or amoebic dysentery in such service between said dates, and said presumption shall be conclusive in cases of active tuberculous disease, but in all other cases said presumption shall be rebuttable by clear and convincing evidence; but nothing in this proviso shall be construed to prevent a claimant from receiving the benefits of compensation and medical care and treatment for a disability due to these diseases of more than 10 per centum degree (in accordance with the provisions of subdivision (4) section 202, of this Act) on or subsequent to January 1, 1925, if the facts in the case substantiate his claim.

It will be noted that there are two separate conclusive presumption provisions in this section. The first is as to soundness at time of entering the United States service, and precludes the consideration of any evidence tending to show that the defect, disorder, or infirmity, on account of which disability compensation is claimed, was incurred prior to the entrance into the United States service, unless such defect, disorder, or infirmity was made of record "by proper authorities of the United States at the time of, or prior to, inception of active service." 3 Comp. Gen. 555. This would appear to answer so much of your question as relates to the case of a veteran receiving

disability compensation or other benefits from another government on account of service in the military forces of said government before entering the service in the military forces of the United States.

The second conclusive presumption provision in the section applies only to cases of active tuberculosis disease, and has reference to those cases in which the disease had developed a 10 per cent degree of disability or more prior to January 1, 1925. With respect to certain other diseases on account of which compensation is authorized if the disease had developed a 10 per cent degree of disability or more prior to January 1, 1925, it is provided that the presumption that the disease was incurred or aggravated in the service of the United States between April 6, 1917, and July 2, 1921, "shall be rebuttable by clear and convincing evidence"; but with respect to cases of active tuberculosis disease it is specifically provided that "said presumption shall be conclusive." This provision precludes the consideration of any evidence—however clear and convincing—to the effect that the disease was acquired or aggravated subsequent to the service in the military forces of the United States between April 6, 1917, and July 2, 1921.

Accordingly, it must be held that the fact that a veteran served in the military forces of another government either before or subsequent to his service at any time between April 6, 1917, and July 2, 1921, in the military forces of the United States, and is receiving disability compensation or other benefits from such other government, does not preclude the payment to him of disability compensation otherwise due under the World War veterans' act on account of active tuberculosis disease developing a 10 per cent degree of disability prior to January 1, 1925.

(A–8709)

POSTAL SERVICE—PAY OF FOURTH-CLASS POSTMASTERS

A post office which was of the third class from January 1 to June 30, 1924, and of the fourth class from July 1 to December 31, 1924, may be advanced to third class July 1, 1925, if the compensation allowed the postmaster for the entire calendar year 1924 amounted to $1,000 and the receipts of the office aggregated $1,500 for said calendar year, regardless of the fact that all compensation and receipts were not as of a fourth-class office.

Postmasters who received the maximum rate of compensation for fourth-class post offices during the quarters ended September 30 and December 31, 1924, viz, $1,000 per annum, or $250 per quarter, will only be entitled for the quarters ending March 31 and June 30, 1925, to an amount not in excess of the maximum rate authorized by the act of February 28, 1925, 43 Stat. 1054, viz, $1,100 per annum, or $275 per quarter, making the maximum amount that may be paid for the fiscal year 1925, $1,050.

Decision by Comptroller General McCarl, April 3, 1925:

In the audit of accounts of fourth-class postmasters there are for decision two questions under the act of February 28, 1925, 43 Stat. 1054, as follows:

1. Whether or not a fourth-class post office may be advanced to third class July 1, 1925, on the basis of $1,000 compensation allowed the postmaster and receipts of his office in excess of $1,500 for the calendar year 1924, where such office was a third-class office for the first six months and a fourth-class office for the last six months of said calendar year.

2. Whether the maximum compensation allowable to a fourth-class postmaster for the fiscal year ending June 30, 1925, is the sum of $1,050, or the sum of $1,100.

1. In the first question the compensation of the postmaster and receipts of his post office were as third class for the first two quarters of the calendar year 1924, and as fourth class the last two quarters. The office was in the fourth class on and prior to February 28, 1925, date of the act "fixing July 1 following" the calendar year as the time when a fourth-class office may be assigned to a higher class. The decision of March 28, 1925, A–8551, held:

> * * * and on July 1, 1925, all such postmasters who during the calendar year 1924 earned compensation amounting to $1,000, exclusive of commissions on money orders issued, will be advanced to a higher class, provided the receipts of the office for said calendar year aggregated as much as $1,500.

The conditions on which the advance is to be made are specified in the statute as (1) the total compensation, exclusive of commissions on money orders and (2) the receipts of the office. The statute does not require that such compensation and receipts for the prior calendar year must have been as fourth class for the entire year. As the compensation allowed the postmaster for the entire calendar year 1924 was $1,000, the maximum then authorized for a fourth-class office, and the receipts of the office amounted to more than $1,500, the maximum specified in the statute, the office should be advanced July 1, 1925, to third class, regardless of the fact that the portion of the compensation and receipts earned during the first half of the calendar year 1924 were as a third-class office.

2. The second question deals only with the maximum compensation of fourth-class postmasters for the quarters ending March 31 and June 30, 1925, who received the maximum compensation ($250) for the quarters ended September 30 and December 31, 1924. Postmasters who received the maximum rate of compensation for fourth-class post offices during the quarters ended September 30 and December 31, 1924, viz, $1,000 per annum, or $250 per quarter, will only be entitled for the quarters ending March 31 and June 30, 1925, to not in excess of the maximum rate authorized by the new law, viz, $1,100 per annum, or $275 per quarter making the maximum amount that may be paid as compensation to any fourth-class postmaster for the fiscal year ending June 30, 1925, $1,050.

(A-8713)

ARLINGTON MEMORIAL BRIDGE COMMISSION—CONTRACTING IN EXCESS OF APPROPRIATIONS

Under the authority given the Arlington Memorial Bridge Commission by the act of February 24, 1925, 43 Stat. 974, to proceed at once with the construction of the bridge and to prosecute the construction to completion by contracts or otherwise, contracts may be entered into in advance of the actual appropriations but the contracts so made impose no obligation upon the Government beyond the amount actually appropriated and are subject to and dependent upon the future appropriations by Congress and must so stipulate.

Comptroller General McCarl to the executive officer, Arlington Memorial Bridge Commission, April 3, 1925:

I have your letter of March 24, 1925, requesting decision whether, in view of the provisions of law, quoted below, the Arlington Memorial Bridge Commission and its executive officer have authority to enter into contracts at once, for work to be done in succeeding years in amounts not exceeding $14,750,000, covering the 10-year building program authorized by said law.

The act entitled "An act to provide for the construction of a memorial bridge across the Potomac River from a point near the Lincoln Memorial in the city of Washington to an appropriate point in the State of Virginia, and for other purposes," approved February 24, 1925, 43 Stat. 974, reads in part as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the commission created by section 23 of the Act approved March 4, 1913 (Thirty-seventh Statutes, page 885), is hereby authorized and directed to proceed at once with the construction of a memorial bridge across the Potomac River from the vicinity of the Lincoln Memorial in the city of Washington to an appropriate point in the State of Virginia, including appropriate approaches, roads, streets, boulevards, avenues, and walks leading thereto on both sides of said river, together with the landscape features appertaining thereto, all in accordance with the design, surveys, and estimates of cost transmitted by said commission to Congress under date of April 22, 1924: *Provided*, That said commission may make such changes in design and location of said bridge without increasing the total cost of the project as in its discretion may be found to be necessary or advisable.

Sec. 2. That the execution of the project herein and hereby authorized shall be carried out under the general supervision of the Arlington Memorial Bridge Commission in the immediate charge of the executive officer of the said commission, and that said construction shall be entered upon as speedily as practicable in accordance with the plans submitted by the said commission and shall be prosecuted to completion by contracts or otherwise, as may be most economical and advantageous to the Government and approved and ordered by the said commission in a total sum not to exceed $14,750,000, which sum is authorized to be appropriated from any moneys available or that may become available in the Treasury of the United States: *Provided*, That such appropriations as may be made under the authority of this Act for the execution of said project shall be chargeable to the Treasury of the United States and the revenues of the District of Columbia in such manner as shall then be determined by Congress to be equitable: *Provided further*, That the opening, widening, extending, or improvement of any streets of the District of Columbia in connection with this project shall be subject to assessments for benefits in accordance with the laws governing similar work under the Commissioners of the District of Columbia: *And provided further*, That if the bridge is constructed otherwise than by contract there shall be kept accurate and itemized account of all costs, including labor, materials, rental, repairs, insurance, depreciation of plant and equipment, and all other items and engineering costs properly chargeable to the construction of said bridge.

* * * * * * *

Sec. 6. That the project herein authorized may be prosecuted by direct appropriations or by continuing contracts, or by both direct appropriations and continuing contracts: *Provided*, That the expenditures in any year shall not exceed the amounts for the corresponding year as shown in the ten-year program of expenditures and construction contained in the report of the said commission.

Sec. 7. That said commission shall annually submit to Congress, through the Bureau of the Budget, a statement of sums of money previously expended and an estimate of the total sum of money necessary to be expended in the next succeeding year to carry on the work authorized by this Act.

An appropriation was made by the deficiency act of March 4, 1925, 43 Stat. 1316, under the heading "Arlington Memorial Bridge Commission" making available funds for beginning construction work on the bridge, in the following language:

For commencing the construction of the Arlington Memorial Bridge across the Potomac River at Washington, authorized in an Act entitled "An Act to provide for the construction of a memorial bridge across the Potomac River from a point near the Lincoln Memorial in the city of Washington to an appropriate point in the State of Virginia, and for other purposes," approved February 24, 1925, to be expended in accordance with the provisions and conditions of the said Act, $500,000, to remain available until expended.

The amount of $14,750,000 authorized to be expended by section 2 of the act of February 24, 1925, in the construction of the memorial bridge and its approaches in carrying out the 10-year building program in accordance with the design, survey, and estimates as recommended by the Arlington Memorial Bridge Commission in its report of April 22, 1924, is to be apportioned to the years and for purposes indicated as follows:

End of—	Expended during year	Work to be completed during year
First year	$500,000	Engineering forces organized; equipment, plant, instruments, and furniture purchased; working drawings prepared, grading and dredging finished, consultants retained, and contracts let for actual construction work on bridge.
Second year	2,500,000	Work on river piers half completed.
Third year	2,500,000	Work on piers completed and construction of arches and superstructure begun.
Fourth year	2,500,000	Arches and superstructure finished; draw span installed; plaza and water gate at Lincoln Memorial, avenue across Columbia Island, twin bridge over boundary channel, parkway to cemetery and driveways in cemetery half finished.
Fifth year	2,000,000	Ornamentation of main bridge and twin bridge over boundary channel and all work start d in fourth year finished, thus providing access across bridge into cemetery over completed avenue.
Sixth year	1,000,000	In the last five years the formal treatment on Columbia Island will go forward with the filling of the island by the dredging in Virginia Channel and by dumping from trucks. The memorial entrance to the cemetery and all landscape work will be finished at the end of this period including the improvement of B Street and Twenty-third Street.
Seventh year	1,000,000	
Eighth year	1,000,000	
Ninth year	1,000,000	
Tenth year	1,000,000	

The intent of Congress in adopting the 10-year building program and in authorizing expenditures during that period from appropriations to be made from time to time not to exceed a total of $14,750,000, as gathered from the foregoing, was to confer authority on the commission to enter into contracts with private parties after due and proper competition to continue for the period necessary for the construction of the bridge and its approaches or to authorize prosecution of the work directly by the commission, or both, as the commission might deem advisable.

In public works of magnitude, it has been customary for Congress to grant authority therefor within a limit of cost, but only make appropriations by fiscal years as the progress of the work requires rather than immediately appropriating the entire amount of the authorization. The authorization and not the appropriation is the authority for contracting for so much of the work as the physical and the orderly sequence of construction makes necessary, but the contracts so made impose no obligation upon the Government beyond the amount actually appropriated, and contracts so made are subject to and dependent upon future appropriations by Congress, and must so stipulate. See 13 Comp. Dec. 478; 14 *id.* 755. The entering into contracts by the commission under the act of February 24, 1925, is authorized accordingly.

(A–8724)

PAYMENT OF CONSENT JUDGMENTS

The prohibition in the act of March 4, 1925, 43 Stat. 1347, against the payment of any of the judgments therein appropriated for, until the right of appeal shall have expired, does not prevent the immediate payment of a judgment on a compromise or consent decree from which no appeal can be taken.

Decision by Comptroller General McCarl, April 3, 1925:

There is before this office for consideration the question whether the New England Steamship Co. may be paid, prior to the expiration of time for appeal, the sum of $10,160.70 as the amount of a judgment obtained by decree dated December 31, 1924, of the United States District Court for the Southern District of New York as damages sustained by the steamship *Commonwealth* when it collided with the U. S. S. *New Hampshire.* Consent of the United States to be sued by reason of the collision was given in the act of February 20, 1914, 38 Stat. 1244, and appropriation to pay the amount of the decree was made in the second deficiency act, approved March 4, 1925, 43 Stat. 1347.

The facts in the matter are stated in a letter dated January 6, 1925, from the Department of Justice to the Secretary of the

Treasury and published in House Document No. 632, Sixty-eighth Congress, 2d session, as follows:

I am inclosing herewith certified copy of modified final decree which has been entered in the Southern District of New York in the above matter under date of December 31, 1924.

This is a special act case. The battleship *New Hampshire*, while anchored during a fog, was struck by the steamship *Commonwealth*, as a result of which both vessels were damaged. A libel was filed by the Government to recover its losses and by authority of a special act of Congress approved February 20, 1914, the owners of the *Commonwealth* filed a cross libel to recover substantially $70,000 for damages suffered by the *Commonwealth*. The case was tried and it was determined that the *Commonwealth* was at fault for navigating at too great a speed in fog and the *New Hampshire* was at fault for anchoring so as to unnecessarily take up space in the channel, and accordingly the court ordered the damages and costs divided. This decree was entered October 8, 1915. The matter was then referred to a commissioner for the assessment of damages, and his report was adopted by the court.

The Solicitor General authorized an appeal from the decision of the District Court on two grounds: First, question of liability; second, question of interest. The District Court allowed interest from January 17, 1913, although the special act under which the cross libel was filed made no mention of interest. Before the appeal was perfected the owners of the *Commonwealth* offered to concede to the Government the amount of interest, approximately $4,000, provided the appeal was withdrawn. In view of the concession to the Government of about $4,000, the department determined that the appeal be withdrawn.

The inclosed final decree states that the New England Steamship Co., owners of the steamship *Commonwealth*, shall recover from the United States of America the sum of $10,160.70, which sum include costs in the sum of $1,687.60. We are forwarding the final decree to you with the request that same be certified to Congress for appropriation to pay the amount of the decree. In view of the fact that this is a very old case, it is requested that this final decree be included in the first list of decrees which are certified by you to Congress for payment.

The act of March 4, 1925, 43 Stat. 1347, appropriated $20,795.69 to pay certain judgments, including the judgment here in question, with the provision that "None of the judgments contained herein shall be paid until the right of appeal shall have expired." Section 1008, Revised Statutes, as amended by section 11 of the circuit court of appeals act of March 3, 1891, 26 Stat. 829, requires appeals to the circuit courts of appeals to be effected within six months from the date of the final decree and in letter dated March 7, 1925, the Attorney General stated that the time for taking an appeal had expired. The question for decision is thus whether the decree entered January 11, 1924, or the modified decree entered December 31, 1924, is the final decree in this case from which the six months' period for appeal began to run and if the latter, whether the judgment in this case may be paid prior to the expiration of the appeal period.

Unquestionably the modified decree of December 31, 1924, was the final decree in the case. *Hume* v. *Bowie*, 148 U. S. 245; *Newcomb* v. *Burbank*, 159 Fed. Rep. 483; *Washington County* v. *Murray*, 100 Pacif. 588. However, said decree was a compromise, or consent decree and no appeal could be taken therefrom. See *Raisin Co.* v. *Chaddock*, 173 Fed. Rep. 577; *McCafferty Co.* v. *Celluloid Company*, 104 Fed. Rep. 305; *Elwell* v. *Fosdick*, 134 U. S. 500; *Crawshoy* v.

Soutter, 6 Wall. 739. Thus it may be said that the *right* of appeal has expired and there is nothing to be gained by withholding payment of the judgment for six months from December 31, 1924. It will not be presumed that the Congress intended the general prohibition, which is usually inserted in all appropriations for the payment of judgments, to operate to delay payment for six months from date of final decree in a case, such as the instant case, where the United States does not have the right of appeal and when the Attorney General of the United States reports that no appeal will be attempted on the part of the Government.

The judgment in this case will be paid in regular course without waiting for the expiration of six months from the date of the judgment.

(A–8001)

HIRE OF MOTOR-PROPELLED PASSENGER-CARRYING VEHICLES

The hiring of motor-propelled passenger-carrying vehicles for a continuous, indefinite, or extended period under an agreement which places the vehicles in the custody and control of the Government officer or employee, confers all the benefits of temporary ownership and is in contravention of the act of July 16, 1914, 38 Stat. 508, prohibiting the purchase, maintenance, or operation of motor-propelled passenger-carrying vehicles unless specifically appropriated for.

The hire of an automobile for actual and necessary travel upon public business by the trip, mile, hour, or day to reach points inaccessible by common carriers is a proper charge against appropriations available for traveling expenses. Where the public business so requires, contracts may be entered into for hire of automobiles covering a period of a year or less, payment to be made on the basis indicated only for such time as the vehicle is actually required on official trips away from the headquarters or place where the automobile is hired.

Decision by Comptroller General McCarl, April 4, 1925:

There is for consideration whether credit is authorized in the accounts of John F. Vivian, special disbursing agent, Internal Revenue, for the month of September, 1924, for a payment made to Agent William H. Trimble as reimbursement of amount expended for hire of an automobile from August 27 to 31, 1924, at $6 a day as per voucher No. 56.

It appears that a like charge is made in the October account, covering a successive period from September 1 to 30, total $180.

This particular hiring was sanctioned by a letter from the Prohibition Commissioner, dated September 4, 1924, in the following words:

FEDERAL PROHIBITION DIRECTOR,
Denver, Colorado.

With reference to your letter dated August 28, inclosing a proposal signed by O. E. Bannister, Grand Junction, Colorado, agreeing to rent you an automobile at $6 per day for a period of sixty days, which includes repairs but not gas and oil, you are informed that the rental of the car for sixty days meets with the approval of this office. The expense of $6 a day and the cost of all

gas and oil used should be prorated among the agents using it and submitted on vouchers (Form 63½), to be paid by you from your allowance covering traveling expenses. The proposal which is returned herewith should be attached to the first voucher to be submitted to the Accounts and Collections Unit.

JAMES E. JONES,
Prohibition Commissioner.

In justification of this hiring the commissioner states in letter dated February 2, 1925, that:

Attention is invited to the fact that in the enforcement of the national prohibition act, it is necessary that Federal prohibition agents travel to points remote from common carriers, this is particularly true in investigating and raiding illicit distilleries.

To preclude the hire of automobiles for the use of Federal agents, is to preclude any reasonable effort to investigate reports of the operation of illicit distilleries or the capture and destruction of same. The cost for hire of automobiles for agents who are in a travel status and required to visit remote points from common carriers, has been given very serious consideration by the Prohibition Unit and many methods have been considered with a view of decreasing the same. In nearly all cases where an economical method can be used for the hire of automobiles, it is found that it is in contravention of law or that it is held that the policy is detrimental to the public interests.

This office has, therefore, adopted the policy that where Federal prohibition agents are required to travel considerable distances, remote from common carriers, that the agents secure a vehicle and pay their pro rata share and seek reimbursement as travel expenses and this method was authorized in the case under discussion.

To authorize the hire of an automobile as an item of traveling expense, it must appear that the charge is incurred in actual travel upon the public business; and where agents secure such a vehicle intermittently for a trip or a day, such hiring, under the circumstances stated in the paragraph last quoted herein, *supra*, is a valid charge upon the appropriation available for traveling expenses. Where, however, such hiring is continuous over an extended definite period without reference to particular trips, as in this case, and particularly under an agreement which places the machine in the custody of the Government officer or employee, such continuous possession and continuous availability confers all the necessary benefits derived from temporary ownership, and such arrangement is in contravention of the prohibition against the use of appropriations for the purchase, maintenance, or operation of motor-propelled passenger-carrying vehicles, as stipulated in the act of July 16, 1914, 38 Stat. 508. It was held in 22 Comp. Dec. 188, that where a vehicle is rented for public purposes for any definite or indefinite period of time, and passes into the control and continuous operation of Government agencies, as distinguished from hiring for a trip, there is acquired a temporary possession and right of property therein, and it is for the time being and for the purpose of the appropriation acts a Government vehicle, "as much so as if it had been purchased and owned by the Government."

The appropriation to which the rental of this automobile is proposed to be charged, "Enforcement of narcotic and national prohi-

bition acts (Internal Revenue), 1925," does not specifically provide for the purchase, operation, or maintenance of motor-propelled passenger-carrying vehicles. Therefore said appropriation may be used for the hire of an automobile only as a means of accomplishing specific travel necessary in the performance of official duty where other means of transportation are not available. See 24 Comp. Dec. 189; 2 Comp. Gen. 693. When the hiring of an automobile is shown to be necessary under such circumstances the rate of such hiring may be by the mile, by the hour, or by the day, as the interests of the Government may require, and when the necessity for such hirings is frequent it would be proper, after advertising for bids for such service, to enter into a contract for such service as may be required throughout the fiscal year, payment to be made only for such time as the vehicle is actually required on official trips. If the needs of the service require a more general hiring—as for a period of 60 days, as in the case here under consideration, where the vehicle is placed at the disposal of the officer or employee at his station to be used if and when needed—the matter is for presentation to the Congress with a view to obtaining specific authority to use the appropriation for such specific purpose or for the general purpose of purchase, maintenance, and operation of motor-propelled passenger-carrying vehicles, as in the case of many other services.

The hiring in the case here under consideration was not authorized; but in view of all the circumstances appearing, credit will be allowed for the entire amount of $30 paid on voucher 56 for the month of August, it appearing that for the five days for which hire is charged the automobile was in use on an extended trip on official business away from Grand Junction, Colo., the officer's station, at which place the vehicle had been hired. On voucher 91, covering the month of September, credit can not be allowed for the hire charges made on the 8th, 9th, 11th, 14th, 21st, 22d, and 23d, being days (including two Sundays) on which no official travel was performed and the agent was at Grand Junction, his headquarters, there appearing no necessity for the incurring of hiring expenses for these days. The hire charges made for the other days in September will be passed for credit in the disbursing officer's account.

(A-6870)

INTERNAL REVENUE—DISTRAINT OF ASSETS OF DELINQUENT TAXPAYER—COMMISSIONS OF SALES AGENT

A tax lien established against the assets of a delinquent taxpayer and the distraint and sale of such assets under and pursuant to sections 3186 and 3191, Revised Statutes, takes precedence over a claim by a sales agent against the tax delinquent for commissions on sales, and such commissions are not payable by the United States from the proceeds of the distraint sale.

Decision by Comptroller General McCarl, April 7, 1925:

Nathaniel M. Bowie applied December 13, 1924, for review of settlement No. 051845, of October 8, 1924, wherein was disallowed his claim of $99 for commissions alleged to be due on the sale of 87 cases of Gordon Dry Gin, said claim having been forwarded to this office for direct settlement on August 28, 1924, by an Acting Deputy Commissioner of Internal Revenue, approved for payment under the appropriation for " salaries and expenses of collectors of internal revenue," etc., 1924, act of January 3, 1923, 42 Stat. 1096.

The facts appear that claimant was an agent of the Gordon's Dry Gin Co. (Ltd.), engaged in selling its products on a commission basis; that he had made sales of 87 cases of gin for which payments had been made by the vendees and for which sales he claims he is entitled to commission amounting to $99; and that the Gordon's Dry Gin Co. (Ltd.) had not paid said commissions, because, as stated in its form letter of May 12, 1924:

> This is to advise you that the United States collector of internal revenue for the second district of New York has placed a lien for additional 1917 taxes on the entire assets of this company, and its parent company, La Montagne, Chapman Co. (Inc.).
>
> The lien is of sufficient amount to close both companies, as the difficulty of operating legally in competition with illegal products had gradually diminished resources and revenue.
>
> The administration of both companies has in consequence passed from our hands, and we have absolutely no control over any asset of either company.
>
> We regret the situation, which has arisen through no fault of our own, but from the difficulty of interpreting the complex income tax laws existing in 1917.

The collector of internal revenue, New York, N. Y., in his letter of September 17, 1924, to the Commissioner of Internal Revenue, which letter was transmitted to this office on September 20, 1924, stated:

> An investigation discloses that Messrs. Bowie and Baldwin were agents of the Gordon Dry Gin Co., and sold products for which they received no commissions. Inasmuch as this office levied upon and distrained by virtue of a warrant for distraint against the property of the Gordon Dry Gin Co., these parties assume that they should be reimbursed by the Government.
>
> It is the opinion of this office that Messrs. Bowie and Baldwin are not entitled to the claims submitted.

Though not so stated, it appears that the appropriation of the assets of the Gordon's Dry Gin Co. (Ltd.) was under and pursuant to sections 3186 to 3191, Revised Statutes. Section 3186, Revised Statutes, as amended by the acts of March 1, 1879, 20 Stat. 331, and March 4, 1913, 37 Stat. 1016, provides that if any person liable to pay any tax neglects or refuses to pay the same after demand, a lien is established in favor of the United States upon all property and rights of the tax delinquent for the amount of the tax, interest, penalties, and cost, but that such lien shall not be valid as against any mortgagee, purchaser, or judgment creditor

until notice thereof shall be filed by the collector in the manner and places provided. Section 3187 provides that if any person liable to pay any taxes neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the collector to collect said taxes, penalties, and interest by distraint and sale of the goods, chattels, or effects, including stocks, securities, and evidence of debt, of the delinquent, except as to certain property exempted, such as school books, wearing apparel, household furniture, etc.; section 3188 provides the procedure of levying the distraint; section 3189 for the exhibiting of all books containing evidence or statements relating to the subject of distraint; section 3190 for the procedure to be followed by the collector in connection with the distraint; section 3191 for the appropriation of the proceeds of the distraint to the payment of the delinquent taxes and expenses; and section 3205 for successive seizures of property until the total amount of taxes and expenses is realized.

The amount of the tax delinquency, the character and quantity of goods, etc., distrained, the amount realized from such distraint, and whether sufficient was realized to satisfy the tax, etc., are not disclosed. Claimant does not definitely state the basis of his claim against the United States; however, from the matters submitted it is indicated that his claim is on the basis that his unpaid commissions constituted a charge against the assets of the tax delinquent, so as to render such assets distrainable only to the extent that they were unaffected by such charges. Claimant particularly invites attention to a remittance from one of the vendees, stating that the collector "also got, I am told, a certain check, dated May 12, 1924, for $1,137.58 from J. L. Thompson & Sons (Inc.), Troy, N. Y., and used same," and that if the check for $1,137.58 was a part of the assets distrained, "I doubt very much if the Government seizure would cover bills payable to Gordon Dry Gin Co. (Ltd.) without the Government paying the commissions due me for the sale of these very goods."

As hereinbefore stated, it is not disclosed what assets of the Gordon's Dry Gin Co. (Ltd.) were distrained; therefore it is not known, and for the purposes of this decision it does not appear material or necessary to ascertain, whether the remittance of $1,137.58, supra, was utilized by the Gordon's Dry Gin Co. (Ltd.) or applied by the collector. The remittance, it appears, was to the Gordon's Dry Gin Co. (Ltd.), and constituted an asset of that company subject to distraint the same as any other asset. Such amount as may have been due from the Gordon's Dry Gin Co. (Ltd.) to claimant was a liability of that company, over which the tax lien of necessity must have had precedence. It appears to have been the duty of the collector to seize and realize the asset here considered, and it

appears further to be for the attention and consideration of the Commissioner of Internal Revenue to determine whether that was done.

The appropriation under which the claim here in question was approved for payment by the acting deputy collector of Internal Revenue, act of January 3, 1923, 42 Stat. 1096, provided:

> For salaries and expenses of collectors of internal revenue, * * * expenses of seizure and sale, and other necessary miscellaneous expenses in collecting internal-revenue taxes * * *.

The approval of the claim here in question under the appropriation just quoted obviously was improper and unwarranted. The amount claimed was in no sense an expense of seizure and sale nor a miscellaneous expense of collecting internal revenue taxes.

Upon review the settlement is sustained.

(A–8035)

ADVERTISING

The prohibition in section 3828, Revised Statutes, against the payment for advertisements published in newspapers "except in pursuance of a written authority for such publication from the head of the department," is mandatory and permits of no exception due to hardship in particular cases. The subsequent approval or ratification by the head of the department does not remove the statutory bar.

Decision by Comptroller General McCarl, April 7, 1925:

There is for consideration whether credit may be allowed in the accounts of James E. Miller, trade commissioner, Bureau of Foreign and Domestic Commerce, Department of Commerce, for the sum of $6.88, the equivalent in United States money of 23 rupees, expended by him for an advertisement inserted in the Times of India, published in Bombay, India. The advertisement was inserted without securing the prior written authority of the head of the department in which Mr. Miller was employed and therefore comes within the inhibition of the plain provision of section 3828, Revised Statutes, which is as follows:

> No advertisement, notice, or proposal for any Executive Department of the Government, or for any Bureau thereof, or for any office therewith connected, shall be published in any newspaper whatever, except in pursuance of a written authority for such publication from the head of such Department; and no bill for any such advertising, or publication, shall be paid, unless there be presented, with such bill, a copy of such written authority.

The statute provides for no exceptions to the rule thus plainly prescribed and therefore no exception thereto is authorized to be made by this office. As was said in *Corona Coal Co.* v. *United States*, 263 U. S. 537, 540:

> * * * But the words of the statute are plain, with nothing in the context to make their meaning doubtful; no room is left for construction, and we are not at liberty to add an exception in order to remove apparent hardship in

particular cases. See *Amy* v. *Watertown*, 130 U. S. 320; *St Louis, Iron Mountain & Southern Ry. Co.* v. *Taylor*, 210 U. S. 281, 295; *United States* v. *First National Bank*, 234 U. S. 245, 259–260.

It has been held uniformly that a subsequent approval of an expenditure for advertising is not a compliance with the statutory requirement of "a written authority for such publication." See 5 Comp. Dec. 166; 3 Comp. Gen. 737.

Credit for the payment in question is not authorized.

(A–8397)

COURT-MARTIAL—FORFEITURE OF NAVY PAY

An enlisted man who surrendered to the naval authorities more than three years after his desertion from the Navy and after his enlistment had expired and was given an undesirable discharge is not entitled to pay forfeited prior to his desertion under sentences of summary courts-martial.

A summary court-martial sentence imposing forfeiture of pay operates only upon pay earned under a contract of enlistment and a discharge issued before sufficient pay has been earned to satisfy the forfeiture works a remission of the unexecuted portion of the sentence.

Decision by Comptroller General McCarl, April 8, 1925:

Benjamin Harrison Thayer, formerly boatswain's mate, first class, United States Navy, has applied for review of claim settlement 043775, dated November 7, 1924, wherein his claim for arrears of pay at $84 per month for the period November 1, 1920, to January 10, 1921, was disallowed and a balance was certified to be due from him to the United States.

Claimant last enlisted in the United States Navy, April 28, 1919, at New York, N. Y., for four years, was attached for duty aboard the U. S. S. *Texas*, and was rated boatswain's mate, first class, April 1, 1920. The Chief of the Bureau of Navigation has reported concerning his conduct and service thereafter as follows:

11 DECEMBER, 1924.

[1st Indorsement:]

From: The Chief of the Bureau of Navigation.
To: The Comptroller General, General Accounting Office, Claims Division.
Subject: Thayer, Benjamin Harrison, #501–70–38, BM 1c, U. S. N.
Information regarding courts-martial.

1. Returned. The records of the bureau indicate that the above-named man was tried by summary court-martial and sentenced to lose pay amounting to $273. Loss of pay was reduced to $75 and so remitted in accordance with Art. I–4893, N. I., 1913, approved by convening authority 18 November 1920 and by immediate superior in command on 19 November 1920.

2. Thayer was again tried by summary court-martial and sentenced to be discharged from the U. S. Naval service with a bad conduct discharge and to lose pay amounting to $268.50. Bad conduct discharge remitted; placed on six months' probation. Approved by convening authority and superior officer presiding on 28 December 1920. Loss of pay in this case was not remitted.

3. There is nothing on file in the bureau to show that the above-mentioned courts-martial were ever reviewed or disapproved.

3 OCTOBER, 1924.

[1st Indorsement]

From: The Chief of the Bureau of Navigation.
To: The Comptroller General, General Accounting Office (Claims Division).
Subject: Thayer, Benjamin Harrison, #501-70-38, BM 1c, U. S. N.
Regarding period of desertion.

1. Returned. The records of the bureau indicate that the above-named man, a deserter from the U. S. S. *Rathburn* from 12 January, 1921, surrendered himself at the Navy recruiting station, Des Moines, Iowa, 28 March, 1924. In view of the fact that a period of over two years had elapsed since the date of his desertion and that he was a technical war-time deserter the bureau did not recommend trial by court-martial, but directed that Thayer be discharged as undesirable for the naval service. The mark of desertion has not been removed from his record.

Between October 1, 1920, and December 15, 1920, claimant was paid $138. He was not paid thereafter for the reason that the total pay earned by him was insufficient to cover the forfeiture of pay ($268.50) imposed by the summary court-martial sentence approved December 28, 1920, and the cost of his transportation and subsistence ($17.20) from Des Moines, Iowa, where he surrendered, to the naval training station at Great Lakes, Ill. See Articles D-2132 and D-7120, Bureau of Navigation Manual, 1921. Though the loss of pay imposed by the summary court-martial sentence approved November 19, 1920, was conditionally remitted, it became an absolute forfeiture by reason of claimant's subsequent desertion. In this connection see Article 1877 (2) (f), Navy Regulations, 1920.

When claimant was discharged April 22, 1924, at the naval training station, Great Lakes, Ill., as undesirable for the naval service, his account showed an overpaid balance of $208.19. This overpaid balance resulted from an entry on the debit side of the account of the $268.50 forfeiture of pay imposed by the summary court-martial sentence approved December 28, 1920.

Since a summary court-martial sentence imposing a forfeiture of pay operates only upon pay earned under a contract of enlistment, a discharge issued before sufficient pay has been earned to satisfy the forfeiture works a remission of that portion unsatisfied at the date of discharge. See in this connection decision rendered to Paymaster T. J. Arms in the Taylor case, 69 MS. Comp. Dec. 109, April 6, 1914. As his enlistment had expired when he surrendered March 28, 1924, he is not entitled to pay subsequent to that date.

Accordingly, the charge raised against claimant will be removed but the portion of the settlement wherein his claim for arrears of pay was disallowed, is sustained.

59344°—25——55

(A-8498)

POSTAL SERVICE—CLERK HIRE IN THIRD-CLASS POSTOFFICES

The allowance for clerk hire to third-class postoffices in the act of February 28, 1925, 43 Stat. 1054, may be divided into such respective parts for the quarters as will meet the needs of seasonal conditions, provided that such apportionment does not obligate the Government for any amount in excess of the total amount appropriated for such allowances or to pay any postmaster an allowance for clerk hire for any year in excess of the amount authorized by law for the office involved.

Comptroller General McCarl to the Postmaster General, April 9, 1925:

I have your letter of March 13, 1925, as follows:

The act approved February 28, 1925 (H. R. 11444), reclassifying the salaries of postmasters and employees of the Postal Service, and readjusting their salaries and compensation, provides in part as follows:

"That postmasters at offices of the third class shall be granted for clerk hire, an allowance of $240 per annum where the salary of the postmaster is $1,100 per annum; * * *," etc.

At a considerable number of third-class offices due to seasonable activities or industries, such as chicken hatcheries, the sale of garden plants, summer and winter resorts, etc., conditions are such that little or no clerk hire expenditure is required during the other months of the year, whereas during the period of the seasonal work which may cover only three or four months the entire allowance is required, in addition to which it may be necessary to make a supplemental allowance.

A decision is therefore requested as to whether where such conditions exist, the department has authority to authorize the expenditure in any one quarter of an amount greater than the pro rata quarterly amount of the annual allowance, provided that the total expenditures for clerk hire for the year do not exceed such annual allowance.

A specific lump-sum appropriation is made for each fiscal year for allowances to third-class post offices to cover the cost of clerical service. For the present fiscal year, see act of April 4, 1924, 43 Stat. 86, and for the fiscal year 1926, see act of January 22, 1925, 43 Stat. 784.

Prior to the act of February 28, 1925, third-class postmasters were authorized to be paid for clerk hire only in accordance with allowances prescribed by the Postmaster General subject to the provision in the act of June 5, 1920, 41 Stat. 1052, which reads:

That no allowance to third-class post offices to cover the cost of clerical services in excess of $450 shall be made where the salary of the postmaster is $1,000, $1,100, or $1,200; nor in excess of $600 where the salary of the postmaster is $1,300, $1,400, or $1,500; nor in excess of $700 where the salary of the postmaster is $1,600, $1,700, or $1,800; nor in excess of $900 where the salary of the postmaster is $1,900 or $2,000; nor in excess of $1,200 where the salary of the postmaster is $2,100 or $2,200: * * *

The act of February 28, 1925, 43 Stat. 1054, discontinues the payments to third-class postmasters of money-order commissions previously authorized, increases their fixed salaries, and provides for clerk-hire allowance at specific rates per annum based on the salary received. It also provides that the Postmaster General "may" modify these allowances "to meet varying needs" but that in no case shall they be reduced by such modification more than 25 per cent;

also that the aggregate of such allowances as modified shall not exceed in any fiscal year the aggregate of the allowances as fixed by the act.

The enactment does not require that the allowance be the same amount for each quarter. There is sufficient authority for dividing the maximum per annum allowance, whether the rates fixed in the statute or lower rates to which hereafter modified by the Postmaster General within the limit specified in the statute, into such respective parts for the quarters as will meet the needs of seasonal conditions which you represent exist with respect to the need for clerk hire in certain third-class postoffices. See act of February 27, 1906, 34 Stat. 49. It is to be understood, of course, that such apportionment or authorization can not operate to obligate the Government for any amount in excess of the total amount appropriated for such allowances or to pay for any postmaster an allowance for clerk hire for any year in excess of the amount authorized by law for the office involved.

The question submitted is answered accordingly.

(A–6044)

EFFECTIVE DATE OF APPOINTMENTS

To entitle an officer or employee to compensation under an appointment, the appointment must be accepted either formally, or by entry upon duty or by taking the oath of office. No payment may be made prior to taking the oath but the oath when taken may relate back to the date of the acceptance of the appointment in the absence of any restriction in the appointment itself.

Comptroller General McCarl to William H. Smith, special disbursing officer, International Joint Commission, April 11, 1925:

There has been received your letter of November 1, 1924, requesting decision whether payment is authorized of a voucher transmitted for compensation to Hon. Fred T. Dubois, commissioner on the part of the United States of the International Joint Commission of the United States and Canada for the period from July 3 to 14, 1924, inclusive, amounting to $250.

It appears that Mr. Dubois was appointed to the commission on July 3, 1924, but was not notified of his appointment until July 15, 1924, on which date he took the oath of office. Section 1757, Revised Statutes, and the act of May 13, 1884, 23 Stat. 21, require generally that an officer of the United States shall take the oath of office before entering upon his duties. These provisions have been held to be directory only. *United States* v. *Eaton*, 169 U. S. 331. The accounting officers have followed the decision cited and held that unless

an appointment stipulated taking the oath of office as a condition precedent to make the appointment effective, the officer or employee would be entitled to compensation from the date of acceptance of the appointment, provided the oath had been taken prior to the payment of compensation; that is, the oath must be taken before the officer or employee is entitled to payment, but the oath having been taken the right to compensation may relate back to the date of the acceptance of the appointment in the absence of any restriction in the appointment itself. See 24 Comp. Dec. 547.

The decisions have been that there must be an acceptance of appointment to entitle an officer or employee to compensation. Acceptance may be shown by formal acceptance, by entry on duty, or by taking the oath of office. No evidence has been presented showing that Mr. Dubois accepted the appointment as commissioner on any date prior to July 15, 1924, and accordingly payment of the voucher submitted is not authorized.

(A–7218)

SALES OF SURPLUS PROPERTY—REFUNDS FOR SHORTAGE

The fact that a sale of surplus oil was offered "as is" and "where is" does not bar a refund covering a shortage in the quantity of oil delivered when the terms of the sale expressly stated that the quantities were approximate and that any overpayment due to shortage in the actual quantity would be refunded and that the purchaser would be required to pay the balance due should the quantity be found to be more than advertised.

Comptroller General McCarl to the finance officer, Watertown Arsenal, April 11, 1925:

There has been received the communication of the commanding officer of the Watertown Arsenal, dated December 16, 1924, forwarding voucher for $6 in favor of the Newton Machine Screw Co., representing a refund on a shortage of 300 gallons of oil purchased by the payee thereof under circular proposal No. 184, dated January 16, 1924. Decision is requested whether payment of such voucher is authorized.

The circular advertisement and proposal of January 15, 1924, required bidders to submit sealed bids for the purchase of certain surplus ordnance property in accordance with the terms and conditions of sale set forth therein. The salient points of these conditions provide that the material is offered for sale "as is," "where is," that the bidder will be required to accept the material "as is" and "where is" in its present condition; that the Government assumes no responsibility whatever as regards quantity, quality, analysis, or description; that no representative of the Government

is authorized to make any statement or representation as to any property offered for sale; and that no representation or statement made by any representative of the Government concerning any such property would be considered as ground for any claim of adjustment or rescission of the sale.

Under "Terms of sale" it is provided:

> All quantities are approximate and when removing material, if it is found that the quantity is more than that advertised, the purchaser will be required to pay the balance due before material is removed. If quantity is less than the amount paid for, the Government will promptly refund any overpayment to purchaser * * *.

The property purchased by the claimant was described in the circular as:

> Lot 65, Approx. 1725 gallons misc. oil, cutting, machine quenching, etc., in barrels and cans. Lot.

The bid for this lot was $34.50, an average of 2 cents per gallon, for the estimated quantity.

Upon delivery it was found that due to an error in the inventory there was a shortage of 300 gallons of the quantity advertised and paid for. The voucher covers this shortage at 2 cents per gallon.

In cases of Government sales of surplus property where the goods are sold by lot "as is" and "where is" without warranty of any kind, the general rule is that the purchaser bids and pays for the "lot" regardless of quantity, quality, condition, etc., proper opportunity being given to the prospective bidder to inspect the property before he makes his bid; more especially is this so when the advertisement warns the public that "the Government assumes no responsibility whatever as regards quantity, quality, analysis, or description."

There are certain conditions, however, peculiar and applicable to each particular sale which must be taken into consideration in order to determine the understanding of the parties when the sale was consummated. The outstanding peculiarities of the sale involved in the present case are that the quantities are listed as approximate; that the bids are to be on the lot on the basis of quantities advertised; and that any shortage or overage is to be adjusted upon removal of the goods. The bid was, therefore, only tentative to be finally adjusted or prorated when the goods were delivered, and the quantity delivered being less than that paid for, an adjustment of the undelivered quantity is proper and the purchaser is entitled to a refund of the overpayment.

The voucher submitted by you is returned herewith together with papers related, and you are advised that payment thereon is authorized.

(A-8396)

APPROPRIATIONS—TRANSFER

The appropriation of $5,000 in the legislative appropriation act of March 4, 1925, 43 Stat. 1297, to enable the Joint Committee on the Library to carry out the provisions of the joint resolution of January 7, 1925, 43 Stat. 729, with regard to the new location of the Botanic Garden, was made to the legislative branch, as distinguished from the administrative branch, of the Government and may not be transferred to the Office of Public Buildings and Public Parks, an administrative service, for direct expenditure.

Comptroller General McCarl to Col. C. O. Sherrill, Director, Office of Public Buildings and Public Parks of the National Capital, April 13, 1925:

I have your letter of March 7, 1925, transmitting a copy of letter of January 30, 1925, from the chairman of the Senate Committee on the Library, advising you that it had been concluded to have the work called for under Public Resolution No. 42, approved January 7, 1925, 43 Stat. 729, entitled "Joint resolution providing for the procurement of a design for the use of grounds in the vicinity of the Mall by the United States Botanic Garden," performed by you. The public resolution provides:

* * * That the Joint Committee on the Library is hereby authorized and directed to investigate and report to Congress, with estimate of cost as to a new location for the conservatories of the United States Botanic Garden, south of the Mall in the vicinity of the present location, and also as to a suitable landscape plan in connection therewith: *Provided*, That in the preparation of such a report the committee is hereby authorized to procure advice and assistance from any existing governmental agency, including the services of engineers, surveyors, draftsmen, landscape architects, and other technical personnel in the executive departments and independent establishments of the Government.

SEC. 2. For the purpose of this Act the sum of $5,000 is hereby authorized to be appropriated from any available money or money that may become available in the Treasury of the United States.

The legislative appropriation bill approved March 4, 1925, 43 Stat. 1297, provides:

To enable the Joint Committee on the Library to carry out the provisions of the joint resolution entitled "Joint resolution providing for the procurement of a design for the use of grounds in the vicinity of the Mall by the United States Botanic Garden," approved January 7, 1925, $5,000, to be available immediately.

In your letter of March 7, 1925, you state:

It is requested therefore, in order that I may proceed immediately with this work, that these funds be placed to the credit of the accounts of this office.

I, of course, assume this appropriation will remain available until after the end of the present fiscal year.

The appropriation here in question is available for obligation on and from March 4, 1925, to June 30, 1926.

The resolution, Public No. 42, of January 7, 1925, authorizes and directs the Joint Committee on the Library to make the investigation and the report to the Congress. The appropriation is to the legislative branch of the Government as distinguished from the executive branch, which makes it necessary that the legislative com-

mittee retain full control of the funds appropriated, likewise following the usual course by having disbursements made by the finance officer of the Senate on vouchers approved by the chairman of the committee. It will be observed that the resolution entitled the committee to the "advice and assistance" of other Government agencies, but this is only in the sense of subordinate to said committee and does not authorize placing the appropriated funds to the credit of any such agencies. The responsibility and accountability for the appropriation remains with the committee.

I am compelled to advise you the funds here in question may not be placed to the credit of your office.

(A–8086)

COMPENSATION DURING SUSPENSION—CLERK OF DISTRICT COURT

The suspension from duty by a United States district judge, of a clerk of the district court pending an investigation of official misconduct without stating whether the suspension is to be with or without pay, forfeits the pay of the clerk for the period of suspension and no subsequent order can operate to restore pay for any period of suspension prior to the order.

Decision by Comptroller General McCarl, April 14, 1925:

There has been received the application of David McDowell for review of settlement dated September 3, 1924, disallowing his claim, No. 040861, in the amount of $400 for salary as clerk of the District Court for the Northern District of Mississippi for the period December 22, 1923, to January 27, 1924, during which time he had been suspended from duty by order of the United States district judge for that district.

It appears that as a result of certain charges preferred against him by the Attorney General, and pending an investigation of said charges, the United States district judge issued the following order of suspension:

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF MISSISSIPPI

In re charges of official misconduct against David McDowell, clerk, and his suspension or removal.

This day upon receiving and reading the complaint of the Honorable H. M. Daugherty, Attorney General of the United States, that David McDowell, clerk of the United States District Court for the Northern District of Mississippi, has been guilty of serious misconduct in the performance of his official duties as clerk, it is ordered by the court that the said clerk be, and he hereby is, suspended, pending an investigation of his said official conduct and the charges of the Attorney General.

It is further ordered that the Attorney General file in this court forthwith formal charges against said clerk, touching the said matters complained of by him. to the end that issues may be made up and a trial had upon the merits thereof, and an appropriate judgment entered upon said charges.

The judge of this court, not deeming it proper for him to sit upon the trial of said charges, doth hereby recuse himself, and directs that said fact be entered of record and an authenticated copy of this order be forthwith certified by J. J. Vance to the senior circuit judge for the 5th circuit in order that such proceedings may be had as are provided for in section 20 of the Judicial Code.

It is further ordered that a certified copy of this order be sent to the Attorney General by J. J. Vance, deputy clerk.

Ordered and adjudged this 21st day of December, A. D. 1923.

(Signed) E. R. HOLMES,
U. S. District Judge.

Received filed Dec. 22, 1923.

(Signed) J. J. VANCE,
Chief Deputy Clerk.

Recorded in M. B. 19, on page 135.

When the notice of disallowance of salary for the period in question was called to the attention of the judge, he stated in a letter addressed to the Attorney General, under date of January 5, 1924, that "it was my intention at the time I entered the order suspending Mr. McDowell for him to be paid during his period of suspension."

Clerks of district courts are appointed by the respective district judges. See act of March 3, 1911, 36 Stat. 1087. Also par. 760 of current instructions to marshals, attorneys, clerks, and commissioners.

In Mechem on Public Officers, section 445, it is said:

Where, therefore, the tenure of office is not fixed by law and no other provision is made for removals either by the Constitution or by statutes, it is said to be "a sound and necessary rule to consider the power of removal as incident to the power of appointment." Citing *Smith* v. *Brown*, 59 Cal. 672; *Patten* v. *Vaughn*, 39 Ark. 211.

The same principle is upheld by Throop in his work on Public Officers. In section 354, he says:

The general rule is, that where a definite term of office is not fixed by law, the officer or officers, by whom a person was appointed to a particular office, may remove him at pleasure, and without notice, charges, or reasons assigned * * *.

Citing *Carr* v. *Stale*, 111 Ind. 101; *Stale* v. *Barrow*, 29 La. Ann. 243; *People* v. *Robb*, 126 N. Y. 180, and other cases.

As to the matter of compensation or pay under such conditions, it is said, in section 870, Mechem on Public Officers:

The right to receive or recover salary or other compensation attached to an office being vested in him who is by law the duly chosen and qualified incumbent of it, it follows necessarily that when the right of the officer to the office ceases, either through his resignation, removal, misconduct, or abandonment, his right to longer receive the compensation thereupon ceases also.

In section 864, the same author says:

An officer who has been * * * suspended from his office is not entitled to compensation for the period during which he was suspended, even though it be subsequently determined that the cause for which he was suspended was insufficient.

The reason given is—

that salary and prerequisites are the reward of express or implied services, and therefore can not belong to one who could not lawfully perform such services.

It has been held by the Comptroller of the Treasury, and by this office, that where the head of an executive department as an incident to the power of appointment and removal suspends an employee from duty pending the investigation of charges of official misconduct the pay of the employee for the period of suspension is forfeited; and that no order can operate retroactively to restore pay for any period of suspension. 21 Comp. Dec. 478; 20 *id.* 505; 11 *id.*, 661. A suspended officer or employee is in a nonpay status for the period of suspension whether the order of suspension specifically states that it shall be without pay, or is merely silent upon the question. 11 Comp. Dec. 661. See also 25 Comp. Dec. 996.

The order issued by the court was silent upon the question of payment of compensation during the period of suspension, and the judge's subsequent statement that it was his intention at the time he issued the order for the clerk to be paid during the period of suspension can not now be accepted and applied retroactively to an official act of the court. The question as to whether he would have been entitled to pay during the period of suspension if the court's order of suspension had specifically stated that the suspension would be with full pay is not here involved and no opinion thereon is expressed.

Upon review the settlement is sustained.

(A-8862)

CLASSIFICATION OF CIVILIAN EMPLOYEES—JUSTICE DEPARTMENT

The classification act is equally applicable to temporary appropriations for personal services in the District of Columbia as to annual or permanent appropriations, and to temporary positions as well as permanent, and the temporary character of an appropriation does not justify or authorize classing it as a separate unit in so far as personal services in the District of Columbia are concerned.

All appropriation items under the Department of Justice in the act of February 27, 1925, 43 Stat. 1025, providing for personal services in the District of Columbia for the fiscal year 1926, constitute "one bureau, office, or other appropriation unit" within the meaning of the average provision relating to the classification of civilian employees, except "Conduct of customs cases," which is excluded from classification, and "Inspection of prisons and prisoners," which may be considered a separate and distinct unit.

Comptroller General McCarl to the Attorney General, April 14, 1925:

I have your letter of April 1, 1925, requesting decision whether the several items of appropriations providing for personal services

under the Department of Justice in the District of Columbia for the fiscal year 1926, act of February 27, 1925, 43 Stat. 1025, may be considered as constituting a single "bureau, office, or other appropriation unit" within the meaning of the average provision restricting payments for personal services in accordance with the classification act of 1923.

Appropriations for the fiscal year 1926, under the Department of Justice, in so far as they provide for personal services in the District of Columbia, are under the major or general heading and subitems as follows:

Office of the Attorney General.
Miscellaneous objects, Department of Justice:
Conduct of customs cases.
Detection and prosecution of crimes.
Enforcement of antitrust laws.
Enforcement of acts to regulate commerce.
Investigation and prosecution of war frauds.
Marshals, district attorneys, clerks, and other expenses of United States courts: For assistants to the Attorney General and to United States district attorneys employed by the Attorney General to aid in special cases, including not to exceed $60,180 for clerical help for such assistants in the District of Columbia.
Penal institutions: Inspection of prisons and prisoners.

The decisions of this office in substance have held that ordinarily the respective bureaus in a department are the units within the meaning of the average provision in the absence of a specific showing that a bureau is operating under two or more appropriations providing for dissimilar and unrelated activities. 4 Comp. Gen. 167; id. 497; id. 678; id. 703; decision of March 7, 1925, A–7865; and decision of March 27, 1925, A–8477.

There are no bureau organizations under the Department of Justice as that term is ordinarily understood, so that here is a question whether the amounts appropriated under any of the individual headings or items of appropriations constitute the "unit," whether several items should be grouped, or whether there is one unit for the Department of Justice.

There is unquestionably a common purpose in all the work provided for under each of the items that have to do with the enforcement of the laws of the United States. The difference in the laws to be enforced or violations thereof to be prosecuted does not justify or authorize a division of the personnel into separate units. The restriction of the average provision may be applied properly only by grouping all the personnel engaged in the enforcement and prosecution of violations of all the laws provided in the several appropriation items into one unit, wherein comparison of efficiency may properly determine promotions, demotions, and dismissals.

Under the item "Conduct of customs cases," it is provided:

* * * special attorneys and counselors at law in the conduct of customs cases, to be employed and their compensation fixed by the Attorney General,

as authorized by subsection 30 of section 28 of the Act of August 5, 1909; necessary clerical assistance and other employees at the seat of government and elsewhere, to be employed and their compensation fixed by the Attorney General * * *.

The classification act is not applicable to attorneys and employees engaged under this heading for the reason that the employment and fixing of salaries has otherwise been expressly provided for. See in this connection The Budget, 1926, page 566.

You state in your submission as follows:

While the appropriation "Investigation and prosecution of war frauds" might well in our judgment be brought within the proposed plan, yet it is not deemed desirable to do so for the reason that the war frauds organization is one of a temporary character composed in large degree of field employees and is and will continue to be handled as a separate organization.

The classification act is equally as applicable to temporary appropriations providing for personal services in the District of Columbia as to annual or permanent appropriations so providing, and to temporary positions or employments as well as permanent, unless expressly excepted. The temporary character of this appropriation, and the use of a portion thereof for field work does not justify or authorize classing it as a separate unit in so far as personal services in the District of Columbia are concerned.

The work provided for under the appropriation item "Inspection of prisons and prisoners," is unrelated to the enforcement of the laws of the United States. This item may, therefore, be considered as a separate and distinct item.

To summarize—all appropriation items under the Department of Justice in the act of February 27, 1925, for the fiscal year 1926, providing for personal services in the District of Columbia constitute one "bureau, office, or other appropriation unit" within the meaning of the average provision, except "Conduct of customs cases" which is excluded from classification, and "Inspection of prisons and prisoners" which may be considered as a separate and distinct unit.

(A–8891)

PER DIEM ALLOWANCES FOR AERIAL SURVEYS—NAVY

The payment of the $7 per diem allowance to officers and enlisted men of the Navy authorized by the act of March 3, 1925, 43 Stat., 1190, for travel by air in connection with aerial survey duty, is payable only for the days actually spent in travel by air from the permanent station to the basing point from which the surveys are to be made, and return, and for travel by air pursuant to competent orders creating a travel status. The $6 per diem allowance authorized by said act for the time consumed in making aerial surveys, is payable for the actual time spent in making aerial surveys from other than the permanent station and for travel performed other than by air between the place where the surveys are made and the permanent station, but $6 per diem is not authorized for any day for which the $7 rate is payable and neither the $6 nor the $7 per diem is authorized when the permanent station is used as the base.

Comptroller General McCarl to the Secretary of the Navy, April 15, 1925:

I have your letter of April 3, 1925, submitting proposed change in section F, of "Instructions for carrying into effect the joint service pay bill, act of June 10, 1922," with request for an expression of views as to whether the proposed changes in so far as they involve disbursements are in conformity with law.

It is proposed to strike out paragraph 15 on page F–13, now obsolete, and substitute therefor the following:

15 (*a*). To cover actual additional expenses to which fliers are subjected when making aerial surveys, hereafter a per diem of $7 in lieu of other travel allowances shall be paid to officers, warrant officers, and enlisted men of the Army, Navy, and Marine Corps for the actual time consumed while traveling by air, under competent orders, in connection with aerial surveys of rivers and harbors, or other governmental projects, and a per diem of $6 for the actual time consumed in making such aerial surveys, to be paid from appropriations available for the particular improvement or project for which the survey is being made: *Provided*, That not more than one of the per diem allowances authorized in this section shall be paid for any one day. (Act March 3, 1925.)

(*b*) For the purpose of allowing such additional expenses, travel time shall begin with the day an officer, warrant officer, or enlisted man leaves his permanent station, and shall end with the day of his return to his permanent station. A travel day shall begin at 12 midnight preceding the time of departure, and the period of travel expires with 12 midnight following the time of return. For the purpose of crediting such per diem allowances, a fractional part of a day shall constitute one day.

(*c*) Actual time consumed while traveling for which a per diem of seven dollars shall be paid shall include aerial travel to and from places where aerial surveys are to be made, and also aerial travel to and from permanent station. Where travel is performed by any mode of transportation other than air to and from places where aerial surveys are to be made, or to and from permanent station, transportation in kind will be furnished and the six dollars per diem will be paid for the entire period of such travel, as well as for the time spent in making the aerial surveys. If it is impracticable for transportation in kind to be furnished, reimbursement will be made on the basis of what it would have cost the Government to have furnished such transportation.

(*d*) An indorsement shall be placed on the original orders showing the hour and date of departure from permanent station and hour and date of arrival at each place or places where aerial surveys are to be made, also the hour and date of departure from place where surveys are made and hour and date of arrival at permanent station.

(*e*) It will be noted that where the seven dollar per diem is paid for travel to and from the place where the survey is to be made, the six dollar per diem commences with the day following the day of arrival at the place where the surveys are to be made and continues through the day preceding the day of departure.

(*f*) Claims for such allowances shall be submitted to the Bureau of Supplies and Accounts on Standard Form 1012, Reimbursement Voucher, accompanied by original orders and two certified copies. In view of the fact that this is a per diem allowance it is not necessary to furnish receipts.

The proposed instructions are for carrying out the provision of section 5 of the act "authorizing the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes," approved March 3, 1925, 43 Stat. 1190. Paragraph 15 (a) sets out the section in full.

Three conditions are requisite to the receipt of the per diem allowance: (1) The officers and men must be assigned specifically to the performance of aerial survey duty; (2) the duty must be upon

projects other than those pertaining to the naval or military services proper; (3) the projects must be authorized either through enactments providing for such activities generally or through specific enactments authorizing the carrying out of the particular project.

In view of the provision of section 20 of the act of June 10, 1922, 42 Stat. 632, granting to officers and men detailed to duty involving flying certain allowances for traveling expenses, those allowances will govern for travel in the performance of military or naval duty. The allowances provided in section 5 of the act of March 3, 1925, are authorized only when the officer or man is assigned to duty otherwise, and are not a substitute for the allowances provided in the 1922 law.

As section 5 of the act of March 3, 1925, specifically provides that the allowances therein fixed are "to be paid from appropriations available for the particular improvement or project for which the survey is being made," it is quite evident that the departments or branches requesting the service must have appropriations available for carrying on work of the character upon which it is proposed to employ the fliers.

From the wording of section 5 of the act of March 3, 1925, it appears that the $7 per diem is to cover expenses of aerial travel involved in proceeding to the basing point or locality of the survey and in returning upon completion thereof and any ordered travel in connection with the survey. Daily flights from the basing point to the location of the survey and return during the continuance of the operation are not aerial travel within the meaning of the law applicable to the $7 rate, such travel being within the terms "the actual time consumed in making such aerial surveys" and to which the $6 rate applies. Were it otherwise, with the day indivisible, a flight from base to location of survey and return to base later in the day with similar performance in succeeding days would make each day one of aerial travel at the $7 rate, and defeat the purpose of the law to make payable the $6 rate during the making of the survey.

For reason above stated, the following should be substituted for paragraph (c):

(c) The seven dollar per diem allowance is payable for the actual time consumed in aerial travel from the officer's permanent station to the area in which the survey is to be made or basing point from which flights will be made in the conduct of the survey, and for return aerial travel to the officer's permanent station upon termination of the detail to the survey duty and for any air travel performed in connection with the survey pursuant to orders which create a travel status. Allowance is not payable when the permanent station of the officer or man is used as a base during the continuance of the survey. The six dollar per diem is payable for actual time spent in making the aerial survey when operating from a base other than permanent station. Where travel is performed by any mode of transportation other than air to and from places where aerial surveys are to be made, or to or from permanent station, transportation in kind will be furnished and the six dollar per diem will be paid for the entire period of such travel, as well as for the time spent

in making the aerial survey. If it is impracticable for transportation in kind to be furnished, reimbursement will be made on the basis of what it would have cost the Government to have furnished such transportation. See 3 Comp. Gen. 598, 739, and 966.

Subject to the above indicated change no reason is apparent why the amendments to the instructions may not be promulgated.

It is, of course, to be understood in this as in other submissions of this kind, that the legal effect of the instructions must be for determination by this office when particular facts arise bringing them into question and that the instructions must therefore be subject to such interpretation as may be made.

(A-9074)

EXCHANGE OF GOLD COIN OF UNITED STATES FOR FOREIGN MONEYS

Gold coin of the United States advanced to a disbursing officer of the Navy for disbursement while in Australian waters may be exchanged for Australian gold coin at par including a deduction for mint charge, but may not be exchanged for any other form of Australian money.

Comptroller General McCarl to the Secretary of the Navy, April 15, 1925:

There has been received your letter of April 13, 1925, relative to the contemplated arrangements of the Treasury and Navy Departments for furnishing the United States fleet with the necessary funds for disbursement during the coming Australian cruise. The proposed procedure is to furnish the paymaster with the requisite amount of money in new United States gold coin to be exchanged by him for Australian money upon the arrival of the fleet in Australia, such Australian money to be used in paying the crews and for other expenses incurred while in Australian ports. It is shown that arrangements have been made by the Treasury of the United States for the immediate exchange of the moneys upon tender of the United States gold coin to the Australian mint, the only expense connected therewith being the customary mint charge. In this connection you submit three questions as follows:

(*a*) May the exchange of United States gold coin for Australian gold coin be effected?

(*b*) Must the exchange be made for gold sovereigns, or may the exchange be made for (1) gold certificates; or (2) silver certificates; or (3) other certificates authorized or issued by the Australian Government?

(*c*) Shall the Australian gold coin or currency received be accounted for at cost price or at par ($4.8665)?

Under section 3620 of the Revised Statutes furnishing a disbursing officer with funds is primarily a function of the Treasury Department and under the provisions of this statute "Department Circular No. 195, Amended and Supplemented" was issued on January 24, 1921, providing that—

* * * all funds advanced to Government disbursing officers for disbursement will be placed to their credit, subject to their official check, with the

Treasurer of the United States in Washington, except in cases where the Secretary of the Treasury by special authority permits disbursing officers to carry official disbursing accounts with depositary banks located beyond the continental limits of the United States, and with the further exceptions that—

* * * * * * *

(c) Any disbursing officer of the Navy Department, or Marine Corps, who is serving afloat or who is assigned to duty outside the continental limits of the United States, or at places far remote from depositaries of public moneys, may when authorized by the Secretary of the Navy, keep at his own risk such moneys as may be intrusted to him for disbursement. Quarterly reports shall be made by the Secretary of the Navy to the Secretary of the Treasury, Division of Bookkeeping and Warrants, showing so far as possible the names and stations of the disbursing officers so authorized to keep moneys at their own risk, the amounts which they are authorized to keep, and the amounts so kept.

Section 3651, Revised Statutes, provides that—

No exchange of funds shall be made by any disbursing officer or agent of the Government, of any grade or denomination whatsoever, or connected with any branch of the public service, other than an exchange for gold, silver, United States notes, and national-bank notes; and every such disbursing officer, when the means for his disbursements are furnished him in gold, silver, United States notes, or national-bank notes, shall make his payments in the moneys so furnished; or when they are furnished to him in drafts, shall cause those drafts to be presented at their place of payment, and properly paid according to law, and shall make his payments in the moneys so received for the drafts furnished, unless, in either case, he can exchange the means in his hands for gold and silver at par.

The matter may be understood as an arrangement by the Treasury of the United States to place the paymaster in funds for the particular cruise rather than a transaction of the paymaster, or as a general procedure, and that in so far as the contemplated procedure pertains to the exchange of gold for gold it is not prohibited by this statute, but as the statute specifically prohibits the exchange of Government funds in the possession of a disbursing officer for anything but gold, silver, United States notes and national-bank notes the exchange can not be made for any form of Australian money save gold coin. The exchange with the deduction of the mint charge to be made in converting the money will be considered as an exchange at par, and, therefore, your first question is answered in the affirmative, and the answer to the second is that the exchange must be made for gold sovereigns. The necessary amount of silver for making change may, of course, be secured by exchanging Australian gold coin for silver.

The Australian coin received must be accounted for at par, all disbursements being made upon the basis of $4.8665, at which rate the payments made will be credited and the cash balance on hand in Australian coin when accounts are rendered will be converted into United States money for accounting purposes. Credit for the mint charge incurred in the exchange will be allowed upon a properly supported voucher.

(A-5119)

JUDGMENTS—SET-OFF OF AMOUNTS DUE THE UNITED STATES

In the payment of a judgment against the United States rendered by the Court of Claims and appropriated for by Congress, the General Accounting Office has authority to set off against the amount of the judgment any balance found due the United States which was not considered or embraced in the judgment and which the judgment creditor fails or refuses to pay upon demand.

Decision by Comptroller General McCarl, April 16, 1925:

Edward F. Bailey, formerly first lieutenant, United States Marine Corps, obtained July 2, 1923, a judgment in the Court of Claims for $150 uniform gratuity, and there is for consideration the question of whether the sum of $42.70 due the United States as the unchecked difference in pay and allowance between the grades of first and second lieutenant for the period from January 2 to April 27, 1919, should be deducted from the amount of the judgment in stating a settlement by this office under the appropriation for the judgment made by the act of April 2, 1924.

The petition presented in the Court of Claims was for $150 uniform gratuity under the act of August 29, 1916, 39 Stat. 589. In view of the decisions in *Bancroft* v. *United States*, 56 Ct. Cls. 218, and *United States* v. *Bancroft*, 260 U. S. 706, no defense to the petition was interposed in the Court of Claims. Accordingly, judgment was rendered July 2, 1923, and in the deficiency appropriation act of April 2, 1924, an appropriation was made to pay said judgment. When the transcript of judgment was referred to this office for settlement pursuant to the act of February 18, 1904, 33 Stat. 41, it was discovered that an error had been made by William G. Powell, colonel, United States Marine Corps, in checking the account of the said Edward F. Bailey, on voucher No. 91, second quarter, 1921, in the sum of only $100.37 as difference between the pay and allowances of the grades of first and second lieutenant during the period from January 2 to April 27, 1919, the real difference between the pay and allowances of a first and second lieutenant for the period involved being $143.07, making an undercheckage of $42.70. By letters dated August 9 and September 22, 1924, request was made for payment of the indebtedness of $42.70 to the United States, but these requests had not been complied with; on the contrary, the attorneys for the judgment creditor demand payment of the whole of the judgment, notwithstanding the claimant's indebtedness to the United States.

The claim presented by the petition and adjudicated by the Court of Claims was for the uniform gratuity of $150. The court did not consider the whole of the account between the United States and Bailey, nor was the item of $42.70 considered and adjudged by the court. This office expressly disclaims any authority to revise the

judgment of the Court of Claims in this or any other case. *O'Grady* v. *United States*, 22 Wall. 641; *Jones* v. *United States*, 119 U. S. 480. However, in the language of the *Jones case*, the creditor here is a debtor to the United States for an item that is not included in the judgment, and the judgment is not conclusive as to said item. It was said by the Court of Claims in *Labadie* v. *United States*, 33 Ct. Cls. 476, that—

* * * When the time of payment [of a judgment] comes the statutes give the accounting officers of the Treasury [now the General Accounting Office] abundant authority to set off an indebtedness due from a claimant to the United States against a judgment in his favor. (Rev. Stat. secs. 236, 1766; act March 3, 1875, 18 Stat. L. p. 481; *Howe's case*, 24 C. Cls. R. 170; *Pennebaker's case*, 29 id. 35.)

In the *Schooner Henry et al.* v. *United States*, 35 Ct. Cls. 394, a sum of money had been appropriated to pay a claim, but a certificate was required from the Court of Claims that the claimant was the proper party. The United States resisted the granting of the certificate on the ground that the decedent was indebted to the United States in excess of the sum appropriated. The court overruled the objections, granted the certificate, and said:

It is among the general duties of the Treasury Department, through the accounting officers [now of the General Accounting Office], to settle all claims and demands by and against the United States, and in proper cases to set off one against the other when the Government is both debtor and creditor of the same party. (*Taggart's case*, 17 C. Cls. R. 323; *Bonnafon's case*, 14 C. Cls. R. 489; Rev. Stat. secs. 236, 1766; act of March 3, 1875, ch. 149, Sup. Rev. Stat. 185; *Howe's case*, 24 C. Cls. R. 170.)

It will be seen by these decisions and citation of the statutes that the Treasury [now the General Accounting Office] is in possession of adequate power to guard the United States against the payment of judgments or claims when there exists in the department a demand against the claimant which is a proper subject of set-off.

The court said in the *Taggart case*, 17 Ct. Cls. 323, at page 327, that—

Where a person is both debtor and creditor of the United States, in any form, the officers of the Treasury Department, in settling the accounts, not only have the power but are required, in the proper discharge of their duties, to set off the one indebtedness against the other and to allow and certify for payment only the balance found due on one side or the other. Section 1766 of the Revised Statutes so provides, and special provisions on the subject, to meet the case of judgments recovered against the United States "or other claim duly allowed by legal authority," are made by the act of March 3, 1875, chapter 149. (1 Supplmt. to R. S. p. 185.) But the right of set-off in such cases exists independently of those special enactments and is founded upon what is now section 236 of the Revised Statutes, as follows:

"SEC. 236. All claims and demands whatever by the United States, or against them, and all accounts whatever in which the United States are concerned, either as debtors or creditors, shall be settled and adjusted in the Department of the Treasury."

The duty of the accounting officers in matters of set-off has frequently been recognized by the courts. ((*McKnight's case*, 13 C. Cls. R., 306, affirmed on appeal; *Bonnafon's case*, 14 C. Cls. R., 489.) * * *.

Section 236, Revised Statutes, quoted by the court, is now section 305 of the budget and accounting act of June 10, 1921, 42 Stat.

24. See also *United States* v. *Griswold*, 30 Fed. Rep. 604; *Teller* v. *United States*, 113 *id.* 463; *United States* v. *Ennis*, 132 *id.* 133; *Wanner* v. *Louis Wanner, jr. (Inc.)*, 300 *id.* 376.

There is clearly authority, both statutory and judicial, for the deduction by the General Accounting Office from the amount of a judgment of a balance due the United States which was not considered or embraced in a judgment and which the judgment creditor fails and refuses to pay upon demand, although not expressly denying liability. A settlement will be stated allowing $150 as the amount of the judgment and deducting therefrom the overpayment of $42.70 and certifying the balance of $107.30 due Edward F. Bailey.

(A–5574)

TELEGRAMS—CONFIDENTIAL MESSAGES IN CODE

Vouchers for telegraph services furnished by a foreign government in transmitting alleged confidential messages in code may not be passed by the General Accounting Office upon a blanket certification that they were confidential, but copies of the telegrams in code and untranslated must be submitted in support of the account.

Decision by Comptroller General McCarl, April 17, 1925:

In connection with the settlement of the accounts of Herbert P. Middleton, special disbursing officer, Department of State, stationed at the American Embassy, Paris, France, there is for consideration the question whether all telegrams having their origin in matters styled "Foreign intercourse" are *ipso facto* confidential messages in the sense that they are not required to be forwarded to the General Accounting Office with vouchers in support of payment of the service rendered by the telegraph or cable company.

In the March, 1924, quarter, voucher 9, there is charged to "Contingent expenses, foreign missions, 1924," the sum of $4,206.26 paid to the Ministry of Postes, Telegraphes, and Telephones of the French Republic for what is stated as "official" telegrams sent during the months of January, February, and March through the private branch telegraph office located in the chancery of the American Embassy. A voucher, No. 9, in the June quarter pays $5,684.18 for like service under similar circumstances.

While these two vouchers claim credit for disbursements in the sum of $9,890.44, they are unsupported by the originals or even copies of the telegrams sent by which this office may exercise its proper function in deciding as to the amount and propriety of such a charge upon the public funds. In lieu of such telegrams there is a

certificate attached to each voucher signed for the ambassador by Sheldon Whitehouse, counselor of embassy, stating that—

I certify that the telegrams charged in the foregoing account, with the exception of those for which reimbursement has been made (and which are marked "p" in the accompanying itemized lists), are official and in connection with foreign intercourse.

In reference to this method of submitting a public voucher as evidence of a valid disbursement, a letter from the Secretary of State dated September 9, 1924, states in part, that—

You will find that on the recapitulation of expenditures for telegrams in the accounts of Mr. Middleton for the March quarter there is a certificate signed by Sheldon Whitehouse, counselor of embassy, giving full information as to the telegrams pertaining to foreign intercourse, and all accounts rendered by Mr. Middleton have been supported in the same way.

Accompanying the files pertaining to this matter is a copy of a circular of the Department of State, No. 901, "General instructions, consular (Diplomatic Ser. 203)," dated June 27, 1923, which in part directs as follows:

All entries of disbursements for telegrams and cablegrams should be supported by (1) the usual receipt or receipts from the telegraph company for payments made to it; (2) by Form No. 250, entitled, "Schedule of telegrams and cablegrams, Foreign Service," showing the date, number, addressee, destination, number of words, rate per word in foreign currency, and the total charge in foreign currency and the equivalent in United States currency, in relation to each message sent during the period covered by the account, the date of which should correspond with the receipt or receipts from the telegraph company with respect to amounts and essential facts; and (3) true copies of the transmitted text whether plain or in cipher, of all telegrams and cablegrams for which payment has been made.

The receipt or receipts of the telegraph company covering the charge for telegrams in confidential cipher and pertaining to foreign intercourse should be indorsed with the words "Foreign intercourse," followed by the initials of the responsible diplomatic or consular officer, and precisely the same treatment should be given to the copies of said telegrams. Copies of telegrams sent in commercial codes will not be so indorsed and will be accompanied by translations. The copies of telegrams indorsed "Foreign intercourse" will be retained in the confidential files of the department, while the copies and translations of telegrams not sent in confidential code but plain or commercial code, and not pertaining to foreign intercourse, will be transmitted by the department to the General Accounting Office as part of the accounts to which they relate. It will be apparent, therefore, that great care must be exercised in appropriately indorsing receipts of the telegraph companies and copies of the cipher text of telegrams pertaining to foreign intercourse.

The tenor of these directions, and the action in consequence thereof, is to determine all telegrams indorsed "Foreign intercourse" as confidential, and to require their withdrawal without exception from the accounts as submitted for payment, and secure their retention in the archives of the State Department, or the diplomatic offices thereof, leaving only a certified schedule of telegrams thus purporting to be confidential for submission to this office for its audit.

It appears that all of the telegrams in question were transmitted by the French Government over telegraph lines under its control, and its bill therefor, supported by copies of the telegrams thus sent, was submitted to the embassy for payment, and it is thereafter that

they are withdrawn from the accounts and retained because of being too confidential in nature to permit of their accompanying the account to the General Accounting Office for audit. We thus have the situation where the agencies of a foreign government receive and transmit a confidential message of the United States, furnish a copy of the message to one agency of the United States as proper evidence upon which it shall make payment, and yet another agency of the United States may not be intrusted with such copy, presumably in a secret code, for the similar purpose of having proper evidence upon which it may exercise its function of office. The reason for thus excluding the Accounting Office of this Government is not understood.

In view of the conditions which can be fairly assumed to exist, this office is not justified in passing accounts covering expenditures to the amounts indicated above upon such a blanket certification. There appears no reason why a copy of the messages in code as submitted to the foreign sending agency may not be submitted with the accounts to this office, the copy to be untranslated. The fact that personal messages are said to be involved which would disclose the code if translated, suggests that personal messages should not be permitted in such secret code rather than require this office not to receive proper accounting. Accordingly it is required that the usual copies of telegrams be submitted for use in auditing these and like payments before credit may be allowed for the expenditures. This ruling accords with like holdings of former comptrollers. 4 Comp. Dec. 233; 7 id. 528.

(A-8417)

RURAL MAIL ROUTES

The act of February 28, 1925, 43 Stat. 1063, fixing the salaries of rural carriers and providing for a sliding scale of $30 per mile per annum for each mile in excess of 24 miles, or $15 when the service is only performed three times a week, abolishes the distinction previously existing between horse-drawn and motor-vehicle routes and authorizes the establishment of routes of a length above 36 miles and less than 50 miles, which length routes were formerly not provided for.

Comptroller General McCarl to the Postmaster General, April 17, 1925:

I have your letter of March 9, 1925, wherein you request my decision whether under the act of February 28, 1925, 43 Stat. 1063, reclassifying the salaries of postmasters and employees of the Postal Service, etc., you are authorized to establish rural mail routes of a length above 36 miles and less than 50 miles, and pay salaries and equipment maintenance allowance to carriers assigned to serve routes of more than 36 miles and less than 50 miles in length.

The act of July 28, 1916, 39 Stat. 423, divided all rural mail delivery routes into two standard classes and provided as follows:

Hereafter all rural mail delivery routes shall be divided into two classes to be known as—

Standard horse-drawn vehicle routes, which shall be twenty-four miles in length, and

Standard motor-vehicle routes, which shall be fifty miles in length, and shall only be established hereafter when a majority of the proposed patrons who are heads of families residing upon such proposed routes shall by written petition ask the Post Office Department to establish the same.

Nothing herein contained shall be construed to prohibit the establishment of horse-drawn vehicle routes of less length than the standard of twenty-four miles: *Provided*, That if, in the discretion of the Postmaster General, in order to render more complete service, it should be necessary to do so the Postmaster General is hereby authorized to increase the length of routes not to exceed fifty per centum above the standards herein prescribed, and in such cases the compensation of the carrier on such horse-drawn vehicle routes shall be increased above the maximum pay heretofore fixed by law for rural carriers at the rate of $24 per annum for each mile of said routes in excess of thirty miles, and any major fraction of a mile shall be counted as a mile: *Provided further*, That carriers in the rural mail-delivery service shall furnish and maintain at their own expense all necessary vehicle equipment for prompt handling of the mail: *And provided further*, That nothing herein shall be construed, and no order shall be issued, to prevent the use of motor vehicles on horse-drawn vehicle routes * * *.

The salaries of rural carriers were readjusted by the act of June 5, 1920, 41 Stat. 1051, in which it was provided that the compensation of each rural carrier serving a rural route of 24 miles, six days in the week, should be $1,800 with provision for lesser salaries for carriers serving on routes of less than 24 miles. This act further provided:

* * * Each rural carrier assigned to a horse-drawn vehicle route on which daily service is performed shall receive $30 per mile per annum for each mile said route is in excess of twenty-four miles or major fraction thereof, based on actual mileage, and each rural carrier assigned to a horse-drawn vehicle route on which triweekly service is performed shall receive $15 per mile for each mile said route is in excess of twenty-four miles or major fraction thereof, based on actual mileage.

The classes into which the rural routes were divided seems to be recognized in this act and the prior act making the divisions together with the restrictions attaching thereto remained in full force and effect. Under such divisions and with the proviso that the Postmaster General might increase the length of either standard class of the routes not to exceed 50 per cent of the standard prescribed, it was not considered within the authority of the Post Office Department to establish rural routes in excess of 36 miles and less than 50 miles, the 36 miles equaling the standard route of 24 miles plus 50 per cent of the same.

The act of February 28, 1925, section 13 of which amends or repeals all acts and parts of acts inconsistent or in conflict with title 1 thereto, provides:

SEC. 8. That the salary of carriers in the Rural Mail Delivery Service for serving a rural route of twenty-four miles six days in the week shall be $1,800; on routes twenty-two miles and less than twenty-four miles, $1,728; on routes twenty miles and less than twenty-two miles, $1,620; on routes eighteen miles and less than twenty miles, $1,440; on routes sixteen miles and less than eighteen miles, $1,260; on routes fourteen miles and less than sixteen miles,

$1,080; on routes twelve miles and less than fourteen miles, $1,008; on routes ten miles and less than twelve miles, $936; on routes eight miles and less than ten miles, $864; on routes six miles and less than eight miles, $792; on routes four miles and less than six miles, $720. Each rural carrier assigned to a route on which daily service is performed shall receive $30 per mile per annum for each mile said route is in excess of twenty-four miles or major fraction thereof, based on actual mileage, and each rural carrier assigned to a route on which triweekly service is performed shall receive $15 per mile for each mile said route is in excess of twenty-four miles or major fraction thereof, based on actual mileage.

It is apparent from the language of this section that only one standard rural route is recognized, namely, the 24-mile route, and it is also evident that it was the intent of Congress to abolish the distinction between horse-drawn vehicle routes and motor vehicle routes, thereby removing the restrictions for the extension of these routes imposed by the act of February 26, 1916. The act of February 28, 1925, fixes the salaries of rural carriers operating on rural routes of 24 miles or less and provides that rural carriers assigned to routes on which daily service is performed shall receive $30 per mile per annum for each mile in excess of 24 miles and $15 when the service is performed three times a week. The salaries of rural carriers were fixed by Congress in this act at a standard rate for routes from 4 miles to 24 miles and above this maximum it was provided that the salaries should be adjusted at a certain rate for each mile.

Answering your question specifically, you are advised that under the act of February 28, 1925, there are authorized to be established rural routes of a length above 36 miles and less than 50 miles, there being no recognized standard route of 50 miles, and it, therefore, follows that payment of salaries, and equipment maintenance allowance of carriers assigned to such routes, is likewise authorized.

(A–3671)

RENTAL ALLOWANCE WHILE IN HOSPITAL

By virtue of the amendment of the joint service pay act by the act of May 31, 1924, 43 Stat. 250, an officer of the Navy entitled to active duty pay and not assigned public quarters for occupancy by himself and dependents is entitled to rental allowance notwithstanding his failure to perform duty due to sickness for a period in excess of six months.

Decision by Comptroller General McCarl, April 18, 1925:

There was received June 27, 1924, the request of William Armistead Gills, lieutenant (M. C.), United States Navy, retired, for a revision of settlement No. C–173445–N, dated April 14, 1924, by which was disallowed his claim for rental allowance from July 1 to December 15, 1923, and the sum of $237.33 found due by him to the United States, for rental allowance received from April 2 to June 30, 1923, on account of being in a hospital for more than six months.

On August 10, 1922, Lieutenant Gills was ordered to regard himself detached from duty on board the receiving ship at San Francisco, Calif., at such time as would enable him to report on September 2, 1922, to the commandant Twelfth Naval District and the commanding officer of the U. S. S. *Argonne* for duty on board that vessel; upon arrival of the U. S. S. *Argonne* at Annapolis, Md., to regard himself detached from duty on board that vessel and proceed to Washington, D. C., and report to the commandant of the navy yard for such duty as might be assigned him at the naval hospital, Washington, D. C. He was detached from the receiving ship at San Francisco, August 29, 1922; reported to commanding officer, U. S. S. *Argonne*, September 7, 1922; detached from the U. S. S. *Argonne* at Hampton Roads, Va., September 27, 1922; reported to commandant, navy yard, Washington, D. C., October 2, 1922, and ordered to report to medical officer in command of naval hospital, Washington, D. C.; reported October 2, 1922, to commanding officer, United States naval hospital, Washington, D. C., and admitted for treatment same date in compliance with Bureau of Medicine and Surgery indorsement of August 14, 1922. The service record of the officer shows his status from October 2, 1922, date he reported and was admitted to the naval hospital in Washington, to have been as follows:

November 2, 1922, granted two months' sick leave upon discharge from the hospital and upon expiration thereof to return thereto for physical examination to determine fitness for duty.
January 8, 1923, admitted to naval hospital, Washington, D. C.; discharged January 29, 1923.
January 30, 1923, admitted to same hospital.
February 20, 1923, granted three months' sick leave upon discharge from hospital and upon expiration to return thereto for physical examination to determine fitness for duty and upon completion await orders at Washington, D. C.
June 14, 1923, admitted same hospital.
December 15, 1923, placed on retired list.

The Chief of the Bureau of Navigation, Navy Department, April 5, 1924, reported that while Lieutenant Gills was ordered to duty at the naval hospital, Washington, D. C., his physical condition upon arrival was such that he was not fit for duty and instead of being assigned to duty, he was placed under treatment; that he performed no duty at the hospital after his arrival October 2, 1922. The commanding officer of the naval hospital, Washington, D. C., reported June 18, 1924, that claimant was not assigned quarters at that hospital during the period October 2, 1922, to December 15, 1923.

Section 2 of the act of May 31, 1924, 43 Stat. 250, 251, amending section 6, act of June 10, 1922, 42 Stat. 628, retroactive from July 1, 1922, provides as follows:

Sec. 6. Except as otherwise provided in the fourth paragraph of this section, each commissioned officer below the grade of brigadier general or its equivalent, in any of the services mentioned in the title of this act, while either

on active duty or entitled to active duty pay shall be entitled at all times to a money allowance for rental of quarters. * * *

* * * * * * *

[Par. 4] No rental allowance shall accrue to an officer, having no dependents, while he is on field or sea duty, nor while an officer with or without dependents is assigned as quarters at his permanent station the number of rooms provided by law for an officer of his rank or a less number of rooms in any particular case wherein, in the judgment of competent superior authority of the service concerned, a less number of rooms would be adequate for the occupancy of the officer and his dependents.

Lieutenant Gills was entitled to active duty pay from July 1 to December 14, 1923, inclusive, and not having been assigned public quarters for occupancy by himself and dependents, he is entitled, under the provisions of the act of May 31, 1924, to rental allowance for that period amounting to $437.33. 40 MS. Comp. Gen. 351.

For like reasons, the officer was entitled, between April 2 and June 30, 1923, to the rental allowance of $237.33, which he received.

The settlement is modified and the sum of $437.33 is certified due claimant from the United States.

(A–5957)

NATIONAL GUARD—DRILL PAY BETWEEN PERIODS OF ENLISTED AND COMMISSIONED SERVICE

A member of the National Guard discharged as an enlisted man to accept a commission as second lieutenant is not entitled to pay either as enlisted man or an officer for drills attended between the date of his discharge and the date he qualified by examination and was Federally recognized as an officer.

Comptroller General McCarl to Lieut. E. W. Wilson, Finance Department, United States Army, April 18, 1925:

I have your letter of October 3, 1924, requesting decision whether you are authorized to pay a supplemental roll transmitted therewith of Battery F, One hundred and thirty-fourth Field Artillery, Ohio National Guard, constituting the claim of Second Lieut. David W. Green, Field Artillery, Ohio National Guard, for armory drill pay during the period from May 1 to June 7, 1924.

Lieutenant Green is shown to have been carried on the original roll and payment was made thereon for drills prescribed and attended on April 6, 15, 23, 30, as first sergeant and drills on June 11, 18, 25, 30, as second lieutenant, no payment being made for drills on May 7, 14, 19, and June 4, 1924, which constitute the basis for the claim now submitted in the amount of $11.20, under the conditions hereinafter stated.

It appears that Green was discharged as a first sergeant, Field Artillery, Ohio National Guard, effective April 30, 1924, in order to accept a commission as second lieutenant, Field Artillery, which

appointment was made and accepted the following day, May 1, 1924. He successfully completed the examination required by section 75 of the act of June 3, 1916, 39 Stat. 202, on June 7, 1924, and Federal recognition in the grade of second lieutenant as of June 7, 1924, was extended to him by the War Department in a communication dated July 18, 1924.

The discharge, effective April 30, 1924, completely separated Green from the service as an enlisted man in the National Guard and he was not thereafter entitled to drill pay in such capacity, and, while he was an officer of the Ohio National Guard, section 75 of the same act denies him any benefit accruing under that act until the passing of the examination there required, which was passed June 7, 1924. Federal recognition having been extended to him from that date, he was from and subsequent to such date an officer of the National Guard, qualified under the national defense act and entitled to National Guard pay as prescribed by section 109 of such act, which for lieutenants belonging to organizations is one-thirtieth of the monthly base pay of their grade as prescribed for the Regular Army for each regular drill or other period of instruction authorized by the Secretary of War. See decision of January 19, 1923, to Lieutenant Colonel Adams, 17 MS. Comp. Gen. 747. The first drill pay accruing to Green as a second lieutenant was for the drill attended by him June 11, 1924, for which it appears that payment was made on the original roll.

You are advised that the pay roll returned herewith should not be paid.

(A-6142)

GROUND RENTS, DISTRICT OF COLUMBIA—DISBURSEMENTS OF FUNDS OF DISTRICT OF COLUMBIA BY OFFICERS OF THE UNITED STATES

The direction in the act of June 7, 1924, 43 Stat. 539, that any revenue of the District of Columbia shall be credited wholly to the District supersedes the requirement in the act of June 29, 1922, 42 Stat. 668, for the payment of ground rent to the United States in certain cases, and no ground rent is therefore payable from the revenues accruing on and after July 1, 1924.

Expenditures by the disbursing clerk of the Department of the Interior from the appropriation "Freedmen's Hospital, pathological building, shelving and equipment, 1925," act of June 5, 1924, 43 Stat. 430, which appropriation was made 40 per cent from funds in the Treasury not otherwise appropriated and 60 per cent from the revenues of the District of Columbia, must be shown in a separate account in accordance with General Regulations No. 18 of the General Accounting Office.

Decision by Comptroller General McCarl, April 18, 1925:

There are for consideration of this office the questions (1) as to the application after June 30, 1924, of the ground rent provision contained in the act of June 29, 1922, making appropriations for the

District of Columbia for the fiscal year 1923, 42 Stat. 668, and (2) as to the application of General Accounting Office Regulations, No. 18, of February 5, 1923, to the appropriation for "Freedmen's Hospital, pathological building, shelving and equipment, 1925," act of June 5, 1924, 43 Stat. 430.

(1) The appropriations for the District of Columbia for the fiscal year 1920, act of July 11, 1919, 41 Stat. 68, and prior fiscal years, were made one-half out of any money in the Treasury of the United States not otherwise appropriated and one-half out of the revenues of the District of Columbia; the appropriations for said District for the fiscal year 1924, act of February 28, 1923, 42 Stat. 1327, and for the intervening fiscal years, were made on the basis of 40 per cent from money of the United States and 60 per cent from the revenues of the District of Columbia; and the appropriations for said District for the fiscal year 1925, act of June 7, 1924, 43 Stat. 539, were on the following basis:

That in order to defray the expenses of the District of Columbia for the fiscal year ending June 30, 1925, any revenue (not including the proportionate share of the United States in any revenue arising as the result of the expenditure of appropriations made for the fiscal year 1924 and prior fiscal years) now required by law to be credited to the District of Columbia and the United States in the same proportion that each contributed to the activity or source from whence such revenue was derived shall be credited wholly to the District of Columbia, and in addition, $9,000,000 is appropriated, out of any money in the Treasury not otherwise appropriated, and all the remainder out of the combined revenues of the District of Columbia and such advances from the Federal Treasury as are authorized in the District of Columbia Appropriation Act for the fiscal year 1923 * * *

The provisions of the act of June 29, 1922, as to the division between the United States and the District of Columbia of its revenues, and as to the charge for ground rent, for convenience here lettered (a) and (b), respectively, 42 Stat. 669, were as follows:

(a) * * * that after June 30, 1922, any revenue derived from any activity or source whatever, including motor-vehicle licenses, not otherwise herein disposed of, which activity or source of revenue is appropriated for by both the United States and the District of Columbia, shall be divided between the two in the same proportion that each has contributed thereto * * *.

(b) * * * that after June 30, 1922, where the United States is the owner of ground or the holder thereof in trust for the public, upon which improvements have been made at the joint expense of the United States and the District of Columbia, the revenues therefrom shall first be used to pay the United States 3 per centum of the full value of the ground as a ground rent, and the remainder shall be divided between them in the same proportion that each contributed to said improvements, and for such purposes the assessor for the District of Columbia shall fix the full value of the ground after he has first made oath that he will fairly and impartially appraise the same * * *.

In decision of April 26, 1923, construing provision (a), it was said:

To determine the requirements of the provision (a), it is necessary to consider it in the light of applications of revenues of the District of Columbia during previous fiscal years as, considered alone, the words "any revenue derived from any activity or source whatever * * * which activity or

source is appropriated for by both the United States and the District of Columbia" would comprehend all revenues including revenues from general taxes, and the like, since, with minor exceptions, the activities or sources of the revenues in question are appropriated for by both the United States and the District of Columbia.

It appears that during the period from June 11, 1878, to July 1, 1888, all revenues, from whatever activity or source, were wholly credited to the District of Columbia, on the basis that such was authorized by the terms of the act of June 11, 1878, 20 Stat. 103–4. In the District of Columbia appropriation act for the fiscal year 1889, approved July 18, 1888, 25 Stat. 316, and in other acts thereafter approved, provisions were made for application of revenues from certain enumerated activities or sources in proportion, respectively, to the contributions by the United States and the District of Columbia until the classes of revenues not specifically designated for such application have narrowed down to a relatively few in number and it is as to these that the request for decision relates.

Prior to the fiscal year 1925, the contributions by the United States to defray the expenses of the District of Columbia were definitely fixed, as to the proportions to be contributed, but the actual amount of money involved by that method of contributing, at the time of making the appropriations and for at least the period of a year thereafter, could not be ascertained other than by estimate because of the divisional application of certain of the revenues, the proportion of such revenues determined to be that to which the United States was entitled, and for which it received credit, operating as an offset and in reduction of the total amount of the appropriations apportioned to the United States.

During the period from June 11, 1878, to July 1, 1888, all revenues, from whatever activity or source, were wholly credited to the District of Columbia, on the basis that such was authorized by the terms of the act of June 11, 1878, 20 Stat. 103, 104. From time to time thereafter, starting with the District of Columbia appropriation act for the fiscal year 1889, approved July 18, 1888, 25 Stat. 316, certain of the revenues which theretofore had been credited wholly to the District of Columbia were specifically designated for divisional application and by the provision of the act of June 29, 1922, 42 Stat. 669, quoted, supra, all miscellaneous revenues were provided to be distributed in proportion to contributions. Prior to the act of June 29, 1922, 42 Stat. 669, several special investigations had been directed by Congress to determine the extent to which the United States was entitled to share in certain revenues which had been credited wholly to the District of Columbia; for instance, such as resulted in the provision contained in the act of April 17, 1917, 40 Stat. 8, transferring $211,450.12 from the credit of the District of Columbia to the credit of the United States. By the act of June 29, 1922, 42 Stat. 670, a joint committee of Congress was created with direction to inquire into all matters pertaining to the fiscal relations between the District of Columbia and the United States since July 1, 1874, and to report its findings on or before the first Monday in February, 1923.

The change from the proportionate to the lump-sum method of contributions appears without question to have been for the purpose of fixing in advance the actual amount to be contributed by the United States, unaffected by any subsequent disposition of revenues, and the brief history of the previous method of appropriating for the District of Columbia, and the disposition of its revenues, is given because of its bearing in arriving at the intention of Congress with respect to the exaction of ground rents after June 30, 1924.

It is understood that there are some District of Columbia activities or sources of revenue situated on ground of which the United States is the owner or holder thereof in trust for the public from which there practically would be no return to the District of Columbia of revenue if the ground rent provided by the act of June 29, 1922, were required to be exacted. The act of June 7, 1924, quoted supra, specially directs that any revenue, except for prior fiscal years, shall be wholly credited to the District of Columbia, and a deduction from such revenues of a ground rent would appear to be contrary to the intent and purpose of the provision in question. The intent and purpose of the provision in question clearly appear to have been that the United States would contribute a fixed and definite sum toward the expenses of the District of Columbia for the fiscal year 1925, to wit, $9,000,000, and that said District would contribute the necessary balance by the application of its revenues from miscellaneous sources and general taxation, thus dispensing with many of the complications attendant upon accounting for the revenues collected and the difficulties in some instances in determining whether a particular revenue was such as was required to be credited wholly to the District of Columbia or proportionately divided, a revenue pursuant to general taxes and the like being wholly for credit of the District of Columbia and a miscellaneous revenue being for divisional application. Decision of April 26, 1923. Accordingly, it is held that the ground-rent provision of the act of June 29, 1922, quoted supra, has no application to revenue accruing on and after July 1, 1924, any revenue thus accruing being wholly for credit of the District of Columbia.

(2) The appropriation for "Freedmen's Hospital, pathological building, shelving and equipment, 1925," act of June 5, 1924, 43 Stat. 430, provides:

> For necessary equipment and shelving for the pathological building, $18,700, payable 60 per centum from the revenues of the District of Columbia and 40 per centum from the Treasury of the United States.

By letter of July 10, 1923, the Secretary of the Treasury submitted for decision the question as to his authority to comply with the request made upon him by the Secretary of the Interior that the

$36,000, payable from the revenues of the District of Columbia pursuant to the Interior Department appropriation act of January 24, 1923, 42 Stat. 1216, appropriating $60,000 for "Freedmen's Hospital, pathological building," be transferred to the Department of the Interior under and pursuant to section 7 of the act of May 21, 1920, 41 Stat. 613, and by letter of July 26, 1923, said Secretary was advised:

There is no necessity for a transfer of funds as requested. The appropriation for $60,000 has been established on the books of the General Accounting Office and the Treasury, and is available for expenditure by the Secretary of the Interior, the project being under his control.

By reason of the appropriation providing that 60 per centum of the amount thereof shall be from the revenues of the District of Columbia, and although the item is not contained in the District of Columbia appropriation act but in the Interior Department appropriation act, the requisitioning of, and accounting for, the moneys therein provided should be in accordance with General Accounting Office "General Regulations No. 18" of February 5, 1923, entitled "Accounting for funds pertaining to the District of Columbia by officers not under the jurisdiction of the District Commissioners."

General Regulations No. 18 of February 5, 1923, provides, among other things, that every officer of the United States, other than those subject to the jurisdiction of the Commissioners of the District of Columbia, who receives and disburses funds for account of the District of Columbia, shall render accounts for such funds separate and distinct from accounts for any other public funds which may be in his possession; that the accounts current for such accounts shall be made in duplicate, one copy being for this office and one copy for the auditor of the District of Columbia; and that appropriation accounts, such as the one for "Freedmen's Hospital, pathological building," here in question, should be carried on the ledgers of the division of bookkeeping and warrants of the treasury, and on the ledgers of this office pertaining solely to the District of Columbia.

It is understood that the disbursing clerk of the Department of the Interior did not render separate accounts of the appropriation for "Freedmen's Hospital, pathological building," act of January 24, 1923, 42 Stat. 1216, and is not now rendering separate accounts for the appropriation for "Freedmen's Hospital, pathological building, shelving and equipment, 1925," act of June 5, 1924, 43 Stat. 430, notwithstanding the directions so to do in the decision of July 26, 1923.

A copy of this decision will be furnished for the information of the Secretary of the Interior in order that he may direct compliance by the disbursing clerk of the Department of the Interior with the requirements of General Regulations No. 18, of February 5, 1923, and decision of July 26, 1923. A copy of this decision will also be furnished for the information of the Secretary of the Treasury.

(A-8298)

NATIONAL-GUARD PAY—FEDERAL SERVICE

A national guardsman who has met the conditions precedent to Federal recognition as such and who reports at the rendezvous of his organization in response to the call of the President is entitled to pay from date of so reporting to the date of discharge notwithstanding his discharge was due to surgeon's certificate of disability. 3 Comp. Gen. 258, distinguished.

Decision by Comptroller General McCarl, April 18, 1925:

There has been received request for review of settlement No. 048779, dated October 10, 1924, allowing Oakes W. Henry, former National Guard man, pay from July 25, to 31, 1917. His discharge shows that he enlisted June 20, 1917, and he claims that he should have pay from that date to date of discharge, July 31, 1917.

Under call of the President his organization, the Tennessee National Guard, was called into the service of the United States on July 25, 1917. The Adjutant General of the Army reports that claimant enlisted June 20, 1917, at Crossville, Tenn.; that he reported at that place July 25, 1917, the date called to service under the President's order dated July 3, 1917; that he was assigned to Company D, Second Regiment, Infantry, and honorably discharged from that organization July 31, 1917, by reason of surgeon's certificate of disability. That report has been verified.

The question is whether under the law members of the National Guard are entitled to pay from the Government upon being called into the service of the United States from date of their appearing at the place of company rendezvous.

Section 3 of the act of June 2, 1795, 1 Stat. 408, provided in part as follows:

> That whenever the militia shall be called into the actual service of the United States, their pay shall be deemed to commence from the day of their appearing at the places of battalion, regimental or brigade rendezvous; * * *

The identical language appears in section 1651, Revised Statutes, which was repealed by the act of January 21, 1903, 32 Stat. 780, section 25, and reenacted in section 11 thereof, 32 Stat. 776, which provided:

> That when the militia is called into the actual service of the United States, or any portion of the militia is accepted under the provisions of this Act, their pay shall commence from the day of their appearing at the place of company rendezvous.

The provision subsequently appears in section 7 of the act of May 27, 1908, 35 Stat. 401, amending the act of January 21, 1903. The next general legislation affecting the militia or National Guard appears in the act of June 3, 1916, 39 Stat. 197–217, which is in the nature of an amendment and repeals only such laws and parts of laws as are inconsistent therewith. See section 128, 39 Stat. 217, and section 52 of the act of June 4, 1920, 41 Stat. 787. The act of June

3, 1916, in section 70 thereof, provides that before members of the National Guard of the several States can be federally recognized as such they must have signed a Federal enlistment contract and have subscribed to oath of enlistment as prescribed therein. Also, in section 115 thereof, it is provided that—

> Every officer and enlisted man * * * who shall be called into the service of the United States as such shall be examined as to his physical fitness under such regulations as the President may prescribe without further commission or enlistment.

No express reference is made in said act as to when pay of enlisted members of the National Guard shall commence upon reporting when called into actual service of the United States.

The act of January 21, 1903, 32 Stat. 776 (section 7), provided for physical and fitness examination before being mustered or accepted into the United States service. The provision in section 7 of the act of May 27, 1908, 35 Stat. 401, that Federal pay shall commence from date of reporting at organization rendezvous does not seem to be based on any condition as to final qualification for muster. It was not repealed by the act of June 3, 1916, nor was it modified by the provisions therein as to physical and fitness examination, before being mustered, and therefore is still in effect.

In decision dated October 26, 1923, 3 Comp. Gen. 258, it was held that a member of the National Guard who reported to the rendezvous of the organization in response to the call of the President, but who refused to take and subscribe to the oath required by section 70 of the act of June 3, 1916, 39 Stat. 201, and was dropped from the rolls of his organization, is not entitled to pay from Federal funds for the time spent at the organization rendezvous. That conclusion was based on the ground that only recognized members of the National Guard as provided in section 70 of the act of June 3, 1916, could be mustered, and the man in question, having refused to take the oath necessary to recognition, the fact that he reported at the organization rendezvous could give him no right to pay, since he was not a member of the National Guard. It was stated in said decision that "If a National Guardsman was found morally, mentally, and physically qualified and was mustered, he is, by relation, entitled to pay from the date he reported for duty. If he did not meet the conditions precedent and was not mustered he is not entitled to pay, because he neither formally nor constructively entered into the 'actual service' of the United States." In subsequent cases that decision has been cited as authority for denying pay from date of reporting at rendezvous if discharged by reason of failure to physically qualify for muster.

In that case the man was not mustered not because of failure to pass the physical and fitness examinations but because of his refusal

to qualify as a member of the National Guard by subscribing to the required oath. It was not by reason of his failure to meet the conditions precedent to muster but because of failure to meet the conditions precedent to membership in the National Guard, that pay while at the organization rendezvous was denied the man. A National Guard man who has met the conditions precedent to recognition as such and who reports at the rendezvous of his organization in response to the call of the President is entitled to pay from date of so reporting.

The decision of October 26, 1923, 3 Comp. Gen. 258, should be given no further application than to the condition of failure to take and subscribe to the oath.

Claimant has been correctly paid and the settlement is affirmed.

(A-8658)

NAVAL RESERVE FORCE PAY—SEA DUTY—OVERPAYMENTS OF ALLOTMENTS

An officer of the Naval Reserve Force ordered to report for temporary duty on board a receiving ship of the Navy and quartered and messed thereon, occupies the status of an officer on sea duty and is entitled to sea duty pay while in the performance of such duty.

A supply officer of the Navy who fails to notify the Navy allotment office to discontinue an allotment by an enlisted man of the Navy upon his discharge, as required by the Navy regulations, is primarily liable for payments made to the allottee after the discharge of the enlisted man and such illegal payments are properly chargeable against the supply officer's account.

Decision by Comptroller General McCarl, April 18, 1925:

Lieut. J. W. Overand (SC), United States Navy, custodian of the papers in the accounts of late Lieut. R. L. Gressitt (SC), United States Navy, deceased, applied September 3 and 9, 1924, for review of the items of $13.22 and $280, disallowed in the deceased officer's account in settlement No. M-7214-N, dated May 26, 1924, on account of erroneous payments made to Ensign Harrell Clifford, United States Naval Reserve Force, and to James Stewart Wilscher, seaman, first class, United States Navy, respectively.

The item of disallowance of $13.22, in the case of Ensign Clifford, represents the difference between sea pay at $1,870 and shore pay at $1,700 per annum from January 9 to February 6, 1922, while the officer was on temporary duty on board the receiving ship at Puget Sound, Wash.

Under orders of December 23, 1921, Ensign Clifford reported to the commandant of the thirteenth naval district, January 7, 1922, and was assigned to temporary duty on board the receiving ship at Puget Sound, Wash., reported thereon for duty January 9, 1922, was quartered and messed on board this vessel, and was detached therefrom February 6, 1922. His status, during this period, was

clearly that of an officer under orders to duty at sea, and he was therefore entitled to sea pay. 24 Comp. Dec. 145, 183; 20 id. 651; 17 id. 516; 15 id. 8.

The disallowance in the case of Wilscher of $280 represents overpayments of allotment S and A, form 6, at $35 per month, registered on the U. S. S. *Chancey* for 16 months, and paid by the Navy allotment office, from March, 1922, to March, 1923, inclusive, 13 months at $35 per month, amounting to $455. This man was discharged from the Navy July 20, 1922, and his account was checked for said allotment only from March, 1922, to July, 1922, five months at $35 per month or $175, and through the failure of the supply officer carrying his account to stop payments thereof in the naval allotment office, the allotment was overpaid the difference between $455 and $175, or $280.

Lieutenant Overand stated that the above error was due to an oversight on the part of the clerical force closing out the account and the officer-assistant checking the account prior to discharge. He also states that due to the great volume of work carried on by Lieutenant Gressitt, and considering the fact that he was in very poor health during the last six months of duty at the receiving ship, Puget Sound, Wash., it was a physical impossibility for him to personally check, in detail, all accounts coming up for discharge. He further states that no record is available showing that a stop notice was sent to the Navy allotment office in this case.

The supply officer having failed to send notice to discontinue the allotment in question upon the discharge of the enlisted man, as required by Art. 1805 (6) of the Navy Regulations, 1920, and as a result of such failure payments were made to the allottee for a period of time subsequent to said discharge, viz, from August, 1922, to March, 1923, amounting to $280, the supply officer is primarily liable for the payments so illegally made, and the amount thereof is properly chargeable against his account. 15 Comp. Dec. 306; 18 MS. Comp. Gen. 791, February 15, 1923; 35 id. 1275, July 31, 1924.

Upon review there is certified for credit in the accounts of Lieut. R. L. Gressitt, deceased, $13.22, and the settlement is sustained as to $280 therein disallowed.

(A-8865)

RETIREMENT DEDUCTIONS—POUCH-MAIL ALLOWANCE TO RURAL CARRIERS

The additional amount authorized by the act of July 28, 1916, 39 Stat. 425, to be paid rural letter carriers who are required to carry pouch mail to intermediate post offices or for intersecting loop routes, is an allowance and is not subject to retirement deductions as a part of the basic salary.

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Comptroller General McCarl to the Postmaster General, April 18, 1925:

I have your letter of March 31, 1925, as follows:

The act of June 5, 1920, contains the following provision:

"The Postmaster General may, in his discretion, allow and pay additional compensation to rural letter carriers who are required to carry pouch mail to intermediate post offices, or for intersecting loop routes, in all cases where it appears that the carriage of such pouches increases the expense of the equipment required by the carrier or materially increases the amount of labor performed by him, such compensation not to exceed the sum of $12 per annum for each mile such carrier is required to carry such pouch or pouches."

Question has now arisen whether or not allowances made to rural carriers under this provision are subject to a deduction of 2½ per cent on account of the retirement fund.

I have to request that you consider this question and advise me as to your decision in respect to it.

The provision you quote is not found in the act of June 5, 1920, as you state, but in the act of July 28, 1916, 39 Stat. 423. The additional amount thereby authorized for rural carriers who are required to carry pouch mail is an allowance intended as a commutation to cover the additional expense of equipment and for additional physical labor. The granting of the allowance is not an increase in the basic salary of the carrier nor does it change the grade of designation of the carrier. 3 Comp. Gen. 925.

Retirement deductions under section 8 of the act of May 22, 1920, 41 Stat. 618, are required to be computed on the "basic salary, pay, or compensation" of the employee, and section 2, *id.* page 615, provides:

The term "basic salary, pay, or compensation" wherever used in this act shall be so construed as to exclude from the operation of the act all bonuses, allowances, overtime pay, or salary, pay, or compensation given in addition to the base pay of the positions as fixed by law or regulation.

The additional amount payable to rural carriers handling pouch mail under the conditions set forth in the act of July 28, 1916, supra, is an allowance and is not subject to retirement deductions. 27 Comp. Dec. 152 and decision of March 14, 1925, A–8391, question and answer 3.

(A–6498)

DAMAGES TO PRIVATE PROPERTY—NAVY

It is within the jurisdiction of the General Accounting Office to determine whether payments made under a statute authorizing an administrative officer to pay claims against the United States of a certain defined class or classes, come within the general class to which the statute applies and to disallow credit in a disbursing officer's account for payments not coming within the scope of the law.

The act of December 28, 1922, 42 Stat. 1066, authorizing the heads of departments to consider, ascertain, adjust and determine damage claims in amounts not to exceed $1,000 caused by negligence of any officer or employee of the Government acting within the scope of his employment supersedes in negligence cases the act of July 11, 1919, 41 Stat. 132, and requires that damage claims resulting from negligence of employees and enlisted men of the Navy within the scope of their employment be certified to Congress and not paid by disbursing officers.

Comptroller General McCarl to the Secretary of the Navy, April 20, 1925:

I have your letter of March 12, 1925, furnishing additional evidence requested by office letter of February 6, 1925, relative to the award and payment of $450 to Commander William B. Tate, United State Navy, under provisions of the act of July 11, 1919, 41 Stat. 132, for damages to his automobile sustained in collision with a Navy ambulance, for which C. A. Robey, seaman (S. C.), United States Navy, the driver of the ambulance, was held responsible by the authorities of the Navy Department. The matter was presented for consideration of this office in the audit of the disbursing accounts of Commander F. G. Pyne, United States Navy, for August, 1924.

In letter to you of February 6, 1925, it was stated that the evidence therein requested "is desired for the purpose of determining that the claim was properly for determination and settlement within the discretion of the Secretary of the Navy." You state you do not understand this request and discuss the jurisdiction of the Secretary of the Navy under the act of July 11, 1919, supra, contending that the authority thereunder given the Secretary of the Navy to pass upon the validity of the claims "ipso facto is power to determine whether or not the claim [damage] is one which he is authorized by Congress to pay." It is also stated that you "do not wish to accede to the claim that you [I] have the power to review the act of the Secretary of the Navy in allowing claims of this character under circumstances stated by you."

Your letter suggests that you are in doubt as to the relative duties of the Navy Department and this office under the statutes involved, and I shall reply accordingly, and I shall also be glad to confer with you personally, if, in connection with this reply, you believe it necessary.

The letter of February 6, 1925, is not to be understood as involving a review of the merits of such claims. The prime function of this office, in so far as the audit of disbursing accounts is concerned, is to determine that the expenditures of appropriated funds for which credit is asked have been made for the purpose for which appropriated. All statutes authorizing administrative officers to make payment of claims against the United States define the classes of claims coming within the terms of the acts. The General Accounting Office undoubtedly has the duty to determine whether a payment made under such a statute, for which credit is claimed in the accounts of a disbursing officer coming before it for settlement, was based on a claim coming within the terms of the controlling statute. If it appears that the claim was not of the class within the terms of the statute which the Government officer had authority to pay, the amount thereof must be disallowed in the accounts of the disbursing

officer, but if it appears that the claim was of the class within the terms of the statute, the payment is properly allowable in the accounts. It is necessary, therefore that the record presented to the General Accounting Office show the proper facts upon which the claim paid must rest to be within the statute.

I may quote from a decision recently rendered by me to the Secretary of the Interior, February 26, 1925, 4 Comp. Gen. 713, in which it was said:

> The duties of the General Accounting Office relate specifically to the settlement of all claims and demands by or against the United States and the adjustment of accounts in which the United States appears as debtor or creditor. These duties necessarily involve the uses and availability of appropriations; and while in the performance of these duties, particularly in view of the present system of Government disbursements, the action taken is not initially by the General Accounting Office but by the administrative office concerned, yet action in the matter eventually and finally must be by the General Accounting Office. The duties of the General Accounting Office are pursuant to permanent substantive law applicable generally, so that appropriation authority or other legislative authority does not require the express reenactment of or specific subjection to such accounting duties, but on the contrary it would be necessary for express and specific statutory provision to appear to remove from the jurisdiction attendant upon the performance of such accounting duties. The authority given by the appropriation provision was primarily administrative, the same as any other administrative authority. The purpose was to give an administrative authority and there was neither purpose nor need to exclude the accounting duties; and the permanent substantive law relating to accounting for public funds must attach to the administrative authority given by the appropriation provision. The one need not, must not, take from the other.
>
> The real and practical question apparently involved concerns the performance of the administrative authority so as to meet accounting requirements. The basic administrative course is limited to matters within the law of the appropriation. The basic accounting requirement is the examination of the matters to determine that the administrative course was within the law of the appropriation. Hence, in a claim for damages compromised under the appropriation authority there must appear facts showing that it was "by reason of the operations of the United States, its officers, or employees, in the survey, construction, operation, or maintenance of irrigation works." The basic condition must always appear, that there was a claim of the character specified by the law; and probably therein lies the most of administrative difficulty. If there be doubt of the claim being within the law, the matter may be submitted to the Comptroller General for decision in advance of payment as authorized by law. Act of July 31, 1894, 28 Stat. 208. Likewise, the facts must support the amount claimed and thus also support the amount agreed upon in compromise.

In the present instance there are two statutes primarily for consideration. The act of July 11, 1919, supra, authorizes the Secretary of the Navy "to consider, ascertain, adjust, determine, and pay" damage claims in amounts not in excess of $500 for which men in the naval service or Marine Corps are found to be responsible. Annual appropriations are provided for payment of these claims. The act of December 28, 1922, 42 Stat. 1066, authorizes the head of each department, which would include the Secretary of the Navy, to "consider, ascertain, adjust, and determine" damage claims in amounts not to exceed $1,000 accrued since April 6, 1917, "caused by the negligence of any officer or employee of the Government acting within the scope of his employment." Enlisted men of the Army,

Navy, and Marine Corps are expressly included as "employees." You will note that this act does not authorize the head of a department to "pay" the claim but requires the certification of the amount found due to the Congress for specific appropriation.

Thus, it was the duty of the General Accounting Office in the settlement of Commander Pyne's accounts to determine under which of these two acts, if either, the claimant, Tate, was authorized to assert claim against the United States, and the proper performance of that duty necessitated the letter of February 6, 1925, to obtain the full facts.

The act of July 11, 1919, specified that men in the naval service must be "responsible" for the damage or loss to the private property. The act of December 28, 1922, specified that the damage or loss must have been caused by the "negligence" of the employee. The earlier law was broad enough to include negligence claims but the enactment of the subsequent law, specifically applicable to negligence claims, had the effect of superseding the earlier law with respect to that class of claims. That is to say, where there is both a general and special statute covering disposition of private property damage claims against the United States, the special statute is exclusively applicable to the class of claims coming thereunder. If the claim is on account of damages to or loss of privately owned property caused by the negligence of an enlisted man in the Navy there is no authority for its consideration and settlement under the act of July 11, 1919, and payment is not authorized by a disbursing officer of the Navy from the annual appropriations provided for payment of claims under that statute, but is for consideration, adjustment, and determination under the act of December 28, 1922, and for certification of the amount found due to Congress for a specific appropriation. The only claims now for settlement and payment by the Navy Department under the act of July 11, 1919, are those private property damage claims not in excess of $500 for which men in the naval service or Marine Corps are determined to be responsible other than through negligence in the scope of their employment.

A somewhat similar situation arose as to the respective scope of the act of June 16, 1921, 42 Stat. 63, relative to settlement of claims for damage to persons or property by or through the operations of the Post Office Department, and the act of December 28, 1922, supra. In decision of March 5, 1923, 2 Comp. Gen. 529, it was held that the act of December 28, 1922, superseded the act of June 16, 1921, with respect to negligence claims.

In the additional memorandum, dated March 12, 1925, furnished with your letter of the same date, it is definitely stated that the damage to the automobile owned by Commander Tate was "by

reason of the negligence of Driver Robey." Accepting the finding of facts of the Navy Department the claim is a "negligence" claim for consideration, ascertainment, adjustment, and determination, as such, under the act of December 28, 1922, which does not authorize a disbursing officer of the Navy to make payment of the amount found due.

I have no alternative under the law but to disallow the item of $450 in the accounts of Commander Pyne. There is for your consideration whether you desire to report the claim to Congress for an appropriation under the terms of the act of December 28, 1922.

(A-8773)

ADVERTISING—DIVISION OF AWARDS BETWEEN BIDDERS

Where in response to advertisements for bids for surveying transits, two or more bids are received for different models all meeting the specifications but of varying prices, the entire quantity desired must be ordered from the lowest responsible bidder, there being no authority to divide the orders between the lowest and the next higher bidder for the alleged purpose of encouraging continued competition.

Comptroller General McCarl to the Secretary of the Interior, April 20, 1925:

I have your letter of March 28, 1925, as follows:

The Commissioner of the General Land Office advises me that the supervisor of surveys has under consideration the purchase of eighteen new solar transits. Detailed specifications were embodied in an invitation to submit proposals.

Buff and Buff Manufacturing Company of Boston makes an offer of about $560 per instrument; W. and L. E. Gurley of Troy, New York, makes an offer of $600 per instrument; the A. Lietz Company, of San Francisco, makes an offer of $815 per instrument. The supervisor of surveys desires to enter into contract with the Buff and Buff Manufacturing Company to construct twelve instruments, and with W. and L. E. Gurley to construct six instruments, for reasons hereinafter stated, but before doing so desires your opinion on the legality of dividing his purchase requirements.

Plans for the current season's field work are developing rapidly, and the required number of instruments should be available at the beginning of, or early in the season. The extent of the requirements could not be foreseen until plans were perfected subsequent to the passage of recent legislation.

The instruments are of a special type, used only by the General Land Office, and are not carried in stock. The offers are for delivery of six instruments by June 1st, twelve by June 15th, and eighteen by June 30th, so that there will be an actual saving of thirty days on six instruments by dividing the order.

Both the Buff and Gurley instruments come within the required specifications, and both models have given satisfactory service in the public land survey, but is must not be inferred that the instruments are identical. The supervisor of surveys states that some of the engineers prefer one, and some prefer the other of the two instruments, but I understand that there is an actual preference for the Gurley instrument for use in Alaska, as in some respects it is a better constructed instrument, notably that it is better protected against moisture, that the vertical observing field is higher, and that the special one-piece truss standard on the Gurley instrument allows for a longer needle, all of which are desirable in that locality. In the opinion of the supervisor of surveys, the latter differences fully warrant the increased cost.

There is one other reason for dividing the order. The supervisor of surveys desires to encourage the makers of both the Buff and Gurley solar transits to continue the manufacture of these instruments for the General Land Office, even though there may be a slight difference in cost, as in this way competition

is stimulated, and the Surveying Service is not left entirely dependent upon any one maker.

The total difference in cost herein referred to amounts in all to only $240, on an order totaling a little more than $10,000.

Your concurrence in the division of the order as proposed is asked, and I will appreciate a reply at an early date.

It thus appears that a decision is desired as to whether there is authority, in order to secure the advantage of 30 days' time in delivery, to enter into a contract with the lowest bidder for 12 of the surveying instruments, at the bid price of $560 each, and with the next lowest bidder for the remaining 6 such instruments, at the bid price of $600 each, of the total of 18 instruments advertised for, both types of instruments proposed to be contracted for coming within the required specifications but not being identical in construction.

Section 3709, Revised Statutes, requires, except when the public exigencies require the immediate delivery of the articles or performance of service, that all purchases and contracts for supplies or services in any of the departments of the Government, except for personal services, shall be made by advertising a sufficient time previously for proposals respecting the same. The question presented involves the procedure that is to be followed in awarding contracts after bids therefor have been secured in conformity with this law. The controlling purposes of the provisions of said enactment are primarily the securing of competition from responsible bidders and the safeguarding of the Government from the possibility of having to pay exorbitant prices for needed supplies or services. The procedure that would result from accepting two or more bids and entering into contracts with different parties to supply specified articles advertised for would be far different from the contemplated purchase from the successful bidder under competitive bidding and, as to the higher bidder, would entirely void the procedure contemplated by law.

In decision of September 16, 1914, 21 Comp. Dec. 155, a former Comptroller of the Treasury, with respect to a somewhat similar question, said:

The purpose of the advertising required by section 3709 of the Revised Statutes is to enable the Government, through competition, to get the lowest obtainable prices in the purchase of its supplies. And said section contemplates that, when such prices have been obtained, a mutual contract will be entered into whereby the successful bidder is legally bound to furnish the required supplies at such prices, and the Government is likewise bound to purchase such supplies from said bidder at such prices. No agreement or arrangement for the purchase of supplies that is lacking in either of these two obligations can be regarded as a compliance with the provisions of said section.

Answering your questions specifically, you are advised, in view of the foregoing, that contracts with anyone other than the accepted bidder, and for all the instruments desired, called for in the adver-

tisement, and proposed to be furnished by such bidder, would not be authorized.

(A–7858)

OFFICERS OF THE NATIONAL GUARD—DRILL PAY

The attachment of a federally recognized major of the National Guard to a federally recognized unit or organization not entitled to an officer of that rank under the Tables of Organization, does not entitle such officer to drill pay prior to the time he is transferred to a proper organization of the guard federally recognized.

Comptroller General McCarl to Capt. L. P. Worrall, Finance Department, United States Army, April 21, 1925:

There has been received your letter of January 30, 1925, requesting decision whether you are authorized to pay a supplemental roll transmitted therewith of the staff, One hundred and eighty-second Field Artillery, Michigan National Guard, constituting the claim of Maj. Orlando W. Pickard, Michigan National Guard, for 180/360 of $500, major's annual allowance, during the period from October 1, 1922, to March 31, 1923.

It appears from the roll that this officer qualified April 15, 1922, and that he was federally recognized by the War Department from that date as major, Medical Corps, Michigan National Guard; that he was attached to the field and staff, First Battalion, One hundred and eighty-second Field Artillery, Michigan National Guard, from October 1 to December 5, 1922, and upon Federal recognition of the regimental staff, December 6, 1922, he was transferred thereto, and was attached to such organization during the remainder of the period in question.

The National Guard is required to be organized as is the Regular Army, section 60, act of June 3, 1916, 39 Stat. 197. The Medical Corps thereof is a staff corps and except as provided in the act of May 12, 1917, 40 Stat. 68, and regulations promulgated thereunder, to be entitled to armory drill pay its members must be included in federally recognized units or organizations of the National Guard in conformity with Tables of Organization. 2 Comp. Gen. 201. Par. 124, National Guard Regulations, 1922.

The Militia Bureau has informally advised this office that the field and staff, First Battalion, One Hundred and eighty-second Field Artillery, Michigan National Guard, was federally recognized November 1, 1922, and it is stated that the regimental staff received such recognition December 6, 1922. It would appear from Tables of Organization, 133–P, that a regiment, 155-millimeter howitzers, is entitled to have attached one major, Medical Department, and four captains or lieutenants, Medical Department. It is obvious

that the battalion which is a component of the regiment would not be entitled to have assigned to it a major, and pay as major while attached to a battalion prior to Federal reorganization of the regimental staff is not authorized.

It is certified on the voucher that this officer was engaged during the period covered by this roll in various duties assigned to him by the regimental commander and in study, the total being more than equivalent to one and one-half hours for each of the drills for which pay is claimed. If such service is administratively considered to be the satisfactory performance of his duty under the provisions of section 109 of the national defense act as amended by the act of June 4, 1920, 41 Stat. 783, and the regulations of the Secretary of War issued pursuant thereto, he is entitled to pay during the period from December 6, 1922, to March 31, 1923, as provided by such act.

If, therefore, the pay roll is otherwise correct, you are authorized to pay it for the period from December 6, 1922, to March 31, 1923.

(A–8553)

TRAVELERS' CHECKS

The purchase of travelers' checks for the safe-keeping of privately owned or public funds in the possession of a bonded special disbursing agent while traveling, is an unnecessary and unauthorized expense so far as the Government is concerned and the commission on such checks is not payable from public funds.

Decision by Comptroller General McCarl, April 21, 1925:

There is for consideration the question whether the commission of $35 charged on travelers' checks in the accounts of P. H. Dorsett, temporary special disbursing agent of the Department of Agriculture, for the quarter ended September 30, 1924, is a proper charge against public funds. The travelers' checks aggregating $6,960 were purchased at the beginning of a journey by the employee. It is not shown whether this amount was public or private funds. However that may be, the cost of travelers' checks is a personal expense. The safe-keeping of privately owned funds is not a matter with which the Government is concerned and, as all disbursing agents are under bond, the United States is protected from any loss of public funds while in their possession and any additional expense involved in the safe-keeping of such funds is therefore an unnecessary and unauthorized expense so far as the United States is concerned, and is not payable from public funds.

(A-9027)

POSTAL SERVICE—RURAL CARRIERS—EXCESS MILEAGE ON TRIWEEKLY ROUTES

Under the provisions of the postal reclassification act of February 28, 1925, 43 Stat. 1063, payment of additional salary at the rate of $15 per mile per annum for each mile in excess of 24 to a rural carrier serving one triweekly route, should not be made on the basis of the entire length of the route exceeding 24 miles, but only when one-half of the length of the route exceeds 24 miles; that is to say, the increase at the rate of $15 per annum is to be paid only on each mile of the route in excess of 48 miles.

Comptroller General McCarl to the Postmaster General, April 22, 1925:

I have your letter of April 6, 1925, requesting decision whether under the provisions of the postal reclassification act of February 28, 1925, 43 Stat. 1063, payment of salary should be made to a rural carrier serving one triweekly route on the basis of a route one-half the length thereof, and in addition thereto $15 a mile for each mile or major fraction of a mile the route is in excess of 24 miles in length.

Section 8 of the act of February 28, 1925, supra, fixes the salary of carriers in the Rural Mail Delivery Service based on the length of the route served six days in the week, such salaries ranging from $720 per annum for a 4-mile route to $1,800 per annum for a 24-mile route. It is then provided as follows:

* * * Each rural carrier assigned to a route on which daily service is performed shall receive $30 per mile per annum for each mile said route is in excess of twenty-four miles or major fraction thereof, based on actual mileage, and each rural carrier assigned to a route on which triweekly service is performed shall receive $15 per mile for each mile said route is in excess of twenty-four miles or major fraction thereof, based on actual mileage.

* * * * * * *

A rural carrier serving one triweekly route shall be paid a salary and equipment allowance on the basis of a route one-half the length of the route served by him. * * *

The statute does not definitely state in the case of triweekly routes whether the $15 per mile additional compensation for mileage in excess of 24 miles or major fraction thereof is to be based on the "actual mileage" of the entire length of the route or on the "actual mileage" of one-half the length of the route. However, it may be reasonably concluded that the provision fixing the basis for computing the salary and equipment allowance of a carrier on one triweekly route as "one-half the length of the route served by him" was intended to give the carrier on a triweekly route the same relative rate of compensation as the carrier on the daily route, and such effect will be given to the provision. For instance, if a triweekly route were 30 miles in length, the carrier would be entitled to $1,080 per annum basic salary, which is the rate fixed in the statute for a 15-mile route served six days in the week, and to equipment allow-

ance of 4 cents per mile on the basis of a 15-mile route served 306 days per year, or $183.60, a total of $1,263.60 per annum, but he would not be entitled in addition thereto to $15 per mile for 6 miles on the basis that the triweekly route of 30 miles was 6 miles in excess of 24. Likewise, a carrier on a triweekly route 48 miles in length would receive the same amount of compensation as a carrier on a daily route 24 miles in length.

It would be only in case one-half the actual mileage of the triweekly route exceeded 24 miles that the provision for paying additional compensation for mileage in excess of 24 is for application. For instance, if a triweekly route were 60 miles in length, the carrier would be entitled to $1,800 per annum, which is the lump-sum rate fixed in the statute for a 24-mile route served six days in the week or a 48-mile route served three days a week, and to equipment allowance of 4 cents per mile on the basis of a 30-mile route served 306 days per year, or a 60-mile route served 153 days per year, or $367.20, and also to additional salary of $15 per mile per annum for 12 (60–48) miles, or $180, a total of $2,347.20 per annum.

The question is answered accordingly.

(A–6350), (A–7704)

CONTRACTS—AUTHORITY TO SIGN

The requirement that the authority of an agent to bind the corporation for which he purports to act in signing a contract must be affirmatively established in each instance by filing with the contract extracts from the articles of incorporation, by-laws, or minutes of the board of directors, duly certified under seal of the corporation, is not applicable to bids or proposals which are intended as preliminary to contracts thereafter to be formally executed; neither will suspensions or disallowances be made because of the lack of such evidence in completed contracts for which payments have been properly made and the Government has received full value. Hereafter the affirmative evidence of authority above indicated will not be required in contracts amounting to less than $1,000 if the contracting officer on the part of the United States will certify that the signing officers are the same officers who are authorized and do sign similar contracts on behalf of the corporation with the public generally. 3 Comp. Gen. 467; 4 *id.* 38, modified.

Decision by Comptroller General McCarl, April 23, 1925:

There is for consideration the matter of the extent which this office reasonably, and consistent with good accounting and without jeopardy to the interests of the United States, may accept the certificates of Government contracting officers as to the authority of agents to bind corporations for which they purport to act when such agents undertake to sign contracts or agreements entered into between such corporations and such Government contracting officers, acting for and on behalf of the United States. The requirements do not affect bids and proposals as such, but have reference only

to an accepted bid or proposal as a basis of a formal or informal contract.

The general requirement has been that the authority of an agent to bind the corporation for which he purports to act must be affirmatively established in each instance, the usual method of establishing such authority being by filing with the contract extracts from the articles of incorporation, by-laws, or the minutes of the board of directors, duly certified by the custodian of such records under the corporate seal. For the reasons given in decisions of January 21, 1924, 3 Comp. Gen. 436; February 4, 1924, 3 Comp. Gen. 467; and July 10, 1924, 4 Comp. Gen. 38, it was provided that an affirmative showing in each instance of the authority of the agent to bind the corporation would not be insisted upon in those cases in which the Government contracting officer certified, with respect to contracts of $500 or less entered into with such agents, that he had satisfied himself that said agent had the necessary authority to bind the corporation, being the same agent who signs contracts entered into with the public generally.

It appears that there has been some misunderstanding in the application of the decisions referred to, supra, and others of the same purport, in that the requirement has been sought to be exacted with respect to bids or proposals which are intended as preliminary to contracts thereafter to be executed by accepting a bid or proposal or by a more formal instrument.

The matter of the proper execution of contracts entered into with corporations by Government officers is one of some importance, though in those cases where everything provided to be done under a contract has been done, including the making of payment, the question as to whether the authority of the agent to sign for the corporation affirmatively appears is not such as to warrant other than bringing the matter to the attention of the proper administrative officials for instructing and advising subordinate officers or employees. Suspensions of credit, therefore, should not be made in the settlements of disbursing accounts involving payments under such contracts if the contracts appear otherwise proper and the payments properly made to the corporations in whose behalf the contracts are executed for which payments the Government has received full value.

It is the policy of this office not to exact of the departments or establishments of the Government, or those who have dealings with said departments or establishments, any requirement which is not necessary to protect or safeguard the interests of the United States. Therefore, the matter as to the extent to which this office may safely go in relaxing the requirement as to an affirmative formal showing of the authority of agents to bind the corporations which they pur-

port to represent, has been the subject of observation and investigation. It is believed that the present requirement as to an affirmative formal showing with respect to all contracts in excess of $500 may be somewhat relaxed. Hereafter the requirement of such affirmative formal showing will not be exacted as to contracts of $1,000 or less. However, the requirement of the decisions cited, supra, as to a certificate by the Government contracting officer covering contracts of $500 or less, hereafter will be held to apply to contracts of $1,000 or less.

(A–9047)

APPROPRIATIONS FOR REPAIRS AND IMPROVEMENTS TO PUBLIC BUILDINGS

Appropriations for repairs and improvements to public buildings are not "appropriations for public buildings," within the meaning of section 3684, Revised Statutes, and are not available for expenditure prior to the beginning of the fiscal year for which made although no objection would be made to entering into contracts, after the approval of the acts and prior to the beginning of the fiscal year, for the performance of the work contemplated with provisos that payments under such contracts are not to be made prior to the beginning of the fiscal year.

Appropriations may only be placed on the books as two-year appropriations, for the purpose of making the funds available at once and prior to the fiscal year for which made, when it is specifically stated in the act making the appropriation that such funds are to be available immediately.

Comptroller General McCarl to the Secretary of the Treasury, April 25, 1925:

I have your letter of April 9, 1925, wherein you request decision whether certain items contained in the act of January 22, 1925, 43 Stat. 778, may be considered appropriations for public buildings within the meaning of section 3684, Revised Statutes, or, if they are to be regarded as annual appropriations, whether these items may be set up on the books of the Treasury as two-year appropriations so as to make them available immediately.

Section 3684, Revised Statutes, provides:

All appropriations for public buildings under the control of the Treasury Department shall be available immediately upon the approval of the act containing such appropriations.

The two items referred to in your letter appear in the act of January 22, 1925, under the general heading "Public buildings" as follows:

Baltimore, Maryland, Marine Hospital Numbered 1: For extension of fire protection; mechanical equipment, heating old wards, new sewerage and drainage, bedside call system, extension and remodeling of roadways, and so forth, $44,000.

* * * * * * *

Carville, Louisiana, Marine Hospital Numbered 66: For miscellaneous improvements and repairs to buildings and grounds, $25,000.

The appropriations are for miscellaneous kinds of work, such as are usually for accomplishment within a fiscal year. It has been held that appropriations for repairs and improvements to public buildings are not appropriations for public buildings within the meaning of section 3684, Revised Statutes, which may be said in general to have reference to appropriations providing for the construction of public buildings rather than the ordinary repairs and improvements in the use and maintenance of buildings after construction. 1 Comp. Gen. 435.

The first part of your question must therefore be answered in the negative and you are advised that the appropriations made in the two items mentioned in your letter are not appropriations for public buildings available immediately within the meaning of section 3684, Revised Statutes.

With regard to the alternative proposed by your letter of placing the two items on the books as two-year appropriations, i. e., 1925–26, for the purpose of making the funds available at once, you are advised that this procedure may only be resorted to when it is specifically stated in the act making the appropriations that the funds are to be available before the beginning of the fiscal year for which they were made. There being no such provision in the act relative to the items now under consideration, you are advised that such procedure is not authorized.

It is suggested, however, that even though no disbursement may be made from the appropriations made by these items which must be considered on the basis of annual appropriations, there is no objection to the entering into contracts for the performance of the work contemplated thereunder with provisos that payments under such contracts are not to be made prior to the beginning of the fiscal year 1926.

(A–7801)

TRAVELING EXPENSES—TIPS ON TRANSATLANTIC VESSELS

Tips or fees to smoke-room stewards, boot stewards, lounge stewards, and library stewards on trans-Atlantic vessels are dependent upon the particular desires of the individual traveler and can not be considered other than a personal expense which can not be allowed as actual and necessary traveling expenses.

Tips or fees to bath stewards on trans-Atlantic vessels are an allowable traveling expense when properly stated and not excessive in amount unless the traveler has been allowed a per diem in lieu of subsistence, the bath steward being considered a subsistence item.

A tip or fee of $5 per traveler on trans-Atlantic vessels to cabin steward or stewardess or dining room steward, respectively, is the maximum amount which can be allowed as customary fees to such stewards.

Comptroller General McCarl to the Secretary of State, April 27, 1925:

There have been received your requests of January 28, March 9, and April 17, 1925, for decision with respect to the maximum amounts allowable as tips to stewards on a trans-Atlantic voyage, particularly with reference to the allowance of fees to bath, boot, cabin, and dining room (table) stewards.

Paragraph 8 of article 1 of the Regulations to Govern Transportation of Diplomatic and Consular Officers provides:

> The customary fees to stewards on vessels and to car and/or train attendants on foreign railways will be allowed * * *.

With respect to the amount of "customary fees" you state that prior to the war the customary tip to any one steward seldom exceeded $5 on trans-Atlantic vessels, but that at the present time a tip to a cabin steward or stewardess, or dining room steward, not in excess of $10 appears to be reasonable, and it is suggested that the determination of what are customary fees is an administrative matter and when administratively approved should not be objected to, citing decisions of this office of July 3, 1924, A-3013, and November 17, 1924, A-5264. These decisions, however, have no application to the matter here presented. They had reference to the action to be taken in the settlement of accounts when it is shown that there was a failure to comply with regulations, and it was held that such failure should not be made the basis of suspensions or disallowances when the account was administratively approved unless the regulation involved is a legislative as distinguished from an administrative regulation. See 21 Comp. Dec. 482; 26 id. 99; 2 Comp. Gen. 342; 4 id. 363; id. 480.

The travel regulations here under consideration do not attempt to determine what amount is a customary steward's fee. They merely provide for the allowance of "customary fees."

Fees to smoke-room stewards, boot stewards, lounge stewards, and library stewards can not be regarded as necessary expenses of official travel, but are dependent upon the particular desires of the individual traveler and can not be considered other than a personal expense which may not be allowed. 3 Comp. Gen. 661; and manuscript decision of February 12, 1923, Review 3629, to Wade Blackard, United States vice consul. Review 3629 in effect overruled the prior decision in 1 Comp. Gen. 342, in so far as it held fees to library stewards to be allowable under specified conditions.

Fees to bath stewards, which you state rarely exceed $3 per person, are an allowable expense, and it is the practice of this office to allow credit for such fees when properly stated and not excessive in amount, unless the traveler has been allowed a per diem in lieu of subsistence—the bath steward fee being considered a subsistence item. 1 Comp. Gen. 342.

Your statement that the tip or fee to cabin steward or stewardess or dining-room steward may be considered reasonable at the present time, if it does not exceed $10, is entitled to, and has been given, most careful consideration. No reason is apparent, however, why there should be any wide difference between the maximum fees allowable by the various services of the Government. In my decision of February 12, 1923, Review 3629, supra, it was stated that $5 each to room and table stewards was considered a reasonable amount to allow as a tip from one person from New York to Liverpool, and the accounts of officers and employees of the Diplomatic and Consular Service uniformly have been settled on that basis. I find in the regulations of the various departments that a limit has been set in numerous instances as to what may be considered customary fees. The regulations of the United States Tariff Commission and the Departments of Commerce, Labor, and Agriculture all provide for the " customary fees " to stewards, but expressly provide that the fees to stewards shall not exceed " in the aggregate on trans-Atlantic steamers $10." The regulations of the Interior Department limit fees on ocean steamers to " not exceeding a total at the rate of $1 per day; " and the Interstate Commerce Commission permits fees to cabin or deck stewards on steamboats " not to exceed 25 cents per day." The Treasury Department provides as total fees " for an ocean trip of 10 days or less, not exceeding $10; for an ocean trip of more than 10 days' duration, not exceeding $1 per day."

It will be noted that, with the possible exception of the Interstate Commerce Commission regulations, the amount fixed as the limit is the aggregate of all fees to stewards. It would appear, therefore, that a maximum allowance of $5 each per person to cabin and dining-room or table stewards on a trans-Atlantic voyage is a liberal construction of the term " customary fees," and that limit, as previously fixed in my decision of February 12, 1923, supra, will be adhered to.

The accounts of N. D. Borum and Leonard M. Gardner, special disbursing officers assigned to the American Embassies at London

and Rome, respectively, referred to in your letter, will be settled on the basis of what has been said above.

(A–7856)

TELEPHONES IN PRIVATE RESIDENCES

The installation of a telephone in the Government-owned residence of the Superintendent of Lighthouses, in a room equipped and used as an office for the transaction of public business in the administration of lighthouses at times when the office outside the reservation is officially closed, is not within the prohibition by section 7 of the act of August 23, 1912, 37 Stat. 414, against the expenditure of public funds for telephone service installed in private residences.

Decision by Comptroller General McCarl, April 27, 1925:

J. Gonzalez Quinones, special disbursing officer, Lighthouse Service, Department of Commerce, applied for a review of settlement C–18966–C, dated December 13, 1924, of his accounts, wherein there was disallowed credit in the amount of $20 covering payments to the Porto Rico Telephone Co. of $2 per month for telephone service at the residence of superintendent of lighthouses, ninth district, San Juan, P. R., September, 1923, to June 30, 1924 (vouchers 2260, 2316, 2385, 2483, 2556, 2599, 2679, 2756, 2821, 2880, respectively.)

Section 7 of the act of August 23, 1912, 37 Stat. 414, provides:

> That no money appropriated by this or any other Act shall be expended for telephone service installed in any private residence or private apartment or for tolls or other charges for telephone service from private residences or private apartments, except for long-distance telephone tolls required strictly for the public business, and so shown by vouchers duly sworn to and approved by the head of the department, division, bureau, or office in which the official using such telephone or incurring the expense of such tolls shall be employed.

It appears that a telephone is maintained at Government expense in the office of the Lighthouse Service which is outside of the lighthouse reservation and which is leased from the War Department; that this office is closed daily from 5 p. m. to 8 a. m., also on legal holidays, Sundays, and on Saturday afternoons from June 15 to September 15; that there is no watchman in the office to receive calls after office hours; that the superintendent's residence is on the lighthouse reservation in a building provided for that purpose by the Government; and that from the phone in the office outside the reservation, upon the authority of the administrative office, a line 770 feet long was extended to the superintendent's residence and a phone installed therein, at a cost of $2 per month for service, in a room fitted up with Government-owned desk and desk phone to be used as an office. This extension, it is stated, is the only phone of

the Lighthouse Service on the lighthouse reservation, and is used for night, holiday, and emergency service on public business only, to wit, radio messages from the bureau, from the lighthouse tender away from San Juan, and from other maritime sources, telegrams, telephone calls on official business, weather reports, etc. As an instance of such service, it is stated that—

> * * * During a recent threatened hurricane the Weather Bureau called the Lighthouse Service by agency of this telephone at intervals of one-half hour through the night advising the path and intensity of the hurricane which passed over St. Thomas, so that the lighthouse tender and crew could be moved to a hurricane anchorage if need be * * *.

In an advance decision to the Secretary of Commerce March 8, 1919, 88 MS. Comp. Dec. 1157, the Comptroller of the Treasury stated:

> The provisions of the act of 1912, supra, have been construed as not prohibiting the installation of telephones in a Government-owned house of an employee, where the work requires the use of a telephone and that is the logical and necessary place to have the telephone in conducting the Government's business. (19 Comp. Dec. 212; id., 350.)

The Secretary was therein advised, with reference to inquiry, whether telephones at Government expense are authorized to be installed in light keepers' dwellings located on Government land, in addition to the telephones maintained at the lighthouse depots, that such expenditure was prohibited by the statute, the facts presented not showing that the telephones were to be installed for the transaction of public business but rather for the sole purpose of calling the employee to duty when his services are required and he is at home. But April 29, 1919, 89 MS. Comp. Dec. 670, the Secretary was advised, upon further presentation of facts, that upon certification by the administrative office that emergency calls were made at times when the keeper is authorized to be at his dwelling, and the dwelling is actually a place for the transaction of public business in the administration of lighthouses, the expense is authorized.

In the instant case it is shown that the phone in question, the only phone of the Lighthouse Service that is on the lighthouse reservation, is installed in a Government-owned house provided for the residence of the superintendent of lighthouses, in a room equipped and used as an office, upon the authority of the administrative office as apparently the logical and necessary place to install the same for the transaction of public business in the administration of lighthouses at times when the office outside the reservation is officially closed.

Upon review, a difference of $20 is certified for credit in the special disbursing agent's account.

The facts in this case are essentially different from the facts in the case decided in 22 Comp. Dec. 602. The rules announced in said decision and in 19 Comp. Dec. 198, are not abrogated or modified by the action in this case.

(A–8320)

SUBSISTENCE EXPENSES IN CITY WHERE HOME IS LOCATED

An employee who travels under competent orders from his official headquarters to a city where he maintains his home is entitled to reimbursement of the cost of meals necessarily taken apart from his family while on official duty at that place.

Decision by Comptroller General McCarl, April 27, 1925:

Noah Crooks, collector of internal revenue, has requested review of settlements Nos. C–18533–Ti, C–20054–Ti, C–21314–Ti, disallowing credit for amounts paid to Deputy Collector John M. Axtell as reimbursement of expenditures for meals during the months of July, August, and September, 1924, while on temporary duty at Kansas City, Mo., which city is where his home is maintained.

It appears that Deputy Collector Axtell's designated post of duty was at Marshall, Mo., 85 miles from Kansas City, Mo., where the expenses in question were incurred. The orders under which Axtell performed duty at Kansas City were worded as follows:

SEPTEMBER 15, 1924.

J. M. AXTELL,
Deputy Collector, U. S. Internal Revenue Service,
Marshall, Missouri:

The zone deputies have been directed to report to St. Louis on the morning of September 18th, to attend a school of instructions. Since there are a number of matters pertaining to your work which I would like to take up with you, you will please report to this office not later than the morning of September 17th, and be prepared to remain here until the close of the month. You will notify taxpayers in your zone that you will not be at your post of duty on the last three days of September.

(Signed) ROLLIE TIMMONS,
Chief Field Deputy.

ALK
OCTOBER 20, 1924.

J. M. AXTELL,
Deputy Collector, U. S. Internal Revenue Service,
Kansas City, Missouri.

In order that the work to which you are now assigned in Kansas City, Missouri, may be completed, you will please notify the taxpayers at your post of duty, Marshall, Missouri, that you will not be at that place on the last three days of October, and you will remain in Kansas City until your work is completed.

(Signed) ROLLIE TIMMONS,
Chief Field Deputy.

ALK

These orders both indicate a temporary duty to be performed at Kansas City and establish that Axtell was in fact in a travel status at that place.

Section 1555, paragraph 11, of the Internal Revenue Manual, provides:

> When an officer mixes his accounts—for example, when he lives with his family and his part of the expenses incurred can not be determined—he is not entitled to reimbursement of his expenses.

While it is admitted in the present case that Axtell lodged at home, no charge is made for lodging or for breakfasts or suppers taken with his family, and it is asserted that it was not possible for Axtell to make the trip from the office to his home for dinner, dinner in this case evidently meaning the midday meal. An employee who travels under competent orders from his official headquarters to a near-by city where he maintains his home is entitled to reimbursement of the cost of meals necessarily taken apart from his family while on official duty at the latter place, 21 Comp. Dec. 785; 1 Comp. Gen. 120; 3 id. 43, 95; 4 id. 251. See also decision of March 6, 1925, A–4945.

Upon review differences of $19.50, $6, $7.60, respectively, are certified for allowance in Crooks's accounts.

Accounts covering similar expenditures for the month of October, 1924, will be settled accordingly.

(A–8721)

OFFICERS' RESERVE CORPS—ACTIVE-DUTY PAY

A member of the Officers' Reserve Corps ordered to active duty under section 37a of the national defense act, as amended, 41 Stat. 776, for training for a period extending between two dates, both inclusive, is entitled to active duty pay for the entire period covered by his orders, notwithstanding he was permitted to return to his home before the last date covered by his orders, due to completion of the course, but had not been relieved from active duty by competent authority.

Decision by Comptroller General McCarl, April 28, 1925:

There is before this office for decision the claim of Rutherford B. H. Macrorie, Infantry, Officers' Reserve Corps, for pay for the 20th day of July, 1924, on which date he was under assignment to active duty by the terms of Special Order 149, headquarters Seventh Corps Area, Omaha, Nebr., January 24, 1924, under authority of section 37a of the national defense act, as amended, 41 Stat. 776. The said order reads in part, as follows:

13. By direction of the President, and under authority contained in telegram, The Adjutant General's Office, Washington, D. C., dated June 21, 1924, the following-named reserve officers, whose grades and sections, dates of rank, and addresses are stated below, are, with their consent, ordered to active duty for the purpose of training at the training camp at Rock Island Arsenal, Rock Island, Illinois, for the period July 6 to 20, 1924, both dates inclusive:

349th Infantry

Name	Grade and section	Date of rank	Address
Rutherford Birchard Hayes Macrorie (O-121980).	Col., Inf., O. R. C.	6/21/24	310 Whitaker Bldg. Davenport, Iowa.

* * * * * * *

The reserve officers named above will proceed at the proper time to the place of active duty designated and, upon arrival thereat, will report in person to the commanding officer for training, upon completion of which, if not sooner relieved, they will return to their respective homes so as to arrive thereat on July 20, 1924, upon which date they will stand relieved from further active duty.

Section 37a of the national defense act provides:

SEC. 37a. RESERVE OFFICERS ON ACTIVE DUTY.—To the extent provided for from time to time by appropriations for this specific purpose, the President may order reserve officers to active duty at any time and for any period; but except in time of a national emergency expressly declared by Congress, no reserve officer shall be employed on active duty for more than fifteen days in any calendar year without his own consent. A reserve officer shall not be entitled to pay and allowances except when on active duty. When on active duty he shall receive the same pay and allowances as an officer of the Regular Army of the same grade and length of active service, and mileage from his home to his first station and from his last station to his home, but shall not be entitled to retirement or retired pay.

The question submitted for decision arose because of a voucher filed by Colonel Macrorie for payment for July 20, 1924, the concluding day of his assignment period, payment for that day having been denied him on the ground that, as he had left the camp and arrived at his home, Davenport, Iowa, on the 19th of the month, his rights to pay terminated on that day. It is shown by voucher 27, accounts of Capt. Elmer C. Goebert for July, 1924, that claimant was paid pay and subsistence allowance to include July 20, 1924, but that $16.67 covering pay for that day was withheld from a subsequent payment to him for rental allowance and longevity pay accruing to him for the period of his training. The circumstances under which he left the camp are explained by claimant as follows:

The training camp where the undersigned was on active duty beginning July 6, 1924, was closed on July 19, 1924, all property turned in by reserve officers in attendance thereat, mess closed, schedule completed, reserve officers

given authority to return to their homes, and all regular personnel departed on the same day; however, no orders were issued by 7th C. A. or higher authority relieving the undersigned from active duty other than Par. 13, SO 149, 7th CA., dated June 24, 1924. The undersigned was therefore on active duty on July 20, 1924, wherever he might be * * *.

It appears that claimant's departure from the camp on the 19th of the month occurred after the completion of the training course and that his arrival home on that day was due to the fact that his home, Davenport, Iowa, was only 2 miles distant from the camp. The situation presented is not one of actual relief from duty involving curtailment of the officer's period of training, a contingency specifically provided for by the order, nor is it in any sense a grant of leave. The course of training having been arranged to terminate at a time to permit those attending from the greatest distance to reach home on the 20th, the members residing in the immediate vicinity of the camp necessarily had to depart also, but that did not change the terms of the order which was an assignment to active duty to include July 20, 1924, unless sooner relieved by competent authority.

As Colonel Macrorie performed all the duty contemplated by the order, he is entitled to be paid in accordance with its terms, and settlement will be made accordingly.

(A-8918)

OFFICERS OF THE ARMY, NAVY, MARINE CORPS, COAST GUARD, PUBLIC HEALTH SERVICE, AND COAST AND GEODETIC SURVEY TRAVELING ON GOVERNMENT-OWNED VESSELS

The provisions in the respective appropriations for the fiscal year ending June 30, 1926, for the Army, Navy, Marine Corps, Coast Guard, Public Health Service, and Coast and Geodetic Survey, 43 Stat. 772, 774, 864, 879, 897, 1046, that officers traveling on Government-owned vessels for which no transportation is charged shall be entitled only to reimbursement of actual and necessary expenses incurred, change the substantive law relating to mileage found in section 12 of the act of June 10, 1922, 42 Stat. 631, and constitute permanent legislation effective from date of enactment.

Comptroller General McCarl to Capt. Carl Halla, United States Army, April 28, 1925:

By reference of the Chief of Finance, War Department, I have your request for decision whether you are authorized to pay attached voucher covering mileage at the rate of 8 cents per mile, with a deduction of 3 cents per mile for transportation furnished, for travel performed by Warrant Officer Earl T. Halstead, United States

Army, from San Francisco, Calif., to Washington, D. C., via United States Army transport, San Francisco, Calif., to New York City, travel performed March 10 to 30, 1925.

Section 12 of the act of June 10, 1922, 42 Stat. 631, provides:

That officers of any of the services mentioned in the title of this Act, when traveling under competent orders without troops, shall receive a mileage allowance at the rate of 8 cents per mile, distance to be computed by the shortest usually traveled route and existing laws providing for the issue of transportation requests to officers of the Army traveling under competent orders, and for deduction to be made from mileage accounts when transportation is furnished by the United States, are hereby made applicable to all the services mentioned in the title of this Act, but in cases when orders are given for travel to be performed repeatedly between two or more places in the same vicinity, as determined by the head of the executive department concerned, he may, in his discretion, direct that actual and necessary expenses only be allowed. Actual expenses only shall be paid for travel under orders outside the limits of the United States in North America. Unless otherwise expressly provided by law, no officer of the services mentioned in the title of this Act shall be allowed or paid any sum in excess of expenses actually incurred for subsistence while traveling on duty away from his designated post of duty, nor any sum for such expenses actually incurred in excess of $7 per day. The heads of the executive departments concerned are authorized to prescribe per diem rates of allowance, not exceeding $6, in lieu of subsistence to officers traveling on official business and away from their designated posts of duty.

In lieu of the transportation in kind authorized by section 12 of an Act entitled "An Act to increase the efficiency of the commissioned and enlisted personnel of the Army, Navy, Marine Corps, Coast Guard, Coast and Geodetic Survey, and Public Health Service," approved May 18, 1920, to be furnished by the United States for dependents, the President may authorize the payment in money of amounts equal to such commercial transportaion costs when such travel shall have been completed. Dependent children shall be such as are defined in section 4 of this Act.

The act of February 12, 1925, 43 Stat. 897, making appropriation for the military service for the fiscal year ending June 30, 1926, provides as follows:

For mileage, reimbursement of actual traveling expenses, or per diem allowances in lieu thereof, as authorized by law, to commissioned officers, warrant officers, contract surgeons, expert accountant, Inspector General's Department, Army field clerks and field clerks of the Quartermaster Corps, when authorized by law, $800,000; and officers and other members of the military establishment named in this paragraph performing travel on Government-owned vessels for which no transportation fare is charged shall be entitled only to reimbursement of actual and necessary expenses incurred.

The provision therein that "officers * * * performing travel on Government-owned vessels for which no transportation fare is charged shall be entitled only to reimbursement of actual and necessary expenses incurred," also occurs in the appropriation acts for the Navy and the Marine Corps, Coast Guard, Public Health Service, and Coast and Geodetic Survey. In all these acts except for the Army and Navy, it takes the form of a proviso following the amount appropriated for mileage of officers of the service concerned. See 43 Stat. 772, 774, 864, 879, and 1046.

Prior to the act of June 10, 1922, laws relative to the rights of officers of the naval and military services were not uniform. The act of June 30, 1914, 38 Stat. 410, limited the rights of naval officers when furnished Government transportation as follows:

That hereafter no mileage shall be paid to any officer where Government transportation is furnished such officer.

"Government transportation" as used therein was held to mean transportation on vessels owned or employed by the Government or by conveyances on land so owned or employed but not to transportation furnished on transportation requests. 21 Comp. Dec. 690.

No such prohibition as contained in the act of June 30, 1914, applied to right of mileage of Army officers but when furnished transportation, either in kind on Government-owned or controlled conveyances or by means of transportation requests, a deduction of 3 cents per mile was made from the officer's mileage account. The law providing for the issue of transportation requests to officers of the Army traveling under competent orders and for deductions to be made from mileage accounts when transportation is furnished by the Government was embodied in section 12 of the act of June 10, 1922. By reason of the provision of section 22 of that act which repealed all laws and parts of laws which are inconsistent therewith, the limitation attaching to the right of officers of the Navy and Marine Corps as provided in the act of June 30, 1914, no longer applied and all officers coming within that act whether furnished transportation on Government vessels or by transportation requests were entitled to mileage less deduction of 3 cents per mile as formerly provided for officers of the Army. 2 Comp. Gen. 202.

It is evident that the proviso in these appropriation acts cited above that "officers * * * performing travel on Government-owned vessels for which no transportation fare is charged shall be entitled only to reimbursement of actual and necessary expenses incurred" constitutes a change of the conditions in which officers may become entitled to mileage as provided in the substantive law granting mileage to officers of the services concerned in section 12 of the act of June 10, 1922. The question is whether such limitation or restriction operates only against the use of the appropriation in which found prohibiting payment therefrom of mileage when officers are so traveling but not limiting the officer's right thereto; or whether it places a limitation on the officer's right to mileage as provided in the act of June 10, 1922, and is intended as an amendment thereto thus changing the substantive law rela-

tive to the condition of travel in which mileage is payable to the officers concerned.

The usual office of a proviso is to restrain or qualify some matter in the preceding section or part of the statute, but when it is apparent that the legislature designed a more comprehensive meaning or application it may assume the functions and character of an independent enactment, thus constituting a permanent change in the substantive law. *Prindle* v. *United States*, 41 Ct. Cls. 8.

In *National Bank of Commerce* v. *Cleveland*, 156 Fed. Rep. 251, the court said:

> * * * The practice, however, of embodying general laws in appropriation bills has become so common that to adopt a narrow and restrictive construction confining their language to the subject-matter generally dealt with by the appropriation act would go far to nullify a good deal of the legislation of Congress. These provisos that are attached to appropriation acts for the purpose of procuring what is believed to be needed legislation, but which could not be accomplished by an independent statute by reason of the press of business before Congress must be treated the same as if they were separate and independent enactments * * *.

In the hearings before the House Committee on Appropriations, pages 197 and 198, relative to the item of travel expenses of officers in the Navy Department appropriation bill, it was brought out that said item was substantially increased for the fiscal year 1923, by reason of the change in the law in the act of June 10, 1922, authorizing mileage to officers when traveling on Government vessels. Also in the hearings before the Senate Committee on the War Department appropriation for the fiscal year 1926, occurs the following:

> General WALKER. I might call your attention to this change in the language under the head of "mileage."
>
> Senator NEELY. On what page is that?
>
> General WALKER. That is on page 13. There has been a provision inserted there which reads, "Officers and other members of the Military Establishment named in this paragraph, performing travel on Government-owned transports shall be entitled only to reimbursement of actual and necessary expenses incurred."
>
> The effect of that is, as you see, to prevent the department paying either a per diem allowance or mileage for travel on a Government-owned transport. It places all such travel on an actual expense basis.

From the language of the proviso in question it is evident that it constitutes a change of the substantive law in the act of June 10, 1922, authorizing mileage to officers, by placing a restriction or limitation on their right thereto; also that the language leaves room for doubt only as to the operation of such limitation, whether intended to operate against the appropriation in which it occurs only or whether intended as permanent legislation, effective against all

future appropriations from date of enactment until modified or repealed. Usually there is some word or words in the language of provisos of this nature to plainly indicate the intent thereof, whether limited or unlimited in its operation. The word "hereafter" is frequently employed to indicate that a provision in an annual appropriation act is intended as permanent legislation, but the use of that word is not essential if the permanent character of the legislation is clearly indicated in some other manner. 26 Comp. Dec. 1067. It is to be observed, also, that the language here in question is not in its phraseology a restriction on the use of an appropriation but is a substantive provision fixing rights of officers.

From the facts and circumstances leading up to the enactment of this provision in the several appropriation acts as above stated, which so clearly modifies the substantive law relative to right of officers of the several services concerned to mileage; the fact that restrictions are frequently placed on the use of annual appropriations which are operative only as to the particular appropriation, in which or with respect to which they are used, while a change in substantive law, although operating as a limitation on the use of appropriations is not primarily addressed to the appropriation or its use; and in view of rules of construction applicable to provisos of this character, I am of opinion that the legislative intent was that the provision should operate as a change in the substantive law relative to mileage, as provided in section 12 of the act of June 10, 1922, 42 Stat. 631, and that it is permanent legislation, effective from date of enactment. 3 Comp. Gen. 123.

Accordingly, you are advised that for the travel in question Warrant Officer Halstead is entitled to actual expenses only.

(A–9128)

OFFICERS AND EMPLOYEES—CLASSIFICATION—FOREMEN

Foremen and head mechanics in the Bureau of Engraving and Printing who are engaged exclusively in the supervision and direction of the work of the various groups of mechanics or craftsmen and have no clerical, administrative, or fiscal duties are within the provision of the classification act of March 4, 1923, 42 Stat. 1489, excluding from classification requirements any employee engaged as "apprentice, helper, or journeyman" in a recognized trade or craft.

Comptroller General McCarl to the Secretary of the Treasury, April 29, 1925:

I have your letter of April 14, 1925, requesting decision whether the positions of foremen and head mechanics in the Bureau of En-

graving and Printing are subject to allocation in accordance with the classification act of 1923.

You state that these positions have heretofore been allocated to various grades in the clerical, administrative, and fiscal service. With your letter has been submitted a list of the titles of the positions, the grades to which allocated and the description of the duties thereof. The titles of the positions in the several divisions of the office are foreman of plate printers, foreman of pressmen, foreman of bookbinders, foreman of electricians, foreman of plumbing, foreman of carpenters, foreman of machine shop, foreman of machinists, foreman of painters, chief electrician, and chief engineer. The statement submitted shows that these are supervisory positions, the incumbents supervising and directing the work of groups of tradesmen or craftsmen.

Section 5 of the classification act of March 4, 1923, 42 Stat. 1489, provides in part:

> That the compensation schedules * * * shall not apply to employees in positions the duties of which are to perform or assist in apprentice, helper, or journeyman work in a recognized trade or craft and skilled and semiskilled laborers, except such as are under the direction and control of the custodian of a public building or perform work which is subordinate, incidental, or preparatory to work of a professional, scientific, or technical character * * *.

The positions excepted from classification under this provision are those the duties of which are exclusively to perform or assist as apprentice, helpher, or journeyman in a recognized trade or craft and skilled or semiskilled laborers with the exceptions indicated. An apprentice and helper are workers who have not learned their trade or craft, and a journeyman is a worker who has learned his trade or craft. A foreman is well recognized as the chief or director of a group of workmen who supervises the rest. If a foreman of tradesmen or craftsmen, he generally must have passed through the status of an apprentice and journeyman in the trade or craft performed by the men whose work he supervises. The phrase "apprentice, helper, or journeyman," I believe, is intended to include all those engaged exclusively in the work of the recognized trade or craft. This office has been advised that the foremen and head mechanics, whose positions have been described in your submission, have all passed through the status of an apprentice and journeyman in the trade or craft performed by the men whose work they supervise; that their entire time is exclusively devoted to the supervision and direction of the work of the men; that they are constantly in immediate contact with the job, instructing the men, assisting them, and at times actually performing the work themselves; that the

positions of foreman and head mechanic require no clerical, administrative, or fiscal duties whatever, either in connection with the work they direct and supervise, or otherwise, nor desk duties of any character; that such clerical, administrative, and fiscal duties are required to be performed by the division or assistant division superintendents under whose jurisdiction the foremen and their men have been placed in the administrative organization of the bureau.

The positions in question have been allocated to Grade 6, 7, 8, 10, and 11, of the clerical, administrative, and fiscal service. In describing the duties of positions to be allocated in each of these grades the classification act expressly includes the supervision of the work of other employees, but such provisions have particular reference to office employees as distinguished from supervision of tradesmen or craftsmen.

The duties of the positions of foreman and head mechanic in the Bureau of Engraving and Printing as represented to this office, are so closely related to and connected with the work of the tradesmen and craftsmen supervised and directed by them, and so unrelated to and disconnected with the duties described under any of the grades in the classification act, that such positions may clearly be brought within the exception of the classification act provided in section 5.

You are advised, therefore, that on and after May 1, 1925, or at the beginning of any semimonthly pay period thereafter, the compensation of employees holding the positions of foreman and head mechanic mentioned in your submission may be adjusted and paid in accordance with administrative rules and regulations without regard to the rates of compensation fixed by the classification act of 1923.

(A-6138)

CONTRACTS—ENVELOPES—LIQUIDATED DAMAGES

Under the provision appearing in contracts for envelopes for the executive departments and independent establishments at Washington, D. C., for the fiscal year 1925, that the head of the department may deduct liquidated damages if in his opinion the Government has sustained any damages by reason of delay in delivery, payment of a voucher at the full contract price covering a delayed delivery is authorized only if accompanied by a statement by the head of the department of the facts as to the extent and cause of the delay and that in his opinion no damages were sustained by the Government. The presumption in cases of contracts let by competitive bidding is that the Government is generally damaged by delays where time is of the essence of the contract.

Comptroller General McCarl to A. Zappone, disbursing clerk, Department of Agriculture, April 30, 1925:

There has been considered your letter of November 5, 1924, submitting a voucher in the amount of $66.04, in favor of the Commercial Envelope Co. (Inc.), for envelopes, with request for decision as to whether payment thereon is authorized without deduction of liquidated damages for delay in delivery, the contract under which delivery was made containing a revised liquidated damage clause differing in its terms from similar contracts, viz:

* * * If the contractor shall fail to deliver as ordered any or all of the envelopes agreed by him to be supplied under his contract within the time specified herein, unless otherwise specified in his contract, in accordance with the conditions and requirements of his contract, the head of the department or office ordering said envelopes in making payment therefore may, if in his opinion the interest of the Government has sustained any damage by reason of such delay, deduct as liquidated damages, in lieu of actual damages, a sum equal to two-tenths of 1 per cent of the total amount which would be payable therefor, at the price or prices stipulated in the contract, for each day's delay in the fulfillment of the order.

Whenever the Government actually sustains damages by reason of delays in delivery under contracts containing such a provision, the head of the department or office making the purchase becomes obligated—to properly protect the rights to liquidated damages thereby accruing to the Government— to see that proper deduction is made. Therefore there should accompany each voucher covering a payment for a delayed delivery, where in the opinion of the head of the department no damage to the interest of the Government has resulted by reason of delay in delivery, the statement of the head of the department to that effect and giving the facts upon which his conclusion is reached.

Although you state liquidated damages are not deducted from the voucher because no damage was sustained, there is nothing to support such conclusion. The voucher must be accompanied by an administrative finding in this respect and not by a finding of the disbursing clerk. See the act of August 23, 1912, 37 Stat. 375. The contract provision is not an authority to charge or not charge liquidated damages at the administrative will but action must be based upon facts, showing, for instance, what were the causes of delay and the responsibility therefor. If the responsibility does not appear otherwise than with the contractor, and the actual damage to the United States can not be ascertained because it is indefinite and uncertain, then it is a proper case for application of the liquidated damage clause rather than a finding of no actual damages.

The presumption that damage is sustained is particularly strong where the element of time is prescribed in a contract upon which there has been public competition. This is because the element of time requires higher bids and prices to be paid, the increase on account of which is gained by the contractor when the stipulated damage is not deducted, and the United States receives nothing for the amount paid for the earlier delivery contracted.

Payment of the voucher is not therefore authorized.

(A-8130)

TRANSPORTATION OF DIPLOMATIC AND CONSULAR OFFICERS AND FAMILIES

The appropriation for the transportation of diplomatic and consular officers and their families in going to and returning from their posts is available for the transportation of a consul's wife and daughter in returning to the United States from a place other than the consul's post of duty, upon a showing that they had been residing at his post of duty, such reimbursement not to exceed what transportation would have cost from the post of duty to the United States by the most direct route. 26 Comp. Dec. 520, distinguished.

Decision by Comptroller General McCarl, April 30, 1925:

John Q. Wood applied December 30, 1924, for review of settlement C-13250-S, dated July 25, 1924, whereby credit for $479.46 was disallowed in his accounts representing the traveling expenses of his wife and daughter in returning to the United States from Rome, Italy.

Claimant was consul at Frankfort, Germany, and was ordered to return to the United States for assignment to Vera Cruz, Mexico. The consul's family had been living with him in Frankfort but had gone to Rome to arrange for the moving of their furniture and were advised by the consul not to return to Frankfort but to proceed directly from Rome to the United States, which they did.

The appropriation for transportation of diplomatic and consular officers and their families is available to pay the actual and necessary expenses incurred "in going to and returning from their posts."

In this case the consul's wife and daughter traveled from his post at Frankfort to the United States, but instead of making the journey directly they traveled by the way of Rome. Vouchers were submitted covering their necessary expenses actually incurred amounting to $651.58. In the administrative audit the approval was given and reimbursement recommended of only $479.46, which was twice the amount of the actual expenses allowed the consul for his own trip from Frankfort to the United States.

This case differs from the case decided in 26 Comp. Dec. 520, in that in the earlier case the consul's wife had not been residing at her husband's post of duty. Since the consul's wife and daughter in this case had resided at his post of duty, reimbursement is authorized of their actual and necessary expenses incurred in returning from the consul's post of duty, not in excess of what it would have cost to return by the most direct route.

Upon review $479.46 is certified for credit in the accounts of John Q. Wood.

(A–6660)

COMMUTATION OF QUARTERS AND RENTAL ALLOWANCE—DEPENDENT MOTHER

Where the mother of a naval officer is living with her husband and two minor children, and such husband, who is and has been engaged in the hotel business, has an income therefrom upon which he was required to execute an income-tax return, and the domestic arrangements of the mother have not changed since the officer son was appointed in the Navy, she is not dependent upon him within the meaning of the laws authorizing payment of rental allowance or commutation of quarters.

Decision by Comptroller General McCarl, May 1, 1925:

Lieut. Harry L. Dodson, United States Navy, has requested review of settlement No. 01615, dated August 12, 1924, allowing his claim in the amount of $51.34 for difference between pay as lieutenant (junior grade) and lieutenant during the period from March 23 to April 25, 1922, but wherein such amount was set off against an indebtedness due from him to the United States of $1,511.30 by reason of payments made to him for commutation of quarters, heat, and light, and rental and increased subsistence allowances during the period from March 1, 1919, to June 30, 1923, totaling $2,231.97, less $720.67 checked against his pay from July 1, 1923, to December 28, 1923, as a result of certificates made by him that his mother was actually and necessarily dependent upon him for more than one-half of a reasonable living and for her chief support.

The act of April 16, 1918, 40 Stat. 530, authorized the furnishing of public quarters to an officer of the Army in the field or on active duty without the territorial jurisdiction of the United States who maintained a place of abode for a wife, child, or dependent parent, and if no public quarters were available for such dependents at the place at which they were maintained, the statute authorized the payment of commutation of quarters, heat, and light for such dependents. Under assimilating statutes and decisions of the Comptroller of the Treasury this act was applicable to officers of the Navy on sea duty. 24 Comp. Dec. 610, and citations therein. The Comp-

troller of the Treasury, in construing the statute, held 24 Comp. Dec. 686, that the term "dependent parent" included among others, the officer's father and mother and that the qualifying word "dependent" is construed to mean that the officer his contributed, before April 16, 1918, or may thereafter actually and necessarily contribute regularly more than one-half of the cost of a reasonable living for the parent.

In view of the conditions then existing of actual war officers were permitted to obtain payment of such allowances under the system of paying salaries and allowances generally on the faith and credit of their certificates attached to the pay account showing the full name and post office address of each person for the maintenance of whom commutation was claimed, the exact degree of relationship of such person to the officer and, if a parent, that he actually and necessarily contributed regularly more than one-half the cost of a reasonable living.

The obtaining of funds was thus authorized on the faith and credit of the officer, but his rights under the law were in no way expanded. Numerous instances where payments were made on such certificates, where in fact there was no dependency, came to the attention of this office and by action of April 6, 1922, evidence of dependency was required. Such evidence was also required as to the payments of rental and increased subsistence allowances under the act of June 10, 1922, 42 Stat. 625, which by sections 5 and 6 established a subsistence allowance, fixed by the President at 60 cents per day, and a rental allowance, fixed by the President at $20 per month, per room, the number of subsistence allowances and the number of rooms for rental allowance varying with the rank or grade of the officer and his status with relation to dependents. Dependents are defined in section 4 of the act as follows:

> That the term "dependent" as used in the succeeding sections of this act shall include at all times and in all places a lawful wife and unmarried children under twenty-one years of age. It shall also include the mother of the officer, provided she is in fact dependent on him for her chief support.

Claimant has submitted in support of his claim for the allowances indicated the affidavit of his mother, executed March 27, 1923, from which it appears that she is 57 years of age, resides at Ingleside, Norfolk, Va., with her husband, who is engaged in the hotel business in Norfolk, Va. Besides claimant she has two children residing at home, one 20 and the other 16 years of age, a married daughter, residing at Canon City, Colo., and a son, an electrical engineer, at Richmond, Va. The value of property owned by the husband is not shown, but it is stated that his income from his hotel business is $150 per month, and that an income-tax return was filed by him with the collector of internal revenue at Richmond, Va.

The residence in which the father and mother reside is stated to be owned by the mother, and is valued by her at $8,000, with an incumbrance thereon of $5,500. Besides the home, she owns other tangible personal property valued at $400.

The mother's living expenses are stated to be $105 per month, and she states that during the year ended March 1, 1922, there was contributed for her support $1,500 by her officer son and $500 by her husband, and for the year ended March 1, 1923, $1,500 by her officer son and $360 by her husband, and in addition it is stated the son contributed certain publications valued at $14. Further reference to the contributions made by the son shows that he sent his mother $75 the first of each month. While it appears that the mother resides with her husband and two minor children, it is not shown how she arrived at the amount of her individual living expenses apart from those of the other members of the same household. Nor has there been explained the disposition of the funds contributed in excess of the amount indicated as her expenses. It is shown by the original vouchers on file in this office that the mother was away from her Ingleside, Norfolk, Va., residence from October 1, 1919, to May 15, 1920, and that the officer claimed to have maintained an abode consisting of one room for her during such period to March 31, 1920, and three rooms during the remainder of such period. Her address was given as 523 North Fourth Street, Canon City, Colo., apparently the residence of her daughter.

It will be observed that the law does not contemplate dependency arising from the voluntary action of the parties. The claimant did not enter the Navy until May 31, 1918, and the mother's living arrangements were prior thereto adjusted on the basis of independence of her son. There appears no change in her domestic relations requiring the rearrangement of her mode of living based upon necessary contributions from her son for more than one-half of the cost of a reasonable living or her chief support within the meaning of the laws. It is apparent that the father has raised a family of five children. He is now only 57 years of age, and does not appear to be in any way physically or mentally incapacitated from earning a livelihood for himself and family, and, in fact, it is shown that he is and has been during the entire period here in question, engaged in the same hotel business which he has been conducting continuously during the past number of years, and from which he derives a substantial and gainful income and that he is actually maintaining his wife, claimant's mother. In these circumstances and on the evidence furnished, the amounts obtained by Lieutenant Dodson were improper, his mother not being actually and necessarily dependent upon him for more than one-half the cost of a reasonable living or

her chief support within the meaning of the law. The amounts thus paid accordingly constitute an indebtedness due the United States from such officer for which the charge raised by the settlement was properly made. *Gratiot* v. *United States*, 15 Peters, 336; *McKnight* v. *United States*, 98 U. S. 179; *United States* v. *Burchard*, 125 U. S. 176; *Barry* v. *United States*, 229 U. S. 47; *Wisconsin Central Railroad* v. *United States*, 164 U. S. 201.

Upon review the settlement is sustained.

(A-6161)

INTERNAL REVENUE HEARINGS—WITNESSES—STENOGRAPHIC REPORTERS

There is no authority of law for requiring the attendance or paying the expenses of witnesses, who are not Government employees, at hearings conducted by the Bureau of Internal Revenue under sections 5, 6, and 9, Title II, of the national prohibition act of October 28, 1919, 41 Stat. 310. The expenses of Government employees required to attend such hearings as part of their official duty may, however, be paid from the appropriation for enforcement of the narcotic and national prohibition acts. 4 Comp. Gen. 499, amplified and adhered to.

The recording or reporting of administrative hearings as a general rule is for performance by the regular stenographic force of the service or establishment holding such hearings. Necessity for the hire of a stenographic reporter in particular cases, due to the inability of the regular stenographers to perform that service, must affirmatively appear and due compliance should be had with section 3709, Revised Statutes, regarding advertisement.

Comptroller General McCarl to the Secretary of the Treasury, May 2, 1925:

There has been received your request of March 27, 1925, for reconsideration of my decision of November 29, 1924, 4 Comp. Gen. 499, in which it was held that there is no authority of law for the payment of expenses incident to securing the attendance of witnesses at hearings conducted by the Bureau of Internal Revenue for the purpose of determining whether permits issued under sections 5, 6, and 9, Title II, of the national prohibition act of October 28, 1919, 41 Stat. 310, should be revoked or reduced.

In your request for reconsideration it is stated in part:

> This department is now informed that, in view of this ruling, accounting officers are contemplating suspending the payment of expenses of Government agents and witnesses attending and testifying at such hearings, and of stenographers reporting testimony introduced on behalf of the Government. If this is true, and if the ruling referred to is not modified, this department will be compelled to discontinue entirely its present procedure and enter upon one which, it is believed, from a full consideration of the matter, you will agree is not in conformity with the law and regulations. It is for the purpose, therefore, of securing reconsideration of your ruling of November 29, 1924, that this communication is addressed to you.
>
> The sections of the law to which you refer in your opinion are, of course, controlling, with the exception that section 6, Title II, must also be consulted in determining the authority of the Commissioner of Internal Revenue to issue permits. The regulations quoted in your letter deal, however, only with the renewal of basic permits, and refer to but two classes, i. e., those to be

issued to retail druggists and hospitals, leaving entirely out of consideration (1) the issuance of all original permits; (2) the renewal of permits of manufacturers of liquor, wholesale druggists, transporters, importers, physicians, concentration warehousemen, manufacturers of denatured alcohol and of cider and vinegar and of cereal beverages and dealcoholized wines; and (3) the revocation of permits.

The sections of the statute governing the revocation of permits (5 and 9, Title II), with which the department is primarily concerned, as it is holding at least one hundred hearings thereunder daily throughout the United States, unquestionably contemplate a legal hearing at which the facts are established and made a matter of record, and on which are based the findings of the commissioner, which the courts on review are to "affirm, modify, or reverse * * * as the facts and law of the case may warrant." (Sec. 5.) The courts have in the majority of cases so far reviewed under these provisions determined the issue of whether the permit should or should not be revoked on the record so prepared * * *.

The regulations under which the prohibition unit is conducting hearings in cases involving the revocation of permits are not novel. They were adopted after a very careful consideration of the provisions of law authorizing hearings and the rulings of courts as to what constituted a legal hearing. They are designed to approximate as near as may be a judicial hearing, and have thus far met with almost universal acceptance by the courts.

Section 5 of the act of October 28, 1919, 41 Stat. 309, with reference to the procedure to be followed in the revocation of permits for the manufacture of preparations permitted by section 4 of the act as not constituting intoxicating liquors, requires, first, an analysis of the article made and a finding by the commissioner, based upon the analysis, whether the preparation is an intoxicating liquor within the meaning of the act. If so determined, the manufacturer or permittee is then to be served with notice and given an opportunity to disprove the finding to the "satisfaction of the commissioner," his permit to be revoked if he fails. The permittee is then given the privilege of proceeding in court for a review of the action of the commissioner. The Government's case, prior to the presentation of the matter to the court, is based upon the analysis, and no reason is seen for calling outside witnesses to support it. The permittee is privileged to submit such showing by affidavits or oral testimony as he may desire, but neither he nor the commissioner is given any right to subpœna witnesses.

Section 9 of the act, with reference to the revocation of permits for dealing in intoxicating liquors as such, provides for a hearing, after due notice to the permittee, of charges based upon "a complaint under oath setting forth facts showing, or if the commissioner has reason to believe," that any person who has a permit is not in good faith conforming to the provisions of the act or has violated the prohibition laws of any State.

Regulations 60, sections 1900 to 1944, provide a procedure to be followed with respect to hearings. Such procedure, in so far as it does not involve unauthorized expenditures of public funds, is properly for administrative regulation, and the attendance at such hearings of agents and employees of the prohibition forces may be

considered in the line of official duty, and their actual and necessary expenses so incurred are chargeable to the appropriation for "Enforcement of narcotic and national prohibition acts." As section 9 of the act provides for a "hearing" which is to form the basis of the commissioner's action, which action is subject to review by the court, it would appear proper that some record be made of the proceedings. It is not apparent that the proceedings are necessarily of such a formal nature, however, as to require the hiring of a stenographic reporter. As a general rule administrative hearings are for recording or reporting by the regular stenographic force. Should necessity arise in particular cases for the hire of a stenographic reporter, due to the inability of the regular stenographers to perform that service, such necessity must affirmatively appear on the voucher and due compliance should be had with section 3709, Revised Statutes, regarding advertisement.

As pointed out in the decision of November 29, 1924, however, under the sections of the law referred to, permits are not to be revoked or reduced or denied unless the director is in possession of proof to indicate the necessity for such action. The hearing is authorized not for the purpose of obtaining such proof but to enable the permittee to overcome such proof if he can. There would appear to be no necessity for the Government to produce witnesses at such hearing, especially witnesses other than prohibition agents or employees. The act does not give the prohibition officers authority to subpœna witnesses or to administer oaths. *O'Sullivan* v. *Potter*, Federal prohibition director, 290 Fed. Rep. 844. Where Congress intends such power to be exercised, it has conferred it by special statutory enactment as instanced in the cases of the Federal Trade Commission, act of September 26, 1914, 38 Stat. 722; the Employees' Compensation Commission, act of September 7, 1916, 39 Stat. 748; Secretary of Interior in Indian heirship cases, act of August 1, 1914, 38 Stat. 586; United States Tariff Commission, act of September 8, 1916, 39 Stat. 797; registers and receivers of local land offices, act of January 31, 1903, 32 Stat. 790; Board of Tax Appeals, act of June 2, 1924, 43 Stat. 338.

There appears nothing in your letter of March 27, 1925, to require or justify any modification of the decision of November 29, 1924, and the same is accordingly affirmed.

It may be stated for your information that said decision denied only the right of the prohibition officers to require the attendance of witnesses other than Government employees at the hearings held under sections 5, 6, and 9 of the prohibition act, and to pay their expenses from public funds. It did not and was not intended to interfere otherwise in the procedure prescribed by the regulations in conducting such hearings as may be considered necessary from

an administrative viewpoint in so far as they do not contemplate the unauthorized expenditure of public funds.

(A-8638)

MISTAKE IN BIDS—STATE TAX ON GASOLINE—IGNORANCE OF LAW

An oil company that submitted the lowest bid in response to requests for bids on a quantity of gasoline to be supplied during a given period, and whose bid prior to its request for permission to withdraw had been accepted by the postmaster, subject to approval by the Post Office Department, and was subsequently so approved, may not be relieved of furnishing gasoline in accordance with its bid by reason of alleged ignorance of a State tax on gasoline imposed by a State law enacted prior to the request for bids although not effective until thereafter.

Comptroller General McCarl to the Postmaster General, May 2, 1925:

I have your letter of March 18, 1925, requesting decision as to the proper rate to be paid per gallon to the St. Louis Gas & Fuel Co. for gasoline furnished the postmaster at St. Louis, Mo., during the period January 1 to March 31, 1925, under circumstances that may be epitomized as follows:

In response to a request for bids dated November 28, 1924, for furnishing approximately 60,000 gallons of gasoline to the postmaster at St. Louis, Mo., during the period January 1 to March 31, 1925, the St. Louis Gas & Fuel Co. submitted the lowest bid of $0.099 per gallon, which was accepted by the postmaster subject to approval by the Post Office Department at Washington. In submitting a report of the bids the postmaster stated that because of misinformation the St. Louis Gas & Fuel Co. failed to take into consideration the fact that on November 4, 1924, an act had been adopted by the people of Missouri which provided a tax of 2 cents per gallon on motor-vehicle fuel effective January 1, 1925.

On December 19, 1924, the Post Office Department approved the bid of the St. Louis Gas & Fuel Co. of $0.099 per gallon.

On December 18, 1924, the Post Office Department advised the postmaster at St. Louis to readvertise for bids with the result that the St. Louis Gas & Fuel Co. submitted bids of $0.099 per gallon without the 2-cent State tax and $0.119 per gallon including the tax. No action has been taken on the bids requested on December 18, 1924.

You request to be advised whether in view of the fact that the St. Louis Gas & Fuel Co.'s bid was based on misinformation as to the requirements of the Missouri law and that a request for permission to withdraw its bid and to substitute a new bid therefor was filed with the postmaster prior to the final acceptance of the offer by the department, the department will be justified in accepting bills covering delivery of gasoline at $0.119 per gallon or will the con-

tractor be compelled to accept payment for the gasoline delivered at $0.099 per gallon?

While relief from mistakes in contracts may be had in some cases, there appears no lawful basis for relief in this case. The St. Louis Gas & Fuel Co. submitted its bid together with seven other bidders, each of whom was necessarily obliged to know all the conditions that entered into the fixing of the prices quoted in their bids. There is nothing to indicate that the postmaster knew at the time he opened the proposal that a mistake had been made or that there was such mutual mistake as would permit increasing the contract price. In any event there would be for consideration the rate offered by the next lowest bidder as evidencing the reasonable value of the gasoline. The bidder may have had a right to withdraw its bid before the time set for opening, but no such right existed after opening or accepting its proposal.

You are advised that upon the facts appearing the gasoline in question may be paid for at the rate of $0.099 per gallon only, as fixed by the proposal and acceptance constituting the contract of the parties.

(A-8714)

FOREIGN SERVICE RETIREMENT

The provision in section 18 (o) of the act of May 24, 1924, 43 Stat. 140, extending the benefits of the foreign service retirement act to those holding positions as ambassadors or ministers or positions in the Department of State by promotion from the classified service is applicable to those promoted to such positions from the classified diplomatic service subsbequent to February 5, 1915, but is not applicable to persons holding such positions by appointment after having been separated from their classified positions.

Those foreign-service officers entitled to the benefits of section 18 (o) of the act of May 24, 1924, 43 Stat. 140, by reason of promotion from classified service, have no option but to accept the retirement provisions including the deduction from their salaries of the 5 per cent for the foreign-service retirement fund.

Comptroller General McCarl to the Secretary of State, May 2, 1925:

I have your letter without date received in this office March 26, 1925, wherein you request decision relative to several questions arising under the act of May 24, 1924, 43 Stat. 140, in connection with the retirement system of foreign-service officers, and more particularly with regard to the provisions of section 18 (o) of said act which provides as follows:

> Any diplomatic secretary or consular officer who has been or any Foreign Service officer who may hereafter be promoted from the classified service to the grade of ambassador or minister, or appointed to a position in the Department of State shall be entitled to all the benefits of this section in the same manner and under the same conditions as Foreign Service officers.

You state that there are at present several persons who have been promoted from the classified diplomatic service to the position of

minister or to a position in the Department of State who the department believes come within the provisions of section 18 (o) *supra*, and you request to be advised whether this conclusion is correct (1) with regard to those persons now holding the position of ambassador or minister or position in the Department of State who have been promoted to such positions from the classified diplomatic service subsequent to February 5, 1915, the date of the act classifying secretaries in the diplomatic service; and (2) with regard to those persons who were in the classified diplomatic service subsequent to February 5, 1915, but who resigned and were, after an interim, appointed as ambassador or minister or to a position in the Department of State.

The purport of section 18 (o) is to extend the benefits of the foreign-service retirement act to diplomatic secretaries, consular officers, and foreign-service officers, promoted from the "classified service" to the grade of ambassador or minister or to a position in the Department of State. One of the prerequisites as held in 4 Comp. Gen. 317 is that the officer promoted must have been, at the time of such promotion, in the "classified service" in order to come within the purview of this section. Your first question is, therefore, answered in the affirmative, provided the persons referred to were members of the classified diplomatic service at the time of their promotion.

The words "promoted from the classified service" must be taken to include only those persons who are actually members of the classified foreign service at the time of their promotion in order to be entitled to the benefits of the retirement provision under section 18 (o). Separation from the service by resignation severs the officer's connection with the classified foreign service, and his subsequent appointment to a position outside of the classified service can not operate to reinstate him in his classified foreign service status, his position being specifically excluded from the definition of a classified foreign-service officer as contained in section 2 of the act of May 24, 1924. Furthermore, the terms of the provision indicate that the retirement benefits were intended to be extended to the officers mentioned only while serving under the promotion from the classified service. You are accordingly advised that persons who resign while members of the classified foreign service or after being promoted from said service and are subsequently appointed as ambassadors or ministers or to a position in the Department of State are not entitled to the benefits of the retirement provisions of this act.

You also request to be advised as to whether the salaries of officers entitled to the benefits of the retirement provisions of the act of May 24, 1924, under section 18 (c) are subject to the retirement

deduction of 5 per cent as provided for in section 18 (c) of said act. The last part of section 18 (c) provides that officers promoted as specified therein "shall be entitled to all the benefits of this section in the same manner and under the same conditions as foreign-service officers." This clause places those officers so promoted in the same status as foreign-service officers for the purpose of retirement benefits, and they are therefore subject to the retirement deductions provided in section 18 (c).

Relative to the question as to whether it is optional with the officer promoted to the grade of ambassador or minister or to a position in the Department of State to either accept or refuse the retirement benefits of the act of May 24, 1924, you are advised that while, as you suggest, it may have been the intention of the Congress to let the officer exercise his option in this respect, there is nothing in the statute to indicate such intent or from which such intent reasonably can be implied. It is evident throughout the act, and in the reports and hearings of committees in connection therewith, that the primary purpose for inserting subsection (c) under section 18 was to afford the same retirement privileges to persons thus promoted as those granted the foreign-service officers, or in other words, to prevent the promotion from depriving them of the retirement benefits to which they were entitled while members of the classified foreign service. As it is not optional with foreign-service officers to accept or reject the benefits and obligations of the retirement act neither can it be held that the officers entitled to said benefits under section 18 (c) have any option in the matter.

(A–8869)

COMPENSATION—EMPLOYEES OF RECORDER OF DEEDS OF THE DISTRICT OF COLUMBIA

The recorder of deeds of the District of Columbia is given by the act of March 3, 1925, 43 Stat. 1102, authority, subject to the approval of the Attorney General, to fix the compensation of the employees of his office other than the deputy recorders, and he may, therefore, with the approval of the Attorney General, fix the compensation of copyists on a salary basis within the limits of the fees and emoluments of his office available for such payments. 4 Comp. Gen. 53, no longer applicable.

Comptroller General McCarl to the Recorder of Deeds of the District of Columbia, May 4, 1925:

Reference is had to your request of April 2, 1925, for decision whether you are authorized to place the copyists in your office on a salary basis. You state that they are now paid by piecework computed at four-tenths of the recording fee.

The act of March 3, 1925, 43 Stat. 1102, contains the following provision:

* * * And with the approval of the Attorney General of the United States, the recorder of deeds may from time to time fix the number and compensation of all other employees of his office: *Provided,* That any expenditure incurred by him in so doing shall not be a charge upon the Public Treasury, but shall be paid out of the fees and emoluments of said office: ***And provided further,*** That the employees of said office shall not be in excess of the number actually necessary for the proper conduct of said office * * *.

Prior to the enactment of March 3, 1925, cited, the Attorney General expressed the opinion that the employees of the office of the recorder of deeds of the District of Columbia were included in the classification act of March 4, 1923, 42 Stat. 1488. See decision of this office dated July 14, 1924, 4 Comp. Gen. 53. The provision of the enactment of March 3, 1925, cited makes this no longer applicable.

By virtue thereof it is within your discretion, subject to the approval of the Attorney General, to fix the pay of copyists on a salary basis. Care must be exercised, however, in fixing the number and the salary of employees to see that the fees and emoluments of your office are not exceeded, as otherwise a situation might arise in which there would be no funds available to pay salaries fixed by you should the receipts of your office for any reason fail to reach the estimated amount upon which the salaries are based.

(A–9116)

CLASSIFICATION OF CIVILIAN EMPLOYEES—ACCOUNTANTS IN FIELD SERVICE

The act of December 6, 1924, 43 Stat. 704, appropriating funds to enable adjustments of compensation of civilian employees in certain field services to correspond to the rates established by the classification act of 1923 for positions in the departmental service in the District of Columbia, does not apply to field accountants employed under authority of the appropriation for 1925, under the heading "National parks" in the act of June 5, 1924, 43 Stat. 422.

Comptroller General McCarl to the Secretary of the Interior, May 4, 1925:

I have your letter of April 13, 1925, requesting decision (1) whether a voucher may be paid in favor of Francis P. Farquhar for $150 representing compensation at the rate of $30 per diem for five days in March, 1925, for services as an accountant in the field service of the National Park Service under a temporary appointment for 90 actual working days, dated October 9, 1923, extended for 60 actual working days from January 1, 1925, and (2) whether the compensation to be fixed by the Secretary of the Interior for field accounting services for the fiscal year 1925 is limited to the rates specified in the classification act.

The request is based on the decision of this office dated March 12, 1925, A–8208, 4 Comp. Gen. 755, holding that the effect of the appropriation act of December 6, 1924, 43 Stat. 704, was to limit per diem rates of compensation in the field services expressly therein

provided for to the per annum rates fixed in the classification act for corresponding positions at the seat of Government.

The act of June 5, 1924, 43 Stat. 422, appropriating for the fiscal year 1925, under the heading "National parks," provides as follows:

> For compensation to be fixed by the Secretary of the Interior for accounting services in the District of Columbia or in the field in checking and verifying the accounts and records of the various operators, licenses, and permittees conducting utilities and other enterprises within the national parks and monuments under his jurisdiction, including necessary travel and incidental expenses while absent from their designated headquarters, $6,000.

Then followed in the act separate paragraph items for the several national parks, for national monuments, for reconstruction, replacement and repair of roads, etc., and for fighting forest fires. The appropriation act of December 6, 1924, *supra*, on which the decision of this office of March 12, 1925, was based, appropriated funds under specific headings to enable the heads of the several departments and establishments of the Government to adjust the compensation of civilian employees in field services for which appropriations were therein provided, to correspond to the rates established by the classification act for positions in the departmental service in the District of Columbia. Such authority was held to be limited to the field services for which funds were expressly provided in the act and is not applicable to the field service generally. See decision of March 19, 1925, A–8419, addressed to you, involving the compensation of the superintendent of the Chippewa logging service and his assistants.

The paragraph under "National Park Service" in the act of December 6, 1924, *supra*, appropriates specific amounts for each of the individual national parks and for protection of national monuments, but nothing additional for compensation of accountants under the above quoted paragraph in the act of June 5, 1924, *supra*. It follows that the provisions of the act of December 6, 1924, and the decision of this office dated March 12, 1925, have no application to the services of field accountants employed under authority of the quoted provision in the act of June 5, 1924, and the payment of the submitted voucher in favor of Francis P. Farquhar is authorized, if otherwise lawful.

The specific and general questions are answered accordingly.

The express terms of the appropriation act under which these accountants are employed include authority for employment in the District of Columbia and in the field. Those employed in the District of Columbia, either under temporary or permanent appointments, would, of course, be subject to classification. Where a statute so provides for the same character of personal services in the District of Columbia and in the field, there is for consideration whether the administrative office may reasonably pay the field employees at

rates so greatly in excess of the rates authorized by the classification act for corresponding positions in the District of Columbia.

(A-9211)

ENFORCEMENT OF NATIONAL PROHIBITION—SECURING EVIDENCE

The appropraition for expenses of enforcing the provisions of the national prohibition act is not available to reimburse prohibition agents for losses sustained while engaged in gambling in violation of the State laws in an effort to detect or secure evidence of violations of the prohibition laws.

Decision by Comptroller General McCarl, May 4, 1925:

Howard G. Bethards, general prohibition agent, requested, April 20, 1925, review of settlement No. 077731, dated April 16, 1925, wherein was disallowed his claim, amounting to $236, for losses sustained at roulette, cards, dice, etc., during November, 1924, as internal revenue general prohibition agent, for the purpose of securing evidence of violations of the national prohibition act.

The division chief, general prohibition agents, Jacksonville, Fla., in transmitting Agent Bethards's claim to Washington for settlement, under date of December 5, 1924, stated:

> These expenditures are out of the ordinary, and at my suggestion Mr. Bethards has submitted same in the form of a supplemental.
>
> It is quite evident that this money had to be expended in order to secure evidence in these places, and I am therefore approving same for payment, and believe that the amount claimed should be paid in full.

The acting chief, general prohibition agents, in a memorandum to the bureau under date of January 30, 1925, stated:

> Reference is made to your memorandum of December 19, 1924, returning the supplemental Form 63½ of General Prohibition Agent Howard G. Bethards, containing claims in the total amount of $236.00, for expenses incurred for the purpose of obtaining evidence of violations of the national prohibition act.
>
> For your information, this office received numerous reports of wholesale violations at Key West, Florida. You will note from the agent's letter, which is attached to the account, that this was a very difficult proposition and that the only way the necessary evidence could be obtained in these cases was for the agents to put up the appearance of tourists, incurring a considerable amount of expense playing gambling games, etc., in order to gain the confidence of the violators and be able to purchase evidence. Divisional Chief Duncan, who was requested to have this investigation made, states that it was absolutely necessary to expend this money in order to secure the evidence, and that he believes that the amount claimed should be paid in full.
>
> It is the opinion of this office that the results obtained from this investigation fully justify the amount of expense incurred, and payment of this account is recommended.

The national prohibition act of October 28, 1919, 41 Stat. 305, provides that the Commissioner of Internal Revenue, his assistants, agents, and inspectors shall investigate and report violations of the prohibition laws, and the act of April 4, 1924, 43 Stat. 71, making appropriation for the fiscal year 1925, provides:

> For expenses to enforce the provisions of the national prohibition act * * * including * * * the securing of evidence of violations of the acts * * *

and such other expenditures as may be necessary in the District of Columbia and several field offices * * * $10,629,770 * * *.

The appropriation quoted is available for making investigations for the purpose of securing evidence and the purchase of evidence in proper cases, but it does not authorize expenditures of such doubtful propriety as engaging in gambling for the purpose of securing evidence, which in itself is a violation of the laws of the State. See revised general statutes, State of Florida, 1920, volume 2, section 5508, page 2676.

The fact that an expenditure has been authorized by a superior officer does not always constitute authority therefor. The character of the expenditure here involved is such that reimbursement therefor can not be authorized in the absence of specific legislative authority therefor.

Upon review the settlement is sustained.

(A-9312)

APPROPRIATIONS—AVAILABILITY IN ADVANCE OF FISCAL YEAR—RURAL POST ROADS

The approval of rural post-road projects during the fiscal years 1923, 1924, and 1925 obligated the Government to the extent authorized to be appropriated by the act of June 19, 1922, 42 Stat. 660, if and when appropriated for, and the funds actually appropriated to meet such obligations by the act of February 10, 1925, 43 Stat. 852, accordingly became available for expenditure immediately upon the approval of the act to meet the obligations theretofore incurred (but not for personal services in the District of Columbia during the fiscal year 1925) notwithstanding such appropriations were included in an annual appropriation act ordinarily not available until the beginning of the fiscal year.

Comptroller General McCarl to the Secretary of the Treasury, May 4, 1925:

I have your letter of April 24, 1925, requesting decision whether the sum of $6,000,000 of the $76,000,000 appropriated in the annual agricultural appropriation act covering the fiscal year 1926, February 10, 1925, 43 Stat. 852, for cooperative construction of rural post roads may be made available for expenditure during the fiscal year 1925 in accordance with the request of the Secretary of Agriculture forwarded with your submission.

The act of February 10, 1925, under the head "Federal aid highway system," provides as follows:

For carrying out the provisions of the Act entitled "An Act to provide that the United States shall aid the States in the construction of rural post roads and for other purposes," approved July 11, 1916, and all Acts amendatory thereof and supplementary thereto to be expended in accordance with the provisions of said Act as amended, $76,000,000, to remain available until expended, of which amount not to exceed $454,971 may be expended for departmental personal services in the District of Columbia, being $25,000,000, the remainder of the sum of $50,000,000 authorized to be appropriated for the fiscal year ending June 30, 1923; $35,700,000, the remainder of the sum of $65,000,000 authorized to be appropriated for the fiscal year ending June 30,

1924; and $15,300,000, being part of the sum of $75,000,000 authorized to be appropriated for the fiscal year ending June 30, 1925, by paragraph 1 of section 4 of the Act making appropriations for the Post Office Department for the fiscal year 1923, approved June 19, 1922.

Section 4 of the act of June 19, 1922, 42 Stat. 660, mentioned in the above-quoted provison authorized to be appropriated for the purpose of carrying out the provisions of the rural post-roads act of June 11, 1916, and supplemental acts, the following sums:

The sum of $50,000,000 for the fiscal year ending June 30, 1923.
The sum of $65,000,000 for the fiscal year ending June 30, 1924.
The sum of $75,000,000 for the fiscal year ending June 30, 1925.

The item of $76,000,000 in the act of February 10, 1925, while appearing in the annual appropriation act for the fiscal year 1926, is subdivided under the three fiscal years for which an appropriation was authorized to be made by the act of June 19, 1922, *supra*, including "$15,300,000, being part of the sum of $75,000,000 authorized to be appropriated for the fiscal year ending June 30, 1925." There had previously been appropriated for this year only $13,000,000 by the act of June 5, 1924, 43 Stat. 462. The act of January 22, 1923, 42 Stat. 1157, provides "That the appropriations heretofore and hereafter made for the purpose of carrying out the provisions of such act of July 11, 1916, and the acts amendatory thereof and supplemental thereto shall be considered available for the purpose of discharging the obligations created by the approval of projects." Thus the approval of projects during the fiscal years 1923, 1924, and 1925 obligated the Government to the extent authorized to be appropriated provided the authorization is followed by an appropriation, and when actually appropriated the amount becomes immediately available to meet the Government's obligations. It is understood that projects have been approved to obligate the amount appropriated in the act of February 10, 1925. Therefore the general rule that amounts appropriated in annual appropriation acts are not available for expenditure until the beginning of the fiscal year would not be applicable in this case.

It is to be understood that no part of the $6,000,000 proposed to be made available for expenditure during the present fiscal year for payment of obligations heretofore incurred by approval of projects will be available for personal services in the District of Columbia during the present fiscal year as a part of the item of $454,971 authorized for that purpose by the act of February 10, 1925.

The question submitted is answered accordingly.

(A–7615)

MILEAGE WHEN TRANSPORTATION FURNISHED—PUBLIC HEALTH SERVICE

Under the acts of June 12, 1906, 34 Stat. 246, and June 10, 1922, 42 Stat. 631, the transportation which may be furnished an officer of the Public Health Service in a mileage status and charged against his mileage account at 3 cents per mile is limited to transportation over established lines of common carriers or by Government-owned conveyances, and does not include special means of conveyance, such as hired automobiles or buses. When such special means of transportation are used it must be at the expense of the officer, his entire reimbursement being limited to mileage at 8 cents per mile.

Decision by Comptroller General McCarl, May 5, 1925:

There is for consideration a request made on behalf of Surgeon John McMullen, Public Health Service, for review of the action taken in denying his claim to the sums of $2.25, covering a charge for transportation by automobile bus July 30, 1923, from Sassafras, Ky., to Hindman, Ky., and $5 for automobile especially hired August 1, 1923, for travel from Hindman to Carr's Fork Church, and thence to Sassafras.

By a settlement dated September 4, 1924, Surgeon McMullen was allowed the sum of $25.20 as mileage for travel performed during the period from July 29 to August 2, 1923, including in the itinerary there scheduled the trips for which reimbursement is now claimed. Reimbursement was made covering the entire itinerary at the rate of 8 cents per mile, deduction being made therefrom of 3 cents per mile for the entire mileage traveled as representing transportation furnished by the Government for the whole itinerary. For the travel to places other than those involved in the present claim, Government transportation scrip was used, but for the trip from Sassafras to Hindman and return to Sassafras, via Carr's Fork Church, ordinary means of transportation not being available the bus and automobile were used by claimant and, upon the assumption that he would be reimbursed for the expense of such use, 3 cents per mile for the distance traveled by such conveyances was included in the deduction for the total mileage traveled.

The appropriation to which these traveling expenses are charged is provided in the act making appropriations for the Treasury Department dated January 3, 1923, 42 Stat. 1102, under the subtitle and wording as follows:

Prevention of epidemics: To enable the President, in case only of threatened or actual epidemic of cholera, typhus fever, yellow fever, smallpox, bubonic plague, Chinese plague or black death, trachoma, influenza, Rocky Mountain spotted fever, or infantile paralysis, to aid State and local boards or otherwise, in his discretion, in preventing and suppressing the spread of the same, and in such emergency in the execution of any quarantine laws which may be then in force, $335,042.78.

Section 12 of the act of June 10, 1922, 42 Stat. 631, authorizes payment to officers in the Public Health Service for travel on the public business in the limits of the United States the sum of 8 cents per mile, computed by the shortest usually traveled route, and existing laws providing for the issue of transportation requests to officers of the Army traveling under competent orders, and for deduction to be made from mileage accounts when transportation is furnished by the United States, are applicable to this service.

Regarding the transportation furnished by the Government, for which is to be deducted 3 cents per mile, it was said in 2 Comp. Gen. 203:

> * * * existing laws providing for the issue of transportation requests to officers of the Army traveling under competent orders, and for deduction to be made from their mileage accounts when transportation is furnished by the United States, made applicable by section 12 of the act of June 10, 1922, to all the services mentioned in the title of that act, are found in the act of June 12, 1906, 34 Stat. 246.
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> * * * * * * * * *
>
> * * * The above act directs that when transportation is furnished by the Quartermaster's Department the deduction of 3 cents per mile is to be made from the officer's mileage account. This provision has been construed to include transportation furnished by Government conveyances, with certain exceptions, as well as by transportation requests, and it has been the practice of the War Department in settling the mileage accounts of officers for travel performed by certain Government conveyances to deduct therefrom the 3 cents per mile for the transportation so furnished as required by said provision. See 1 Comp. Gen. 555; *id.* 629.

The transportation contemplated to be furnished as a charge against an officer's mileage account is not transportation by special means of conveyance. See 20 Comp. Dec. 485, in which it was held, quoting from the syllabus:

> Under the act of June 12, 1906 (34 Stat. 246), the transportation which may be furnished an officer of the Army in a mileage status and charged against his mileage account is limited to transportation over established lines of common carriers by land or water, and the hire by the Quartermaster Corps of the Army for the use of such officers of extraordinary means of transportation, such as automobiles, carriages, etc., is not authorized by law and is not a proper charge against any appropriation for the support of the Army.

On the settlement as made, Doctor McMullen has only been paid 5 cents per mile for 34 miles for the travel from Sassafras to Hindman and return, and as he was entitled to 8 cents per mile under the act authorizing traveling expenses to such officers, there is due him a balance of 3 cents per mile for the 34 miles so traveled.

Accordingly, upon review there is allowed the sum of $1.02 additional mileage, and disallowance of the claim of $7.25 for automobile hire is sustained for the reasons stated.

(A–9144)

CLASSIFICATION OF CIVILIAN EMPLOYEES—CONSOLIDATION OF OFFICES

Requisitions of funds and accounting for expenditures by the Office of Public Buildings and Public Parks of the National Capital, newly created by the act of February 26, 1925, 43 Stat. 986, must be made under the appropriation headings now appearing on the books of the Treasury and the General Accounting Office as appropriated by acts of Congress under the former offices of Public Buildings and Grounds, Chief of Engineers, United States Army, and the Office of the Superintendent of State, War, and Navy Department Buildings, and there is no greater or additional authority to consolidate such appropriation items by the new office than was previously possessed by the former offices.

All funds for personal services in the District of Columbia subject to classification, appropriated under the former offices of Public Buildings and Grounds, Chief of Engineers, United States Army, and the Office of the Superintendent of State, War, and Navy Department Buildings, authorized by the act of February 26, 1925, 43 Stat. 986, to be expended by the newly created Office of Public Buildings and Public Parks of the National Capital, should be considered as one appropriation unit within the meaning of the average provision.

All the employees under the newly created Office of Public Buildings and Public Parks of the National Capital may be paid, if desired, on one pay roll, provided the particular appropriation charged with the compensation of the employees and the time engaged on the work provided for under each appropriation so charged are shown on the pay roll.

Comptroller General McCarl to the Director, Office of Public Buildings and Public Parks of the National Capital, May 5, 1925:

I have your letter of April 15, 1925, requesting decision of the three following questions, involving the consolidation of the Office of Public Buildings and Grounds and the Office of the Superintendent of State, War, and Navy Department Buildings, authorized by the act of February 26, 1925, 43 Stat. 986:

1. May all the funds of the transferred offices be consolidated into one fund divided into (a) salaries, (b) general expenses, not personal services, and (c) printing and binding regardless of the appropriation in which the funds were made available?

2. If the answer to question 1 is in the affirmative, may employees formerly in different offices now be paid from the same pay roll?

3. Is there an accounting objection to the creation, out of the fund for general expenses, of a deferred or suspense account to which purchased material may be charged, issues being credited to that account and charged to the proper appropriation item, or subdivision thereof? This will greatly facilitate our cost accounting.

The act of February 26, 1925, abolished the two former offices above mentioned and consolidated them into "the Office of Public Buildings and Public Parks of the National Capital." Section 5 of the act provides as follows:

All unexpended balances of appropriations made for either of the activities hereby consolidated shall be available for expenditure by the office hereby established to the same extent and under the same conditions as such appropriations are available for the offices hereby consolidated.

For the present fiscal year the appropriations thus made available for expenditure by the Office of Public Buildings and Public Parks of the National Capital have been provided in the act of June 7, 1924, 43 Stat. 514 (military and nonmilitary activities appropria-

tions), under the heading "Corps of Engineers" and subheading "Buildings and Grounds in and around the District of Columbia"; act of June 7, 1924, 43 Stat. 529 (independent offices appropriation act), under the heading "State, War, and Navy Department Buildings"; and the act of June 7, 1924, 43 Stat. 572 (District of Columbia appropriations), under the heading "Public Buildings and Grounds" and subheadings "Office of Public Buildings and Grounds," "Contingent expenses," "Park police," and "Improvement and care of public grounds." See also corresponding appropriation acts for the fiscal year 1926, respectively, act of February 12, 1925, 43 Stat. 929, act of March 3, 1925, 43 Stat. 1207, and act of March 3, 1925, 43 Stat. 1246.

In each of these appropriation acts under the major headings are separate appropriation items. Section 5 of the act of February 26, 1925, quoted above, making these appropriation items available for expenditure by the newly created office expressly stipulates "to the same extent and under the same conditions as such appropriations are available for the offices hereby consolidated." Thus the new office is given no greater or different authority to consolidate appropriations than was possessed by the two former offices. The amounts appropriated under these separate items, whether for personal services or nonpersonal services, provide for separate and distinct projects or purposes to which Congress has given separate and distinct consideration and approval. The application of amounts appropriated under one item to the purposes provided for under another item would be in violation of section 3678, Revised Statutes. See 4 Comp. Gen. 705.

It must be held, therefore, that section 5 of the act of February 26, 1925, does nothing more than make available the various appropriations for expenditure by the new office and does not contain any additional authority to consolidate any of the appropriations as now appearing on the books of the Treasury into consolidated appropriation accounts for the purpose of obviating the necessity of separate accounting. It may be that the three appropriation headings you propose under question 1 have reference to the future submission of estimates to Congress for the newly created office subsequent to the fiscal year 1926. If so, that is a matter for consideration by the Congress; but until statutory authority is provided for such a consolidation, requisitions for funds must be made, and proper accounting must be maintained, under each of the appropriation headings now appearing on the books of the Treasury and the General Accounting Office.

As to the appropriations provided in the District of Columbia appropriation act, a separate accounting is also necessary to enable

the proper adjustments of expenditures between the United States Government and the District of Columbia under existing provisions of law. See General Regulations No. 18, of this office, dated February 5, 1923. 2 Comp. Gen. 834.

In so far as the appropriation unit is concerned for the purpose of complying with the average provision in the adjustment of rates of compensation under the classification act, all amounts appropriated for personal services in the District of Columbia to which the classification act is applicable should be considered as one unit.

Question 1 is answered in the negative. Question 2 is answered in the affirmative, provided the particular appropriation charged with the compensation of employees and the time engaged on the work provided under each appropriation so charged is shown on the pay rolls. 4 Comp. Gen. 703, 706. In view of the answer to question 1 it does not appear necessary to answer question 3.

(A-9156)

NAVY PAY—ACTIVE SERVICE AFTER RETIREMENT

By virtue of section 3 of the act of March 4, 1925, 43 Stat. 1271, all retired commissioned and warrant officers of the Navy and Marine Corps are entitled to credit for all active service between April 6, 1917, and March 3, 1921, in the computation of their longevity pay on the retired list excluding from such computation any service between the dates named which was credited for promotion on the retired list under the act of July 1, 1918, 40 Stat. 717.

Comptroller General McCarl to the Secretary of the Navy, May 5, 1925:

I have your letter of April 15, 1925, submitting proposed change in section H of the "Instructions for carrying into effect the joint-service pay bill, act of June 10, 1922," with request for an expression of views as to whether the change, in so far as it involves disbursements, is in conformity with law.

The proposed change in instructions is based on the provisions of section 3 of the act of March 4, 1925, 43 Stat. 1271:

That all retired commissioned and warrant officers of the United States Navy and Marine Corps, who served on active duty in the Navy and Marine Corps of the United States during the World War shall be credited with all active duty performed since retirement during the period from April 6, 1917, to March 3, 1921, in the computation of their longevity pay.

By reason of this provision it is proposed to change section H of the pay-bill instructions by adding thereto subparagraph (n) on page H2, under the caption "The retired-list officers," as follows:

All retired commissioned and warrant officers of the United States Navy and Marine Corps who served on active duty in the Navy and Marine Corps of the United States during the World War shall be credited with all active duty performed since retirement during the period from April 6, 1917, to March 3, 1921, in the computation of their longevity pay. (Act of March 4, 1925.) Under this provision, all retired commissioned and warrant officers who were retired prior to March 3, 1921, are entitled to count active duty performed

since retirement from April 6, 1917, to March 3, 1921, in computing their retired pay.

Under the act of July 1, 1918, 40 Stat. 717, retired commissioned and warrant officers ordered to active duty during the existence of war or national emergency are entitled within certain grades to promotion on the retired list by reason of such active service, and were entitled to longevity increase on such advanced grade for active duty performed subsequent to retirement. 25 Comp. Dec. 601; 26 *id.* 409.

It is evident that the subject matter of the act of March 4, 1925, is service that shall be counted on the retired list, and that it makes further exception to the general rule that officers of the Navy are not entitled to credit on the retired list for active service performed after retirement, and confers on all commissioned and warrant officers of the Navy and Marine Corps who performed active duty in said services during the period from April 6, 1917, to March 3, 1921, right to credit for such active service in the computation of their longevity pay on the retired list, but it does not authorize a double longevity credit to any officers who were promoted on the retired list under the act of July 1, 1918. The paragraph should be amplified by adding—

But there should be excluded from the computation any service between the dates named which was credited on promotion on the retired list under the act of July 1, 1918.

Otherwise, the proposed change in the instructions seems to be in conformity with the law.

(A–4716), (A–4705), (A–7148)

FEE TO NOTARIES PUBLIC IN GOVERNMENT SERVICE

Notaries public in the Government service are not entitled to additional compensation or fees for administering to Government officers or employees, upon demand, whether during or out of regular office hours, any oath required of them by law in their official capacity, unless such payment is authorized by law and there is an available appropriation explicitly making provision therefor.

Decision by Comptroller General McCarl, May 6, 1925:

There is before this office for reconsideration the question of allowance of payment to salaried officers or employees of the Government, who are also notaries public, of fees for administering to officers or employees oaths required of them by law in their official capacity.

The Revised Statutes provide:

SEC. 170. No money shall be paid to any clerk employed in either Department at an annual salary, as compensation for extra services, unless expressly authorized by law.

SEC. 1764. No allowance or compensation shall be made to any officer or clerk, by reason of the discharge of duties which belong to any other officer or clerk in the same or any other Department; and no allowance or compensation shall be made for any extra services whatever, which any officer or clerk may be required to perform, unless expressly authorized by law.

SEC. 1765. No officer in any branch of the public service, or any other person whose salary, pay, or emoluments are fixed by law or regulations, shall receive any additional pay, extra allowance, or compensation, in any form whatever, for the disbursement of public money, or for any other service or duty whatever, unless the same is authorized by law, and the appropriation therefor explicitly states that it is for such additional pay, extra allowance, or compensation.

Section 1782, as amended by the act of March 4, 1909, 35 Stat. 1109, provides:

Whoever, being elected or appointed a Senator, Member of, or Delegate to Congress, or a Resident Commissioner, shall, after his election or appointment and either before or after he has qualified, and during his continuance in office, or being the head of a department, or other officer or clerk in the employ of the United States, shall, directly or indirectly, receive or agree to receive, any compensation whatever for any services rendered or to be rendered to any person, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter or thing in which the United States is a party or directly or indirectly interested, before any department, court-martial, bureau, officer, or any civil, military, or naval commission whatever, shall be fined not more than ten thousand dollars and imprisoned not more than two years; and shall moreover, thereafter be incapable of holding any office of honor, trust, or profit under the Government of the United States.

As indicating the intention of Congress to provide facilities for the administering of certain oaths required by law, without charge therefor, reference is made to statutes, as follows:

By the act of August 29, 1890, 26 Stat. 371, chief clerks of the several executive departments and the various bureaus and offices thereof in Washington, D. C., are authorized and directed, on application and without compensation therefor, to administer oaths of office to employees required to be taken on their appointment or promotion, and the act also provides that no officer, clerk, or employee of any executive department who is also a notary public or other officer authorized to administer oaths shall charge or receive any fee or compensation for administrating oaths of office to employees of such department required to be taken on appointment or promotion therein.

By the act of September 30, 1890, 26 Stat. 511, such clerks and inspectors of customs as the Secretary of the Treasury might designate for the purpose are authorized to administer oaths, "such as deputy collectors of customs are now authorized to administer, and no compensation shall be paid or charge made therefor." See also section 3165, Revised Statutes, in regard to collectors of internal revenue.

Executive Order No. 977, dated November 24, 1908, reads:

By direction of the President, it is hereby ordered that hereafter no officer, clerk, or employee in the executive service of the Government (except postmasters at offices of the fourth class and rural carriers), who is also a notary public, shall charge or receive any compensation whatever for performing any notarial act for an officer, clerk, or employee of the Government in his official capacity, or for any person when, in the case of such person the act is performed during the hours of such notary's service to the Government.

Disobedience of this order shall be ground for immediate dismissal from the service.

This order shall not apply to oaths of disinterestedness or other oaths required to be made by law, provided that the work in connection therewith is not performed during office hours. For the purposes of this order, the expression "office hours" shall be construed to include the half hour allowed each working day for luncheon.

Section 8 of the act of August 24, 1912, 37 Stat. 487, provides:

After June thirtieth, nineteen hundred and twelve, postmasters, assistant postmasters, collectors of customs, collectors of internal revenue, chief clerks, of the various executive departments and bureaus, or clerks designated by them for the purpose, the superintendent, the acting superintendent, custodian, and principal clerks of the various national parks and other Government reservations, superintendent, acting superintendents, and principal clerks of the different Indian superintendencies or Indian agencies, and chiefs of field parties, are required, empowered, and authorized, when requested, to administer oaths, required by law or otherwise, to accounts for travel or other expenses against the United States, with like force and effect as officers having a seal; for such services when so rendered, or when rendered on demand after said date by notaries public, who at the time are also salaried officers or employees of the United States, no charge shall be made; and on and after July first, nineteen hundred and twelve, no fee or money paid for the services herein described shall be paid or reimbursed by the United States.

The provisions of this section were by section 7 of the act of March 3, 1915, 38 Stat. 928, specially extended to chief clerks in the offices of lighthouse inspectors or other employees in the Lighthouse Service designated by them, with authority also to administer oaths of office to employees of the Lighthouse Service.

By the act of February 21, 1911, 36 Stat. 927, each United States marshal and each chief deputy United States marshal is authorized and empowered to administer oaths to the marshal's deputies and other persons presenting to the marshal claims and accounts for payment, with the proviso that the marshal or the chief deputy shall not be entitled to any fee for administering such oaths.

Section 1342, Revised Statutes, as amended by the act of August 29, 1916, 39 Stat. 669, enumerates certain Army officers who shall have power to administer oaths for the purposes of the administration of military justice and for other purposes of military administration; and in foreign places where the Army may be serving shall have the general powers of a notary public or of a consul of the United States in the administration of oaths, the execution and acknowledgment of legal instruments, the attestation of documents, and all other forms of notarial acts to be executed by persons subject to military law.

By the act of March 4, 1917, 39 Stat. 1171, certain enumerated officers of the Navy, Marine Corps, Naval Reserve Force, and Marine Corps Reserve are authorized to administer oaths for the purposes of the administration of naval justice and for other purposes of naval administration.

Article 116, paragraphs 3 and 4, of the Navy Regulations, 1920, approved by the President December 17, 1920, reads:

(3) Notaries public shall not be employed in any matters of naval administration where the officers of the Navy or Marine Corps, authorized by law to administer oaths for the purpose of the administration of naval justice and for other purposes of naval administration, are present and accessible.

(4) No officer, clerk, or employee in the executive service of the Government, who is also a notary public, shall charge or receive any compensation whatever for performing any notarial act for an officer, clerk, or employee of the Government in his official capacity, or in any matter in which the Government is interested, or for any person when, in the case of such person, the act is performed during the hours of such notary's service to the Government. This regulation shall not apply to oaths of disinterestedness, or other oaths required to be made by law, provided that the work in connection therewith is not performed during office hours.

As indicating the chief purpose in appointing as notaries public salaried officers or employees of the Government in the District of Columbia, the appointment being made by the President, reference is made to printed information respecting application for appointment issued by the Department of Justice under date of November 16, 1921, reading in part:

The Attorney General has reached the conclusion that the number of notaries public in this District is at least large enough and that he can not consistently recommend further appointments except to fill vacancies which may arise in the present list, and then only in cases were actual public need is shown. * * *

* * * * * * *

A person employed in an Executive Department or other Government office will not be appointed or reappointed a notary public unless his appointment is requested by the head of that department or office to facilitate the transaction of Government business. Persons so appointed will be expected to resign as notaries public upon leaving the Government service * * *.

From the foregoing reference it is apparent that the intent of existing laws and regulations is to provide, as far as possible without additional expense therefor to the United States, the administering of oaths required by law of Government officers or employees in their official capacity, whether administered in a Government bureau or office in Washington or in the field, and in the case of salaried officers or employees who are also notaries public by requiring that such services shall be performed upon demand as a part of their official duties.

The performance of such notarial services by salaried officers or employees after regular office hours does not alter the situation. "It is well settled that per annum employees are not entitled to additional compensation for overtime work—i. e., work in excess of that usually required of them." 21 Comp. Dec. 312.

While neither section 8 of the act of August 24, 1912, *supra*, nor any other law specifically prohibits payment of any fee to such notaries for services rendered on demand in administering oaths of disinterestedness required by section 3745, Revised Statutes, payment of additional compensation for such services or for administer-

ing any other oath which is required by law of officers or employees in their official capacity but payment for which is not specifically prohibited, is not to be implied. Said notaries, therefore, are not entitled to additional compensation for administering, upon demand, whether during or out of regular office hours, to Government officers or employees, any oath required of them by law in their official capacity, unless the same is authorized by law, supplemented by an appropriation explicitly making provision for such payment.

The matter here involved is not that there is no specific prohibitory statute except where the service rendered by the notary is a duty devolving upon some other officer or employee as to which the law prohibits payment of compensation to any other than the regular salary of and to the individual charged with performing the service as his regular or special duty, but is a matter otherwise involving expenditure of public moneys not appropriated for such service, provision therefor having been made through the employment of personnel charged with the duty, thereby rendering notarial services as such unnecessary and not proper charges to existing appropriations. It is not a question of whether the law expressly prohibits such payments but is a matter requiring express statutory authority to overcome the express and implied inhibitions found in the statutes and the fundamental principles of a government of express powers.

Any decisions rendered by this office in conflict herewith are hereby modified to the extent of such conflicting views.

(A-8812)

REWARDS FOR APPREHENSION OF DESERTERS FROM THE ARMY—FEE DEPUTY MARSHAL

The payment of rewards under the act of June 7, 1924, 43 Stat. 485, for the apprehension, securing, and delivery of deserters from the military service being discretionary with the Secretary of War, and that official by regulation having excluded marshals, deputy marshals, and special agents of the Department of Justice from those who may become entitled to such rewards, no reward may be paid to a deputy marshal, whether he be a salaried or a fee deputy.

Comptroller General McCarl to Capt. S. B. Armat, United States Army, May 6, 1925:

There has been received, through the office of Chief of Finance, your letter of March 18, 1925, requesting decision whether you are authorized to pay attached voucher in favor of F. A. Jervah, deputy United States marshal of Newport, Vt., for reward of $50 for the arrest and delivery on January 1, 1925, of Clifford Robichaud, Quartermaster Corps, a deserter from the military service.

The act of June 7, 1924, 43 Stat. 485, 486, making appropriations for the military activities of the War Department for the fiscal year ending June 30, 1925, provides:

> * * * for the apprehension, securing, and delivering of deserters, including escaped military prisoners, and the expenses incident to their pursuit; and no greater sum than $50 for each deserter or escaped military prisoner shall in the discretion of the Secretary of War, be paid to any civil officer or citizen for such services and expenses * * *.

Paragraph 121, Army Regulations, as amended by Change No. 67, January 31, 1918, is in part, as follows:

> A reward of $50 will be paid to any civil officer or civilian, except United States marshals, United States deputy marshals, and special agents of the Department of Justice, for the apprehension and delivery, to the proper military authorities at a military post, of a deserter from the military service * * *. The reward will be paid by the Quartermaster Corps and will be in full satisfaction of all expenses for arresting, keeping, and delivering the deserter or escaped military prisoner. Actual expenses only where the same do not exceed $50 will be reimbursed to the Department of Justice upon presentation of proper expense account in cases where deserters or escaped military prisoners have been delivered to the military authorities by officials of that department * * *.

Mr. Jervah contends that he is not a salaried deputy marshal, but a "fee" deputy and that he receives pay only for what he does. However, the regulation is specific and under its provisions United States deputy marshals may not be paid the reward for apprehending and delivering deserters from the military service. Mr. Jervah is a United States deputy marshal and, therefore, comes within the prohibition in the regulation against payment of the reward. Decision of the Comptroller of the Treasury, August 28, 1919, 90 MS. Comp. Dec. 1155; see also decision dated February 12, 1925, 4 Comp. Gen. 687.

You are advised that payment of the voucher in question is not authorized.

(A–9155)

REENLISTMENT ALLOWANCE—NAVY

Section 19 of the act of March 4, 1925, 43 Stat. 1276, providing thereafter for enlistments in the Navy for terms of two, three, four or six years, with proportionate benefits upon discharge and reenlistment, increases the maximum reenlistment allowance fixed by section 10 of the act of June 10, 1922, 42 Stat. 630, from $200 to $300 for the first three pay grades and from $100 to $150 for the other grades.

Comptroller General McCarl to the Secretary of the Navy, May 8, 1925:

I have your letter of April 15, 1925, submitting proposed changes in section B of the "Instructions for carrying into effect the joint-service pay bill, act of 10 June, 1922," with the request for an expression of views as to whether these changes, in so far as they involve disbursements, are in conformity with law.

Section 19 of the act of March 4, 1925, 43 Stat. 1276, provides:

That hereafter enlistments in the Navy may be for terms of two, three, four or six years, and all laws now applicable to four-year enlistments shall apply, under such regulations as may be prescribed by the Secretary of the Navy, to enlistments for a shorter or longer period with proportionate benefits upon discharge and reenlistment * * *.

The proposed changes in instructions are as follows:

Page B13, paragraph 5, subparagraph (a), change "$200.00" appearing at the end of paragraph to "$300.00."

Page B13, subparagraph 5(b), change "$100.00" appearing at the end of first sentence to "$150.00."

Page B14, under (B), the first sentence enclosed in parenthesis which reads "(If a two, three, or four year enlistment, this would be two, three, or four full years," change to read as follows: "(If a two, three, four or six year enlistment, this would be two, three, four or six full years)." The sentence directly following the examples on page B14 beginning with the words "The extension of an enlistment" and ending with the words "or extensions of the same enlistment," change to read as follows: "The extension of an enlistment for two, three, four or six years entitles a man to enlistment allowance under the same conditions as if he had reenlisted for a like term but the allowance is payable only once for any extension or extensions of the same enlistment."

Relative to enlistment periods in the Navy and Marine Corps, section 7 of the act of June 4, 1920, 41 Stat. 836, provides:

That hereafter enlistments in the Navy and in the Marine Corps may be for terms of two, three, or four years, and all laws now applicable to four-year enlistments shall apply, under such regulations as may be prescribed by the Secretary of the Navy, to enlistments for a shorter period with proportionate benefits upon discharge and reenlistment * * *.

The only benefit that now accrues upon reenlistment is the enlistment allowance which is based on the pay grade of the man and the number of years served in the enlistment from which discharged. Relative thereto, section 10 of the act of June 10, 1922, 42 Stat. 630, provides:

* * * Existing laws authorizing a reenlistment gratuity to enlisted men of the Navy and Coast Guard are hereby repealed, and an enlistment allowance equal to $50 multiplied by the number of years served in the enlistment period from which he has last been discharged, but not to exceed $200, shall be paid to every honorably discharged enlisted man of the first three grades who reenlists within a period of three months from the date of his discharge; and an enlistment allowance of $25 multiplied by the number of years served in the enlistment period from which he has last been discharged, but not to exceed $100, shall be paid to every honorably discharged enlisted man of the other grades who reenlists within a period of three months from the date of his discharge * * *.

Section 19 of the act of March 4, 1925, increases the maximum period of enlistment in the Navy from four years to six years. The maximum enlistment allowance for the first three grades under the act of June 10, 1922, is $50 for each year of the maximum period of four years, or $200, and for the other grades, it is $25 for each year of the maximum period of four years, or $100. The provision in the act of March 4, 1925, as affects enlistment allowance, authorizes proportionate benefits for a "longer period," that is, for six years. The effect of that provision is to increase the maximum enlistment allowance proportionately with the increase in the maximum-enlist-

ment period, or from $200 to $300 for the first three pay grades, and from $100 to $150 for the other grades.

The proposed changes in instructions appear to be in conformity with the law and are approved.

(A-9310)

OFFICERS AND EMPLOYEES—CLASSIFICATION—ONE PERSON IN GRADE

The provision in the appropriation acts for the fiscal year 1926, that in grades in which only one position is allocated the salary of such position shall not exceed the average of the compensation rates for the grade, prohibits promotions in such cases during the fiscal year 1926 above the average of the grade and requires the reduction on July 1, 1925, to the salary rate fixed by the classification act at or next below the mathematical average of the salary rates of the grade, of all persons holding the only position in such a grade who have been promoted during the fiscal year 1925 to a rate of pay above the mathematical average, except that it does not require the reduction of any person below the salary to which entitled on July 1, 1924, by reason of his allocation in that grade.

Comptroller General McCarl to the Secretary of the Interior, May 11, 1925:

I have your letter of April 25, 1925, as follows:

The appropriation act of March 3, 1925, Public No. 580, providing funds for this department for the next fiscal year, contains a provision which is found also in other appropriation measures for personal services in the District of Columbia in accordance with the classification act of 1923, namely, that in grades in which only one position is allocated, the salary of such position shall not exceed the average of the compensation rates for the grade.

There are in this department several officers receiving compensation at the rate of $7,500 per annum whose positions are allocated to Grade 13, C. A. F. service, and several whose positions are allocated to Grade 6, P. & S. service. In each case the officer is the only person in the grade in the particular appropriation unit concerned. These officers were promoted to their respective salaries subsequently to July 1, 1924, and their salaries must on July 1, 1925, be reduced to or below the averages of the compensation rates of their respective grades.

The average of the compensation rates of these grades is $6,750, which is not one of the compensation rates of either grade as specified in the classification act of 1923. Your decision is requested as to whether the salary, in such case must be not more than $6,500 per annum, the salary rate specified in the act next below the mathematical average rate for the grade, or whether the mathematical average, $6,750 per annum, may be paid.

The "average" provision appearing in the appropriation acts for the fiscal year 1926 contains the following:

* * * and in grades in which only one position is allocated the salary of such position shall not exceed the average of the compensation rates for the grade: *Provided*, That this restriction shall not apply * * * (2) to require the reduction in salary of any person whose compensation was fixed as of July 1, 1924, in accordance with the rules of section 6 of such act * * *.

The restriction as to one position in a grade did not appear in the average provisions for the fiscsal year 1925, and there being no natural average of one only, it was of necessity determined by this office that the average provisions as to the present fiscal year could not be applied to grades wherein there was allocated only one position. 3 Comp. Gen. 1004.

The effect of the enactment in question to the average provisions will be to prevent promotions on and after July 1, 1925, and during the fiscal year 1926 of persons holding the only position in a grade to rates of compensation in excess of the mathematical average of the salary rates of the grade as prescribed, and also to require on July 1, 1925, the reduction to a salary rate fixed by the classification act at or next below the mathematical average of the salary rates of the grade of all persons holding the only position in a grade who have been promoted during the fiscal year 1925 to a rate of pay above the mathematical average.

Those persons holding the only position in a grade whose salary was fixed as of July 1, 1924, in accordance with rules of section 6 of the classification act at a rate fixed by the classification act in excess of the mathematical average of the salary rates of the grade are within exception (2) of the average provision quoted above, and need not be reduced on July 1, 1925; but if such persons within exception (2) were, in addition, promoted during the fiscal year 1925 to a higher salary rate than fixed under section 6 of the classification act, they must be reduced on July 1, 1925, to the salary rate to which they were entitled as of July 1, 1924, in accordance with the rules of section 6 of the classification act.

Your specific question relates to whether such reductions in grade 13 of the clerical, administrative, and fiscal service and grade 6 of the professional and scientific service shall be at the rate of $6,500 per annum or $6,750 per annum. In decision of this office dated June 26, 1924, 3 Comp. Gen. 1003, it was held:

> * * *. Of course, it must not be understood that in order to bring the rates of compensation within the average a rate other than one authorized under the classification act may be fixed or paid.

This will be equally applicable to one position in a grade on and after July 1, 1925. The salary rates for the two grades you mention are $6,000, $6,500, $7,000, and $7,500 per annum, and the mathematical average is $6,750 per annum, which is not one of the salary rates of the grade fixed by the classification act. The necessary reductions in salaries of persons holding the only position in a grade who were promoted during the fiscal year 1925 from $6,000 or $6,500 to $7,000 or $7,500 per annum must be to the salary rate of $6,500 per annum on July 1, 1925.

(A-9011)

MEDICAL TREATMENT—ST. ELIZABETHS HOSPITAL

Insane retired officers of the Army, Navy, and Marine Corps may not be considered "veterans" within the meaning of that portion of section 202 (10) of the World War veterans' act, 43 Stat., 620, authorizing the treatment, by the Veterans' Bureau, so far as existing facilities permit, of veterans of any war, military occupation, or military expedition since 1897, and may not therefore be relieved of the $1 per day subsistance charge while inmates of St. Elizabeths Hospital.

All members of the Coast Guard becoming insane while on the active roll, whether of the former Revenue Cutter Service or the Life Saving Service, may be admitted to St. Elizabeths Hospital on the order of the Secretary of the Treasury.

Retired enlisted men of the Coast Guard are "persons belonging to" the Coast Guard within the meaning of the statutes governing admission of insane persons into St. Elizabeths Hospital, and are entitled to admission and treatment therein in the same manner and subject to the same conditions as retired enlisted men of the Army, Navy, and Marine Corps.

Members of the Naval Reserve Force or of the Naval Reserve, while in an inactive status on and after July 1, 1925, will not be entitled to admission to St. Elizabeths Hospital under section 4843, Revised Statutes, as persons "belonging to" the Navy.

An insane merchant seaman admitted to St. Elizabeths Hospital as a patient of the Public Health Service and discharged as cured is not entitled to reentry within three years upon again becoming insane if no longer a merchant seaman and therefore not a beneficiary of the Public Health Service, such right of reentry within three years under section 4843, Revised Statutes, being confined to the personnel of the Army, Navy, and Marine Corps.

Comptroller General McCarl to the Secretary of the Interior, May 12, 1925:

I have your letters of April 1 and April 7, 1925, requesting decision of several questions relative to the availability of funds appropriated for St. Elizabeths Hospital for treatment of (1) retired officers of the Army, Navy, and Marine Corps, (2) active personnel of the Coast Guard admitted on the order of the Secretary of the Treasury, (3) retired enlisted men of the Coast Guard and members of the Naval Reserve Force, and (4) merchant seamen as patients of the Public Health Service.

(1) You state as follows:

> Thomas A. Dwyer was admitted to the hospital under an order of the Secretary of the Navy, as an officer on the retired list of the Navy. On such admission certificate, he was rated as an officer on admission to this hospital, and under the practices and regulations of the Army, Navy, and Marine Corps and Decisions of the Comptroller General [Comptroller of the Treasury] of April 29, 1911, and January 24, 1912, he was directed to pay one dollar per day for his support while in a Government hospital. This dollar per day being paid by an officer, augments the appropriation made by Congress. Thus we receive an appropriation amounting to $547.50 or $1.50 per day from Congress, and $365.00 per year or a dollar a day from the officer while he is receiving support from the Government in a Federal hospital. This dollar per day permits the classification of officers in separate wards, and the serving of a little more choice foods cooked in smaller quantities. A bill was sent to the wife, who is committee for this patient, who instead of making payment has requested the Director of the Veterans Bureau to assume jurisdiction and to transfer this patient to the Veterans Bureau roll, making payment of $547.50 per year direct to the hospital. The hospital would then deduct this patient from those for whom we receive appropriation from Congress, and might lose the charge of one dollar per day from the patient as an officer receiving support in a Government hospital.

In view of the foregoing, I have the honor to request that this whole matter be reviewed and the hospital advised if retired officers of the Army, Navy, and Marine Corps who are sent to the institution by the Secretaries of the War or Navy but transferred to the jurisdiction of the Veterans Bureau, are relieved of paying their dollar a day for support as decided by the Comptroller of the Treasury Department in his Decisions of April 29, 1911, and January 24, 1912; or if such transfer of jurisdiction is permitted, will such patients still have to pay for their support.

Section 4843, Revised Statutes, under the heading "The Government Hospital for the Insane," expressly provides in part as follows:

The superintendent, upon the order of the Secretary of War, of the Secretary of the Navy, and of the Secretary of the Treasury, respectively, shall receive, and keep in custody until they are cured, or removed by the same authority which ordered their reception, insane persons of the following descriptions:

First. Insane persons belonging to the Army, Navy, Marine Corps, and Revenue Cutter Service.

* * * * * * *

Third. Men who, while in the service of the United States, in the Army, Navy, or Marine Corps have been admitted to the hospital, and have been thereafter discharged from it on the supposition that they have recovered their reason, and have, within three years after such discharge, become again insane from causes existing at the time of such discharge, and have no adequate means of support.

It has long been the settled practice to admit retired officers of the Army, Navy, and Marine Corps to St. Elizabeths Hospital on the basis that they are " persons belonging to " the respective services within the meaning of the quoted revised statute. Decisions of the Comptroller of the Treasury of April 29, 1911, 57 MS. Comp. Dec. 530; September 20, 1911, 58 *id.* 1265; and January 24, 1912, 60 *id.* 357. It was held by the Comptroller of the Treasury and the Judge Advocate General of the Army that commissioned officers of the Army, Navy, and Marine Corps both on the active and retired lists who are admitted into St. Elizabeths Hospital under orders of the Secretary of War or Navy, respectively, are not entitled while undergoing treatment in said institution to subsistence at the expense of the Government, based on the laws that such officers were not entitled to rations or subsistence at the expense of the Government otherwise, and that to establish such right while undergoing treatment in St. Elizabeths Hospital, it should appear from specific provisions of law and not rest merely on the terms of the appropriation act for the hospital which includes provision for "support, clothing, and treatment in St. Elizabeths Hospital for the Insane from the Army, Navy, Marine Corps, Coast Guard." See act of June 5, 1924, 43 Stat. 429. In other words, the rulings concluded that the annual appropriation acts should be read in connection with the laws providing for the pay and allowances of the officers, and when so read the appropriation is available to pay for the support or subsistence for those otherwise entitled thereto but not for the support or subsistence for those not otherwise entitled.

Based on these decisions a charge for subsistence of such officers in St. Elizabeths Hospital has been fixed by regulations as indicated in your letter.

Section 202 (10) of the World War veterans' act of June 7, 1924, 43 Stat. 620, provides in part as follows:

> * * * The director is further authorized, so far as he shall find that existing Government facilities permit, to furnish hospitalization and necessary traveling expenses to veterans of any war, military occupation, or military expedition since 1897, not dishonorably discharged without regard to the nature or origin of their disabilities: *Provided,* That preference to admission to any Government hospital for hospitalization under the provisions of this subdivision shall be given to those veterans who are financially unable to pay for hospitalization and their necessary traveling expenses.

This statute has twice been construed not to have repealed, superseded, or rendered inoperative prior laws and regulations governing the treatment and hospitalization of persons entitled by reason of military or naval service. 4 Comp. Gen. 445; *id.* 514. The first was the case of a pensioner hospitalized in St. Elizabeths Hospital, and it was held that the pension was obligated for the care of the veteran under prior laws and the regulations issued pursuant thereto. The second was the case of a pensioner hospitalized in a naval hospital, and the same ruling was made. In the present case, as retired officers of the Army, Navy, and Marine Corps have heretofore been admitted into St. Elizabeths Hospital on the basis of their being a part of the respective services within the meaning of the Revised Statutes, and in view of the fact that the World War veterans' law was enacted in the light thereof, such retired officers may not be considered as "veterans" within the meaning of the quoted portion of section 202 (10) of the World War veterans' act and entitled to hospitalization in St. Elizabeths Hospital at the expense of the Government as such. In the case of Thomas A. Dwyer submitted by you there would be no authority to transfer him to the jurisdiction of the United States Veterans' Bureau, and his committee may not be relieved from paying the regulation charge of $1 per day for the period the officer is in St. Elizabeths Hospital. Likewise, in the case of Lieut. Francis M. Munson submitted in your letter of April 7, the officer is not relieved from the charge of $1 per day for subsistence while in the hospital.

(2) You state:

> Under date of June 15, 1860 (12 Stat. 23), an act authorizing the admission of certain classes of patients to this institution was amended and extended to include the Marine Corps and Revenue Cutter Service. In the act of January 28, 1915, an act to create the Coast Guard by combining therein the existing Life Service and Revenue Cutter Service, the Revenue Cutter Service was merged into the Coast Guard. In the same act it was stipulated that the Coast Guard would operate as a part of the Navy, subject to the orders of the Secretary of the Navy in time of war, or when the President shall so direct. Under this provision, the employees of the Revenue Cutter Service became part of the Coast Guard, and the Coast Guard being a part of the Navy Department during the late war, all such employees became eligible for admission for

treatment in this hospital under the order of the Secretary of the Navy. Thus the act of January 28, 1915, automatically broadened the class of patients eligible to receive treatment at this hospital to all classes in the Coast Guard, the Life Service previous to this act not being entitled to such admission.

The act authorizing appropriations for this hospital was changed in 1916 and the words Coast Guard inserted in the place of Revenue Cutter Service in naming the persons for whom Congress made the appropriation for Saint Elizabeths Hospital. During the war period, these employees were admitted to the hospital under order of the Secretary of the Navy. Now that the Coast Guard is a part of the Treasury Department, all of these classes are admitted under the order of the Secretary of the Treasury. Is this practice authorized under the act of January 28, 1915?

Considering together the provisions of the Revised Statutes authorizing the admission of members of the Revenue Cutter Service into St. Elizabeths Hospital on the order of the Secretary of the Treasury, and the provisions of the act of January 28, 1915, 38 Stat. 800, under which the Revenue Cutter Service was combined with the Life Saving Service, a similar activity, to comprise the Coast Guard, and the provisions of the annual appropriation acts for St. Elizabeths Hospital, expressly including the insane of the "Coast Guard," it reasonably may be concluded that all insane members of the Coast Guard, whether of the former Revenue Cutter Service or the Life Saving Service, may be admitted to St. Elizabeths Hospital on the order of the Secretary of the Treasury.

(3) You state:

Under the recent laws enlisted men of the Coast Guard and of the Navy, or those who may be noncommissioned officers, are transferred to the retired list or reserve. Are retired and enlisted men of the Coast Guard eligible for admission to this hospital? Are members of the Naval Reserve eligible for admission to this hospital?

An enlisted man of the Coast Guard is entitled to retirement under the provisions of the act of January 28, 1915, 38 Stat. 801, and is subject to assignment "to such duties as he may be able to perform." Retired pay is governed by section 10 of the act of June 10, 1922, 42 Stat. 630. From these provisions it may be held that retired enlisted men constitute a part of and are "persons belonging to" the Coast Guard within the meaning of the statutes governing admission of insane persons into St. Elizabeths Hospital in the same manner and subject to the same conditions as retired enlisted men of the Army, Navy, and Marine Corps.

The act of July 1, 1918, 40 Stat. 712, provides that "Members of the Naval Reserve Force when employed in active service, ashore or afloat, under the Navy Department shall receive the same pay and allowances as received by the officers and enlisted men of the Regular Navy." While on active duty with the Navy the members of the Naval Reserve Force are entitled to be furnished with medical and hospital care in the same manner as members of the Regular Navy, including the right of admission into St. Elizabeths Hospital as a part of the Navy, but there is no provision of law pro-

viding for the medical or hospital treatment of members of the reserve on inactive duty. The act of February 28, 1925, 43 Stat. 1080, effective on and after July 1, 1925, abolishes the Naval Reserve Force and creates a Naval Reserve. No rights to medical or hospital treatment of members of the Naval Reserve on inactive duty are granted by this act. While in an inactive status members of the Naval Reserve Force or of the Naval Reserve, on and after July 1, 1925, would not be entitled to admission to St. Elizabeths Hospital under section 4843, Revised Statutes, as "persons belonging to" the Navy. Whether they might under any circumstances be entitled to admission as "veterans" under the World War veterans' act is not for consideration on the present submission.

(4) You state:

A merchant seaman is sent to the hospital as a beneficiary of the Public Health Service. He receives treatment and in the course of two or three years is discharged as recovered. Within three years he requests to be permitted to reenter the hospital for treatment. He is no longer a merchant seaman or beneficiary of the Public Health Service. Is such patient entitled to admission to the hospital for further treatment?

Section 5 of the act of March 3, 1875, 18 Stat. 486, provides as follows:

* * * insane patients of said service [Public Health Service] shall be admitted into the Government Hospital for the Insane upon the order of the Secretary of the Treasury, and shall be cared for therein until cured or until removed by the same authority; and the charge for each such patient shall not exceed four dollars and fifty cents a week, which charge shall be paid out of the marine-hospital fund.

Merchant seamen are entitled to treatment in marine hospitals under the control of the Public Health Service, the cost of which is payable from the marine-hospital fund. Sections 4801, 4802, and 4803, Revised Statutes. They are, therefore, patients of the Public Health Service within the meaning of the act of March 3, 1875, *supra*. The right of the seamen as patients of the Public Health Service to remain in St. Elizabeths Hospital is limited to such time as they are "cured or until removed by the same authority." If they are discharged from the hospital as cured, there is no right of reentry except as a patient of, and under the order of, the Public Health Service. If in the meantime the patient has changed his occupation and is no longer a merchant seaman or otherwise a beneficiary of the Public Health Service, it would follow that there would be no right of admission into the hospital on that basis. The right of reentry within three years under section 4843, Revised Statutes, has reference only to the personnel of the Army, Navy, and Marine Corps and is not extended to merchant seamen as patients of the Public Health Service.

(A-9302)

POSTAL RECLASSIFICATION—SPECIAL-HANDLING STAMPS

Postmasters of the fourth class are entitled to claim commissions for the cancellation of postage stamps affixed to fourth-class mail for the purpose of securing "special handling," as authorized by Title II, section 207 (b), of the act of February 28, 1925, 43 Stat. 1067.

Comptroller General McCarl to the Postmaster General, May 12, 1925:

I have your letter of April 24, 1925, as follows:

The act approved February 28, 1925 (H. R. 11444) [43 Stat. 1067], reclassifying the salaries of postmasters and employees of the Postal Service, and readjusting their salaries and compensation, provides in part as follows:

"Fourth class.—The compensation of postmasters of the fourth class shall be fixed upon the basis of the whole of the box rents collected at their offices and commissions upon the amount of canceled postage-due stamps and on postage stamps, stamped envelopes, and postal cards canceled, on matter actually mailed at their offices, and on the amount of newspaper and periodical postage collected in money, and on the postage collected in money on identical pieces of third and fourth class matter mailed under the provisions of the act of April 28, 1904, without postage stamps affixed, and on postage collected in money on matter of the first class mailed under provisions of the act of April 24, 1920, without postage stamps affixed, and on amounts received from waste paper, dead newspapers, printed matter, and twine sold, at the following rates."

Title II of the same act, section 207 (b), makes the following provision:

"Whenever, in addition to the postage as hereinbefore provided, there shall be affixed to any parcel of mail matter of the fourth class postage of the value of 25 cents with the words 'Special handling' written or printed upon the wrapper, such parcel shall receive the same expeditious handling, transportation, and delivery accorded to mail matter of the first class."

A decision is requested as to whether postmasters of the fourth class may claim commissions for the cancellation of stamps affixed to fourth-class mail for the purpose of securing "special handling."

The basis for computing the compensation of postmasters of the fourth-class offices includes commissions on cancellation of "postage stamps." The 25 cents charged for "special handling" is provided to be affixed as "postage." No specific provision is made for reimbursing the postmasters for this special handling as for special-delivery postage (act of August 4, 1886, 24 Stat. 221), in view of which it is reasonable to conclude that the stamps thus affixed for special handling constitute "postage stamps" within the meaning of the provision for computing the commissions of the postmaster.

Answering your question specifically, postmasters of the fourth class are entitled to claim commissions for the cancellation of postage stamps affixed to fourth-class mail for the purpose of securing "special handling."

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(A-9430)

LONGEVITY PAY—SERVICE CREDITED TO ENLISTED MEN OF THE NAVY

The service which an enlisted man of the Navy may count for the purpose of computing increase of pay for length of service under section 10 of the joint-service pay act, as amended by section 3 of the act of May 31, 1924, 43 Stat. 251, is as follows: (1) Enlisted service in the Navy; (2) enlisted service in the Revenue Cutter Service or the Coast Guard; (3) service as commissioned or warrant officer between April 6, 1917, and December 31, 1921, in any of the services mentioned in the title of the act of June 10, 1922, including adjunct forces thereof; (4) active service with the Navy rendered as a member of the Naval Reserve Force while holding an enlisted rating, but not including active service for training; and (5) active service with the Navy other than training rendered as a member of the National Naval Volunteers.

Comptroller General McCarl to the Secretary of the Navy, May 12, 1925:

I have your letter of April 30, 1925, submitting proposed change in section B of the "Instructions for carrying into effect the joint-service pay bill, act of June 10, 1922," with request for an expression of views as to whether the proposed change in so far as it involves disbursements is in conformity with law.

The proposed change is an addition of the words "and enlisted service in the National Naval Volunteers" at the end of the second sentence in subparagraph (e), on page B3, and is submitted by reason of decision of this office of April 1, 1925, 44 MS. Comp. Gen. 20, wherein it was held that an enlisted man of the Navy was entitled to credit, in computing longevity increase of pay under section 10 of the act of June 10, 1922, 42 Stat. 630, for active duty service with the Navy rendered as a member of the National Naval Volunteers.

In order that it may be clearly understood that only active duty service with the Navy may be counted and that such service as a member of the National Naval Volunteers may be counted irrespective of whether Naval Reserve Force membership was or was not subsequently acquired, it is thought best that the change be worded—

and (4) active duty service with the Navy other than training rendered as a member of the National Naval Volunteers.

Section 3 of the act of May 31, 1924, 43 Stat. 251, provides:

That section 10 of said Act [June 10, 1922, 42 Stat. 630] be, and the same is hereby, amended by adding thereto the following paragraphs:

* * * * * * *

"That all enlisted men of all services mentioned in the title of this Act who served as warrant or commissioned officers in any of said services, including adjunct forces thereof, shall be credited with all active service so performed during the period from April 6, 1917, to December 31, 1921, in the computation of their enlisted service for longevity pay purposes, and shall be paid accordingly."

In view of this provision it is suggested that the entire second sentence in subparagraph (e), on page B3, be reworded as follows:

The service which an enlisted man of the Navy may count for the purpose of computing increase of pay for length of service is as follows: (1) Enlisted service in the Navy; (2) enlisted service in the Revenue Cutter Service or the Coast Guard; (3) service as commissioned or warrant officer between April 6, 1917, and December 31, 1921, in any of the services mentioned in the title of the act of June 10, 1922, including adjunct forces thereof: (4) active service with the Navy rendered as a member of the Naval Reserve Force while holding an enlisted rating, *but not including active service for training;* and (5) active service with the Navy other than training rendered as a member of the National Naval Volunteers.

(A–8420), (A–9419)

TRANSPORTATION OF HOUSEHOLD EFFECTS OF EMPLOYEES OF THE RECLAMATION SERVICE, GEOLOGICAL SURVEY, AND BUREAU OF MINES

In the absence of specific legislative authority therefor, the cost of packing, crating, hauling, and transportation of household effects of employees of the Reclamation Service, Geological Survey, and Bureau of Mines, Department of Interior, upon change of station, may not be paid from appropriated funds. Payments made prior to decision of March 28, 1925, will not be disturbed if otherwise regular. 4 Comp. Gen. 818, modified. (Modified by 4 Comp. Gen. 1069.)

Comptroller General McCarl to the Secretary of the Interior, May 13, 1925:

I have your letter of May 2, 1925, as follows:

In your decision to the Secretary of the Interior of March 28, 1925 (A–8420), you held that payments for transportation of household effects of employees of the Reclamation Service, the Geological Survey, and the Bureau of Mines would not be allowed subsequent to December 6, 1924, which was the date of the act enabling the heads of the executive departments and independent establishments to adjust the compensation of employees in the field service. Before the receipt of this decision and your decision of January 15, 1925, to the Director of the United States Veterans' Bureau, on the same subject, which was not received in this department until the middle of March, the headquarters of a number of employees had been changed and if they are not allowed reimbursement it will mean a decided loss.

Accordingly, in view of the long-continued practice and the apparent ground for the assumption that such payments were proper, I am writing this letter to ask if you will not authorize the payment of such expenses occurring on or prior to March 28, 1925, instead of December 6, 1924.

There has also been received your letter of April 30, 1925, forwarding voucher in the amount of $146.19 in favor of the Kennicott Patterson Transfer Co. for packing, cartage, and shipping household goods of R. M. Patrick, in connection with his transfer from the Denver office to the Washington office of the Bureau of Reclamation, March 18, 1925.

In view of your statements relative to the long-continued practice of the Interior Department under regulations heretofore recognized by the Comptroller of the Treasury, and in compliance with your request, payments for transportation of household goods shipped on or prior to March 28, 1925, are authorized. Voucher in favor of the Kennicott Patterson Transfer Co. returned herewith may be paid in an amount authorized by regulations.

Decision of March 28, 1925, 4 Comp. Gen. 818, is hereby amended, changing the effective date for the discontinuance of the practice of

shipping household goods of employees upon change of station from December 6, 1924, to March 28, 1925.

(A-9110)

MARINE BAND PAY—ACTIVE DUTY AND RETIRED

This decision involves various questions as to pay and allowances of the leaders and members of the Marine Band, both when on active duty and when retired, in accordance with the act of March 4, 1925, 43 Stat. 1274. For points involved see decision.

Comptroller General McCarl to the Secretary of the Navy, May 13, 1925:

I have your letter of April 10, 1925, requesting decision of certain questions submitted by the paymaster, United States Marine Corps, relating to the pay and allowances of members of the Marine Band under section 11 of the act of March 4, 1925, 43 Stat. 1274, which provides:

> That the band of the United States Marine Corps shall consist of one leader whose pay and allowances shall be those of a captain in the Marine Corps; one second leader whose pay shall be $200 per month and who shall have the allowances of a sergeant major; ten principal musicians whose pay shall be $150 per month; twenty-five first-class musicians whose pay shall be $125 per month; twenty second-class musicians whose pay shall be $100 per month; and ten third-class musicians whose pay shall be $85 per month; such musicians of the band to have the allowances of a sergeant: *Provided*, That the second leader and musicians of the band shall receive the same increases for length of service and the same enlistment allowance or gratuity for reenlisting as is now or may hereafter be provided for other enlisted men of the Marine Corps: *Provided further*, That the pay authorized herein for the second leader and the musicians of the band shall be effective from July 1, 1922, and shall apply in computing the pay of former members of the band now on the retired list and who have been retired since June 30, 1922: *Provided further*, That in the event of promotion of the second leader, or a musician of the band to leader of the band, all service as such second leader, or as such musician of the band, or both, shall be counted in computing longevity increase in pay: *And provided further*, That hereafter during concert tours approved by the President, members of the Marine Band shall suffer no loss of allowances.

Prior to the above act the pay and allowances of members of the Marine Band were provided by the act of August 29, 1916, 39 Stat. 612. In the decisions of this office of July 17, 1922, 2 Comp. Gen. 25, and November 29, 1922, *idem* 353, it was held that on and after July 1, 1922, the leader of the Marine Band was classified in the third pay period under the act of June 10, 1922, and that the second leader of the Marine Band was not entitled to 10 per cent additional pay for length of service under paragraph 2, act of June 4, 1920, 41 Stat. 761, and that the second leader and the musicians of the Marine Band were not entitled to 20 per cent increase of pay under acts of May 18, 1920, 41 Stat. 602, section 4, and June 4, 1920, 41 Stat. 761, section 4b, paragraph 1, and to pay for good-conduct medals, which additional pay they had been receiving to and including June 30, 1922.

The general purpose of the provision in the act of March 4, 1925, quoted *supra*, was to restore substantially the rates of pay which were paid the second leader and the musicians of the band on and prior to June 30, 1922. (See H. Rept. No. 31, 68th Cong., 1st sess.; S. Rept. No. 1072, 68th Cong., 2d sess.) The questions presented are stated and answered in the order submitted, as follows:

First. Having in view section 1 of the act of June 10, 1922, which provides in part that:

"The provisions of this act shall apply equally to those persons serving, not as commissioned officers * * *, but whose pay under existing law is an amount equivalent to a commissioned officer of one of the above grades, those receiving the pay of * * * captain, * * * being classified as in the * * * third * * * periods respectively,"

* * * * * * *

(a) Is the leader of the band, with less than ten years' service, limited to the pay and allowances of the second pay period?

(b) Is the leader of the band, with over seventeen years' service, entitled to the pay and allowances of the fourth pay period?

The act of August 29, 1916, 39 Stat. 612, provided that the pay and allowances of the leader of the Marine Band "shall be those of a captain in the Marine Corps." This was the "existing law" governing the pay of the leader of the band at the time of the enactment of the act of June 10, 1922. As the leader of the band was a person serving, not as a commissioned officer, but whose pay under the then existing law was an amount equivalent to that of a commissioned officer of one of the pay grades created by the act of June 10, 1922, he was by the express terms of the provision of the act of June 10, 1922, quoted *supra*, classified in the third pay period, without regard to length of service.

The said act of March 4, 1925, in reenacting the provision in the act of August 29, 1916, relating to the pay and allowances of the leader of the band, effected no change in the law governing the pay and allowances of such leader.

Questions (a) and (b) are accordingly answered in the negative.

Second. Computation of longevity pay of second leader and musicians of the band. Under the provision:

"That the second leader and musicians of the band shall receive the same increases for length of service * * * as is now or may hereafter be provided for other enlisted men of the Marine Corps," are said second leader and musicians entiled to count all service in the Army, Navy, Marine Corps, and Coast Guard, as well as service in the band of the U. S. Marine Corps, in computing longevity pay as provided by section 9 of the act of June 10, 1922?

Section 9 of the act of June 10, 1922, 42 Stat. 629, referred to, provides:

* * * Commencing July 1, 1922, * * * enlisted men of the * * * Marine Corps, shall receive, as a permanent addition to their pay, an increase of 5 per centum of their base pay for each four years of service in any of the services mentioned in the title of this Act not to exceed 25 per centum * * *.

As there is no restriction in the act of March 4, 1925, limiting the service that may be counted for the purpose of longevity pay by the second leader and the musicians of the band to service in the band

they are entitled to count any and all service that may be counted by other enlisted men of the Marine Corps.

This question is answered in the affirmative.

Third: Enlistment allowance. Under the provision:
"That the second leader and musicians of the band shall receive the * * * same enlistment allowance or gratuity for reenlisting as is now or may hereafter be provided for other enlisted men of the Marine Corps,"
what enlistment allowance are they entitled to receive upon reenlisting in the band of the U. S. Marine Corps?

The said act of March 4, 1925, also provides that the second leader shall have the allowances of a sergeant major, and the musicians of the band the allowances of a sergeant. A sergeant major and a sergeant are entitled to an enlistment allowance as provided in section 9 of the act of June 10, 1922. The second leader and the musicians of the band are therefore entitled to an enlistment allowance in the same amount and under the same conditions as a sergeant major and a sergeant, respectively, are entitled under the act of June 10, 1922. See 2 Comp. Gen. 353.

This question is answered accordingly.

Fourth. Under the provision:
"That in the event of promotion of the second leader, or a musician of the band to leader of the band, all service as such second leader or as such musician of the band, or both, shall be counted in computing longevity increase in pay."
will such second leader or musician, upon appointment as leader of the band, be entitled to the same pay as a captain; that is, if appointed with less than ten years' service to second period pay, over ten years' service or less than seventeen years' service to third period pay, and over seventeen years' service to fourth period pay?

This provision does not affect the period or base pay of the leader of the band in the event of promotion thereto of the second leader or a musician of the band. It merely authorizes the counting of the prior service in the band in computing the longevity pay of such appointee. 2 Comp. Gen. 212. The period or base pay of the leader of the band having been determined as that of the third period under the act of June 10, 1922, it so remains as long as the position is filled by a person who is not a commissioned officer until changed by law.

Fifth. Under the provision:
"That the pay authorized herein for the second leader and the musicians of the band shall be effective from July 1, 1922, and shall apply in computing the pay of former members of the band now on the retired list and who have been retired since June 30, 1922."
what will be the basis of computing the pay of retired enlisted men of the band of the U. S. Marine Corps, retired prior to July 1, 1922?

The question presented is whether the new rates of pay provided in said act of March 4, 1925, are applicable in computing the pay of former members of the band retired prior to July 1, 1922.

The word "now" is apparently used in the above provision in its ordinary meaning as referring to the present time as of the date of the act, and the additional clause "and who have been retired since

June 30, 1922," was evidently intended as an additional limitation or qualification, so as to confine the new rates of pay in their application to the retired members of the band to those who were retired since June 30, 1922, and thus by necessary implication to exclude from the benefits of the act those retired prior to July 1, 1922.

That this was the intention of the act is confirmed by a review of this legislation.

As originally introduced this provision read:

> That the pay authorized herein for the second leader and the musicians of the band shall be effective from July 1, 1922, and shall apply in computing the pay of former members of the band now on the retired list.

(See sec. 14, S. 4137, 67th Cong., 4th sess.; sec. 12, H. R. 7864, 67th Cong., 4th sess. Rept. No. 1061.)

In the report of this office of February 12, 1923, to the chairmen of the Senate and House Committees on Naval Affairs, as to the effect of the proposed legislation in regard to the Marine Band contained in S. 4137, it was stated in regard to the provision relating to the retired members:

> In addition * * * this section 14, page 16, lines 10 to 13, proportionately permanently increases the pay of all former members of the Marine Band from second leader and below now on the retired list * * *.

The provision was subsequently amended or changed by adding the clause "and who have been retired since June 30, 1922." (See H. R. 2688, 68th Cong., 1st sess.) This bill as amended was passed and approved on March 4, 1925, the provisions in regard to the Marine Band appearing as section 11 of that act and as quoted *supra*.

As originally introduced the words "former members of the band now on the retired list," were broad enough to include all retired members of the band whether retired prior to July 1, 1922, or since June 30, 1922. By adding the clause "and who have been retired since June 30, 1922, it was evidently intended to restrict or limit the application of the act to those retired since June 30, 1922.

You are advised, therefore, that the provision in question has no application in computing the pay of former members of the band retired prior to July 1, 1922.

> Sixth. What effect does the above provision have on the pay of a retired enlisted man in the band of the U. S. Marine Corps, transferred to the Fleet Marine Corps Reserve prior to July 1, 1922, and retired subsequent to July 1, 1922?

The provision of the act of August 29, 1916, 39 Stat. 591, relative to transferred members of the Fleet Naval Reserve, and made applicable by the act to transferred members of the Fleet Marine Corps Reserve, provides:

> * * * They may, upon their own request, upon completing thirty years' service, including naval and fleet naval reserve service, be placed on the retired

list of the Navy with the pay they were then receiving plus the allowances to which enlisted men of the same rating are entitled on retirement after thirty years' naval service * * *.

The "pay they were then receiving" is the retainer pay, in an amount prescribed by the act of August 29, 1916, 39 Stat. 590, as follows:

Members of the Fleet Naval Reserve who have, when transferred to the Fleet Naval Reserve, completed naval service of sixteen or twenty or more years shall be paid a retainer at the rate of one-third and one-half, respectively, of the base pay they were receiving at the close of their last naval service plus all permanent additions thereto * * *.

In 2 Comp. Gen. 762, it was held that the fact that transferred members of the Fleet Naval Reserve retired prior to July 1, 1922, are borne on the retired list of the Navy does not entitle them to the retired pay prescribed by the act of June 10, 1922, 42 Stat. 630, for retired enlisted men of the Navy; they are only entitled to the retired pay prescribed for them by the act of August 29, 1916, 39 Stat. 591, it being said therein that when enlisted men of the Navy were transferred to the Fleet Naval Reserve—

they ceased for all purposes to be enlisted men of the Navy and became thereafter for all purposes, inclusive of retirement, Fleet Naval Reservists. Enlisted men of the Navy are one class of men, with their own statutes, inclusive of retirement, applicable to them; transferred Fleet Naval Reservists are, on the other hand, another class, with their own separate statutes applying to them, inclusive of that for their retirement * * *.

To the same effect is 12 MS. Comp. Gen. 1415, August 18, 1922, with respect to the Fleet Marine Corps Reserve.

Applying the principle of said decisions to a member of the band transferred to the Fleet Marine Corps Reserve prior to July 1, 1922, he ceased to be a member of the band when so transferred and was thereafter a member of the Fleet Marine Corps Reserve, and when retired thereafter whether prior or subsequent to July 1, 1922, he retired as a member of the Fleet Marine Corps Reserve and not as a member of the band. The said act of March 4, 1925, did not include within its benefits former members of the band transferred to the Fleet Marine Corps Reserve prior to July 1, 1922. The provision in said act making applicable the new rates of pay "in computing the pay of former members of the band now on the retired list and who have been retired since June 30, 1922," evidently refers to those members of the band who were retired as such and not as members of the Fleet Marine Corps Reserve.

Answering the question specifically, I have to advise you that the said provision in the act of March 4, 1925, relating to retired members of the band has no effect on the pay of a former member of the band transferred to the Fleet Marine Corps Reserve prior to July 1, 1922, and retired subsequent to that date.

(A–9114)

CLASSIFICATION OF CIVILIAN EMPLOYEES—TEMPORARY EMPLOYMENT OF EXPERTS

No limitation on the compensation for personal services having been placed in the acts making appropriations for the enforcement of the packers and stockyards act, 42 Stat. 159, for the fiscal years 1925 and 1926, the Secretary of Agriculture has authority to employ temporarily, by means of contracts for such compensation as may be agreed upon, local real-estate appraisers, horse dealers, and others for expert appraisal work, without regard to the maximum salary limitations of the classification act of March 4, 1923, 42 Stat. 1488, provided none of the regular employees is found qualified to perform such service and the duties are not such as have been allocated to specified positions under the classification act.

Comptroller General McCarl to the Secretary of Agriculture, May 13, 1925:

I have your letter of April 11, 1925, requesting decision of a question presented as follows:

In the appraisal of stockyard properties in connection with the enforcement of the packers and stockyards act of August 15, 1921 (42 Stat. 159), it is at times necessary to secure the services of local real-estate appraisers for the purpose of valuing real estate used by stockyard companies in rendering stockyard services, the services of local horse dealers in appraising horses owned by stockyard companies, or other special services and expert testimony. The frequency with which such services are needed are not such that would justify the regular appointment of competent men for these purposes. It is therefore proposed to enter into a contract for the particular job only when such services are needed. The agencies subject to the packers and stockyards act have unlimited means to employ the services of such experts and the department is confronted with the necessity of securing witnesses of comparable standing.

In view of your decision of February 10, 1925 (A–6104) in the matter of payments made to Walter L. Fisher under a contractual agreement, doubt has arisen as to whether the department may enter into such contracts where the payment involved, if prorated, would be in excess of the annual rates of compensation for personal services under the classification act of 1923.

Your decision is therefore requested whether or not the department is authorized to enter into contracts for the payment of such special services under the conditions above stated.

Section 407 of the act of August 15, 1921, 42 Stat. 169, designated as the "packers and stockyards act, 1921," provides that:

The Secretary may make such rules, regulations and orders as may be necessary to carry out the provisions of this Act * * * and shall have the power to appoint, remove, and fix the compensation of such officers and employees, not in conflict with existing law, and make such expenditures for rent * * * and other supplies and expenses as shall be necessary to the administration of this Act in the District of Columbia and elsewhere, and as may be appropriated for by Congress * * *.

The appropriations for the enforcement of the provisions of this law as made by the deficiency appropriation act of August 24, 1921, 42 Stat. 194, and the regular Department of Agriculture appropriation acts of May 11, 1922, and February 26, 1923, 42 Stat. 539, 1320, for the fiscal years 1922, 1923, and 1924, respectively, contain provisos to the effect that for the fiscal year 1922 no person should be paid compensation at a rate exceeding $5,000 per annum with an exception thereto, for the fiscal years 1923 and 1924, authorizing the payment of compensation at a rate not to exceed $6,500 per annum to three persons so employed. These provisos are not carried in the

appropriation acts of June 5, 1924, 43 Stat. 460, and February 10, 1925, 43 Stat. 851, making appropriations for the Department of Agriculture for the fiscal years 1925 and 1926, respectively.

The 1921 law and appropriation made for carrying out the purpose specified therein contemplate that its enforcement is to be accomplished through the regularly employed personnel of the department, except possibly in those rare cases where it becomes necessary to enlist the aid temporarily of persons having an expert or technical knowledge peculiar to some particular matter not possessed by the personnel of the department.

No limitation having been placed in the acts making appropriations for the enforcement of the packers and stock yards act for the fiscal years 1925 and 1926, and authority having been conferred on the Secretary of Agriculture by that law to make such expenditures as shall be necessary to the administration of said law as may be appropriated by Congress, the temporary employment, by means of contracts of employment for such compensation as may be agreed upon of local real estate appraisers, local horse dealers, and others of the character above indicated, would be authorized provided none of the regular personnel is found qualified to perform the required services and the services to be performed by such temporary employees are not such as have been allocated to specified positions under the classification act of 1923, nor are such field service employees whose compensation has been directed to be adjusted in accordance with the classification act, in which event the compensation to be paid for such temporary services would be limited by the compensation fixed for the particular position to be filled.

The views expressed by this office in decision of February 10, 1925 (A–6104), referred to by you do not apply in the instant matter, as the employment there considered was of such a nature as to create a permanent employment and payments for the services there under consideration had been made from appropriations that contained limitations prohibiting payment therefrom for personal services of amounts exceeding the rate of $6,500 per annum.

The question submitted is answered accordingly.

(A–9164)

CONTRACTS—DAILY DELIVERIES—PRICE FOR EXCESS

A contract for furnishing to the Government an approximate quantity of oil "daily" at a specified price entitles the Government to delivery on demand of that quantity of oil each and every day of the week including Sunday. The furnishing by a contractor of a quantity of oil in excess of the amount which might lawfully be demanded under the terms of his contract does not entitle the contractor to pay for the alleged excess deliveries at a price greater than that fixed by the contract for deliveries thereunder.

Comptroller General McCarl to the Postmaster General, May 13, 1925:

There has been received your letter of April 15, 1925, requesting decision of a question presented, as follows:

In December, 1923, the postmaster at Newark, N. J., entered into a contract with the Industrial Oil Company, wherein the latter agreed to furnish approximately 200 gallons of gasoline daily for the period from January 1 to March 31, 1924, inclusive, at a price of $.025 below the local tank-wagon price, the maximum price not to exceed $.13 per gallon. During the period covered by the contract the Industrial Oil Company delivered 19,308 gallons of gasoline, and then claimed that the word "daily" in their contract meant six days in the week, and that, after allowing for a 10 per cent variation where an approximate amount is specified, their contract called for the delivery of 17,160 gallons only. The price of gasoline having advanced since the execution of the contract, they claimed the right to demand tank-wagon price, or open-market price, for the 2,148-gallon excess deliveries, which amounted to an additional sum of $139.62. On June 5, 1924, the Solicitor for the Post Office Department advised that, in the absence of anything showing a contrary intent, the word "daily" includes Sundays as well as other days in the week. A copy of the solicitor's letter was forwarded to the postmaster at Newark, N. J., for his informaion. The post-office garage at Newark, N. J., is open every day in the week, Sundays included, and, while it is not the custom to have gasoline delivered on Sunday, they have on certain occasions replenished their supply on that day. On July 28, 1924, the postmaster transmitted receipted vouchers from the Industrial Oil Company, for $139.62, covering the alleged adjustment on gasoline furnished in excess of the approximate amount called for in the contract. On the basis that the contract required, or specified, deliveries on Sundays which had not been made, this bureau refused to certify the bills for credit to the postmaster's account. Credit was again refused by this bureau on January 3, last. Under date of the 1st instant, the postmaster at Newark, N. J., advises that demand was made on the Industrial Oil Company for a refund of this sum, which was refused, and requests that credit for the amount be certified to your office. Will you please advise if it would be proper for this bureau to certify the sum of $139.62 as a charge against the vehicle appropriation?

It appears that advertisement No. 10 requesting bids for furnishing approximately 200 gallons of gasoline daily for the use of the Newark, N. J., post office for the quarter ending March 31, 1924, was issued by the postmaster at that place under date of December 6, 1923, and that the proposal of the Industrial Oil Company offering to furnish the required quantity was subsequently accepted. The proposal as accepted by the postmaster reads:

Delivery of entire quantity to be made as needed within 90 days at 2½ cents per gallon below local tank wagon price, maximum price per gallon not to exceed 13 cents, beginning Jan. 1, 1924.

In accepting the proposal the postmaster advised the company as follows:

It is desired that you start delivering at the post-office garage, Lafayette St., & N. J. R. R. Ave., Wednesday, January 2d, 1924, between 9.00 a. m. and 11.00 a. m.; also that future deliveries be made during these hours; our requirements will be approximately 250 gallons daily.

There were 91 calendar days in the period January 1, 1924, to March 31, 1924, inclusive, and 19,308 gallons of gasoline were delivered during that period.

Payment for the total quantity delivered was made at 13 cents per gallon, but subsequently the postmaster paid the company an

additional sum of $139.62 to cover the difference between the contract price and the market price for 2,148 gallons at $0.065 per gallon.

The contractor contends that the term "daily" as specified in the proposal refers only to secular days and that Sundays, of which there were 13, should be excluded, and that consequently there were only 78 days on which the approximate quantity of 200 gallons was required, which, with the added 10 per cent to cover the variation where an approximate amount is specified, amounted to 17,160 gallons, which it was obligated to deliver at the price specified and that payment of the remainder should be made at the market price.

The word "daily" is defined in Webster's New International Dictionary as "Every day; day by day; as, to happen *daily*," and in Funk & Wagnall's New Standard Dictionary as "Occurring, appearing, or pertaining to every day; recurring day after day," and as "Day after day; on every day."

The meaning of the word "daily" when used in contractual agreement, unless it sufficiently appears from specific language incorporated in the agreement to show that the intention of the parties was to the contrary, is to be understood in its popular sense, and in that sense it is clear that in the instant case approximately 200 gallons of gasoline were to be delivered each and every day including Sundays if the needs of the Newark post office, during the period covered by the agreement, so required, it being shown that the post-office garage was open every day in the week including Sundays during that time. (In this connection see 11 Comp. Dec. 494, as to the meaning of the word "month" as used in contracts.)

The only authority for the delivery of the gasoline in question was at the price stipulated in the contract, and the action of the contractor in making the deliveries under the contract is inconsistent with the contention that payment for any part thereof was authorized at a price other than that specified in the contract.

In view of the foregoing it must be held that there was no legal basis for making payment in any amount in excess of the price stipulated in the agreement, as there was delivered an average of only 212 plus gallons per day for each of the 91 days included in the quarter ending March 31, 1924, and the amount thus delivered can not be said to have been excessive, since the quantity specified was stated as being the approximate quantity that would be required per day.

Even if it could be held that the quantity delivered was in excess of the quantity which could have been required to be delivered under the contract, there would be no obligation on the Government to pay an increased price for the amount of the excess. See 26 Comp. Dec. 75.

(A–9341)

RECORDER OF DEEDS, D. C.—PURCHASE OF DISTRICT CODE

The Code of Law for the District of Columbia is a law book within the purview of section 3 of the act of March 15, 1898, 30 Stat. 316, and may not be purchased by the Recorder of Deeds of the District of Columbia from the fees and emoluments of his office which are in the nature of appropriated moneys.

Comptroller General McCarl to the Recorder of Deeds of the District of Columbia, May 13, 1925:

This office is in receipt of your request of April 27, 1925, for decision of the question whether you are authorized to pay from the receipts of your office for two copies of the Code of Law for the District of Columbia to enable you to pass upon the legal questions arising in the conduct of your office.

The salaries and incidental expenses of the office of the Recorder of Deeds are payable from the revenues of such office, section 553 of the Code of Law for the District of Columbia, providing:

SALARY; SURPLUS TO BE PAID INTO THE TREASURY.—The recorder of deeds of the District of Columbia shall not retain of the fees and emoluments of his office for his personal compensation over and above his necessary clerk hire and the incidental expenses of his office, certified to by the supreme court of the District of Columbia, or by one of its justices appointed by it for that purpose, and to be audited and allowed by the proper accounting officer of the Treasury, a sum exceeding four thousand dollars a year or exceeding that rate for any time less than a year; and the surplus of such fees and emoluments shall be paid into the Treasury to the credit of the District of Columbia: *Provided*, That the number of clerks and others employed in the office of the recorder of deeds shall not be increased, except that additional copyists may be employed for temporary service as the necessities of the office may require, nor shall the salary or compensation of clerks and others be increased beyond the salaries or compensation paid during the fiscal year *nineteen hundred and one, to take effect with this code*, and the salary of the deputy recorder of deeds shall be two thousand five hundred dollars per annum, to be paid out of the fees and emoluments of said office of recorder of deeds..

The general authority to use the fees of your office for the payment of salaries and "incidental expenses" thereof is in the nature of an appropriation. 6 Comp. Dec. 668. Section 3 of the act of March 15, 1898, 30 Stat. 316, provides:

That hereafter law books, books of reference, and periodicals for use of any Executive Department, or other Government establishment not under an Executive Department, at the seat of Government, shall not be purchased or paid for from any appropriation made for contingent expenses or for any specific or general purpose unless such purchase is authorized and payment therefor specifically provided in the law granting the appropriation.

The office of the Recorder of Deeds of the District of Columbia is undoubtedly a Government establishment within the meaning of the above act; and the Code of Laws for the District of Columbia is a law book. Therefore, in the absence of specific legislative authority therefor, the use of the revenues of your office for the purchase of, or payment for, the District codes in question is prohibited by the statute hereinbefore quoted.

(A-8265)

BURIAL EXPENSES—RETIRED ENLISTED MEN

A retired enlisted man who served in the military forces of the United States during the Spanish-American War or the World War may be considered a "veteran of any war" within the meaning of section 7 of the act of March 4, 1925, 43 Stat. 1305, and if he did not leave sufficient assets to pay his burial expenses such expenses are payable by the Veterans' Bureau to the extent actually incurred but not in excess of $100 nor in excess of the difference between such maximum amount and the lesser amount of assets, if any, left by the deceased.

Decision by Comptroller General McCarl, May 14, 1925:

The United States Veterans' Bureau has approved and forwarded to this office for settlement claim of Hattie Gent for $100 as reimbursement for burial expenses of her husband, Richard Gent, former enlisted man of the Army on retired list at date of death.

The office of The Adjutant General of the Army has reported that Richard Gent served during the Spanish-American War and subsequent thereto; was retired March 4, 1914, while serving as sergeant, Company E, Ninteenth Infantry; that he was called to active duty July 17, 1917, released from active duty December 15, 1917, and was on the retired list of the Army on inactive duty at the date of his death, June 24, 1922. The affidavit of the widow, supported by receipted bill, shows that she paid burial expenses in the amount of $191.50, and that the only asset left by the decedent was $56, accrued retired pay to date of death.

Section 301 of the war risk insurance act of October 6, 1917, 40 Stat. 405, provided as follows:

> If the death occur before discharge or resignation from service, the United States shall pay for burial expenses and the return of body to his home a sum not to exceed $100, as may be fixed by regulations.

This was reenacted in the act of June 25, 1918, 40 Stat. 612. Section 10 of the act of December 24, 1919, 41 Stat. 372, amended the section to read as follows:

> "If death occur or shall have occurred subsequent to April 6, 1917, and before discharge or resignation from service, the United States shall pay for burial expenses and the return of body to his home a sum not to exceed $100, as may be fixed by regulations."
>
> That section 301 of the war-risk insurance act, as amended, shall be deemed to be in effect as of April 6, 1917 * * *.

Section 3 of the act of March 4, 1923, 42 Stat. 1523, amending section 301 of the war risk insurance act, reenacted the above quoted portion, and in addition provided burial expenses for veterans of any war who left insufficient assets to pay for the burial expenses, and if they were not otherwise provided for. Section 201 (1) of the World War veterans' act, June 7, 1924, 43 Stat. 617, again reenacted verbatim the quoted portion of section 301 of the war-risk insurance act of December 24, 1919, relative to burial expenses where death occurred before discharge or resignation from the service. This act

also reenacted, as amended, the provisions relative to burial expenses of veterans of any war. The act of March 4, 1925, 43 Stat. 1305, amending section 201 of the World War veterans' act 1924, again reenacted verbatim the quoted portion of the prior law relative to burial expenses where death occurs prior to discharge or resignation from the service, and made certain amendments in the provisions for burial expenses of veterans of any war.

The question presented by this claim is whether the death of a retired enlisted man of the Army is a death "before discharge or resignation from the service," authorizing payment of burial expenses in an amount not to exceed $100 as may be fixed by regulations, or a death after discharge or resignation from the service, authorizing payment of burial expenses of veterans of any war, or neither.

The quoted provision from the war risk insurance act of October 6, 1917, as reenacted June 25, 1918, and as amended by the act of December 24, 1919, was intended to allow for expenses of funeral and burial of persons dying while on active duty during the World War. It may reasonably be concluded from the provision for "return of body to his home" that persons on the retired list, who are presumed to be at home when they die, were not within the benefits of those acts. The later acts of March 4, 1923, June 7, 1924, and March 4, 1925, *supra*, reenacted such provisions, but, in order to extend the allowance to those who had seen service, not only in the World War, but in other wars as well, dying while not on active duty, the provision for veterans of any war was included. If a retired enlisted man is to be included at all, and it is believed the act is broad enough, it must be as a "veteran of any war" dying after discontinuance of active service and while not under the direct service jurisdiction of the Government. An analysis of the acts discloses that the full amount of $100 is authorized in cases for those persons dying while under the jurisdiction or control of the Government away from their homes, either while on active duty, or while undergoing treatment, vocational training, etc., as beneficiaries of the Veterans' Bureau. In other cases of persons dying while not under direct jurisdiction and control of the Government, the allowance is limited to the difference between assets of the estate and $100. As a retired enlisted man is presumed to die relatively at home while not under the jurisdiction or control of the Government, burial expenses of such would be payable by the Government only if he is shown to be a "veteran of any war" and then only to the extent of the difference between the assets and $100. The deceased in this case is shown to have been a veteran of both the Spanish-American and World Wars. The amount of $56, accrued retired pay

to date of death, constitutes assets and claimant is entitled only to the difference between that amount and $100, viz, $44.

Upon review there is certified due claimant the sum of $44.

(A–7102)

MILEAGE—DELAYED TRAVEL BY RETIRED ARMY OFFICER ON RELIEF FROM ACTIVE DUTY

Orders relieving a retired Army officer from active duty and directing him to proceed to his home contemplate that the travel will be performed at once or within a reasonable time and there is no authority of law to delay the travel for any definite period of time. An extension of time granted upon request made almost one year after the date of release from active duty does not bring the travel within a reasonable time entitling the officer to mileage therefor.

The assignment of retired Army officers to active duty is authorized by the act of June 3, 1916, 39 Stat. 183, in time of war only, and no authority is known for the continuance on active duty with troops of officers assigned to active duty under said act after March 3, 1921, the official termination of the World War.

Decision by Comptroller General McCarl, May 15, 1925:

Major Leo I. Samuelson, United States Army, retired, requested review of settlement M–93686, dated November 20, 1923, disallowing his claim for mileage from Fort Jay, N. Y., to Los Angeles, Calif., by reason of travel to his home under orders relieving him from active duty February 20, 1922.

The travel was performed March 7 to 18, 1923, on Government transportation furnished from New York, N. Y., to Marshall, Tex., and from Marshall, Tex., to Los Angeles, Calif.

Paragraph 24 of Special Orders, No. 26–O, dated February 1, 1922, is in part as follows:

By direction of the President, Major Leo I. Samuelson, United States Army, retired, is relieved from his present duties at Fort Jay, New York, and from further active duty, effective February 20, 1922. He will then proceed to his home. The travel directed is necessary in the military service and is chargeable to procurement authority FD 26 P 2451 A 2.

Under date of January 31, 1923, The Adjutant General advised claimant as follows:

1. The Secretary of War directs that you be informed that the request contained in your letter of the 16th instant that the one year's time allowed you in returning to your home upon relief from actiye duty be extended thirty (30) days is approved.

Military orders are to be obeyed at once or within a reasonable time, according to their character, and public business is the foundation on which mileage is based. If an order to an officer on retirement to proceed to his home is not obeyed within a reasonable time it loses its character as an order to travel on public business, and if the travel is subsequently performed it is at the officer's pleasure or convenience and not under orders within the meaning of the statute. What is a reasonable time in one case might not be so in

another, as no fixed rule can be laid down that will govern in all cases, but an order that is usually given an officer on retirement to proceed to his home can not be regarded as an open order for travel to be complied with at any future time suiting the pleasure or convenience of the officer to whom issued. 2 Comp. Gen. 456; 9 Comp. Dec. 819.

By reason of circumstances peculiar to the military service an officer at time of retirement does not usually have an established residence where he desires to locate his home or dwelling place in civil life, and occasionally some time is required for selecting a home and adjusting his personal affairs preparatory to moving thereto. For this reason and other circumstances peculiar to the particular case some latitude has been allowed officers in carrying out orders to travel upon retirement or upon release from active duty. 13 Comp. Dec. 793; 18 *id.* 634. In no case, however, has any definite period been recognized as within a reasonable time. 13 Comp. Dec. 112; 23 MS. Comp. Dec. 169; 28 *id.* 690.

Orders, such as in this case, contemplate compliance at once or within a reasonable time. In case of a retired officer called to active duty who has an established home to which to return when released from active duty, as did claimant, less time should be required in which to adjust his affairs preparatory to proceeding to his home than is usually required when an officer is ordered home on retirement. There is no implied authority of law to delay the travel for any definite period, and therefore the subsequent action of the Secretary of War one year after date of orders, approving claimant's request for an extension of delay, could not have the effect of bringing the travel within a reasonable time. Under his orders claimant was entitled to a reasonable delay; a reasonable time is not a fixed time, but dependent on the circumstances which necessitate delay. Claimant's orders did not authorize him to perform the travel at any time within a year from date of release at his convenience, and only circumstances existing at time of release or soon thereafter could be considered as affecting the reasonableness of the time of performance of travel. The circumstances advanced by claimant, which apparently arose long after travel should have been performed, are too remotely connected with conditions at time of his release to be considered in determining whether the travel in question was performed within a reasonable time.

It appears there is some confusion in the minds of officers on the matter, and the department has contributed to that confusion by communicating to officers that this office has fixed a definite period after retirement or after relief from active duty during which travel to the officer's home must be made. In view of these circumstances

this claim will be allowed, but that action is not a precedent for similar action in the future.

The Adjutant General reported to this office in communication dated March 26, 1925, that claimant was placed on active duty under section 24 of the act of June 3, 1916, 39 Stat. 183. That section provides:

> * * * That in time of war retired officers of the Army may be employed on active duty, in the discretion of the President, and when so employed they shall receive the full pay and allowances of their grade * * *.

The same provision was reenacted in the third paragraph of section 127a of the act of June 4, 1920, 41 Stat. 785. The war with Germany, so far as a "time of war" existed, terminated March 3, 1921. See act of March 3, 1921, 41 Stat. 1359.

Section 1259, Revised Statutes, prohibits assignment of retired Army officers to active duty and, except as otherwise expressly provided by statute, there is no authority for assignment of a retired officer to active duty in time of peace. This office knows of no provision of law which authorized the employment of claimant on the duty in question after March 3, 1921. However, since claimant has been relieved from such duty, payments to him of full pay and allowances will not now be disturbed.

Upon review the settlement is modified and $155.65 certified due claimant.

(A-7652)

NATIONAL GUARD PAY—CAPTAINS COMMANDING ORGANIZATIONS

A captain of the National Guard assigned to command a headquarters detachment of a medical regiment, which detachment was federally recognized as a unit and was intended to operate en masse, exercises the command of an organization within the meaning of section 109 of the national defense act, as amended by section 47 of the act of June 4, 1920, 41 Stat. 783, and is entitled to the $240 a year payable to captains commanding organizations in addition to drill pay. 2 Comp. Gen. 795 distinguished.

Decision by Comptroller General McCarl, May 15, 1925:

Col. R. S. Offley, finance department, United States Army, requested December 11, 1924, review of settlement No. M-8762-W, dated July 23, 1924, disallowing credit in his accounts for $73.33 of the amount paid to Capt. Richard O'Connell, Medical Corps, Maryland National Guard, for the quarter ended December 31, 1923.

It appears that during the period in question Captain O'Connell was serving as officer in command of Headquarters Detachment, One hundred and fourth Medical Regiment, Maryland National Guard, for which service he was paid one-thirtieth of the base pay of his grade for each of 14 drills attended by him during the quarter as an officer belonging to an organization, in the amount of $93.33, and in addition thereto $60 as captain commanding an organization.

Section 109 of the national defense act as amended by section 47 of the act of June 4, 1920, 41 Stat. 783, in effect during the period in question, provided for payment to captains belonging to organizations of the National Guard at the rate of one-thirtieth of the monthly base pay of their grades as prescribed for the Regular Army for each regular drill or other period of instruction authorized by the Secretary of War, 50 per cent of the commissioned strength and 60 per cent of the enlisted strength being required to be present at each drill, and captains commanding organizations were authorized to receive $240 a year in addition to such drill pay.

Captain O'Connell was a member of the organization to which he was assigned as commanding officer. The enlisted men authorized by tables of organization for assignment to the regimental headquarters were necessarily assigned to a separate organization and with Captain O'Connell were federally recognized as the Headquarters Detachment, One hundred and fourth Medical Regiment, Maryland National Guard, May 11, 1923. It would appear that this federally recognized unit was intended to operate en masse and that the command was that of an organization within the meaning of the act cited, differing in this respect from the medical detachment attached to a combatant regiment, considered in 2 Comp. Gen. 795. Captain O'Connell was accordingly entitled to pay as received by him.

Upon review the settlement is reversed and $73.33 therein disallowed is certified for credit in the accounts of Colonel Offley.

(A–7551)

CLASSIFICATION OF CIVILIAN EMPLOYEES—PROMOTIONS BETWEEN ALLOCATED POSITIONS

The promotion of an employee from a position in a lower grade to one in a higher grade, both positions having previously been allocated, is a matter for the consideration of the head of the department in which the person is employed and the Civil Service Commission, and is not a matter which need await approval by the Personnel Classification Board.

Promotions in the Internal Revenue Service to positions to which appointments and promotions may be made by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may be approved by the Secretary of the Treasury as effective from the date of entrance upon duty after action by the commissioner, but when the approval specifically states that the appointment or promotion will be effective from a later date than the action of the commissioner compensation at the higher rate is payable only from effective date so fixed.

Decision by Comptroller General McCarl, May 16, 1925:

Oscar L. Bowen applied November 28, 1924, for review of settlement No. O–55071, of November 12, 1924, wherein was disallowed his claim for difference in salary between $2,500 and $3,000 per

annum from August 5 to August 31, 1924, while an employee of the Bureau of Internal Revenue, estate tax division, on account of change in grade from P-2 to P-3.

It appears from the record in the case that on June 30, 1924, the position then held by claimant was allocated by the Classification Board to P-2 and his salary adjusted to $2,500 per annum. On August 5, 1924, a vacancy having occurred in grade P-3 and the claimant being deemed qualified to fill the same, there was forwarded to the Classification Board a sheet describing new duties and purporting to assign him to a position already allocated to grade P-3 by said board. Notice of the change in grade was received in the Bureau of Internal Revenue from the board on September 2, 1924. The bureau, treating this either as an original allocation or a reallocation of the position by the board, adjusted claimant's pay at $3,000 per annum beginning September 1, 1924, in conformity with decisions of this office holding that allocation may be given effect only for the pay period current upon the date of receipt by the administrative office of the allocation, whether it be an original allocation or an allocation resulting from an appeal. 4 Comp. Gen. 280; *id.* 395. Subsequent to the receipt from the Classification Board of the change in grade of the claimant, same was reported to the Secretary of the Treasury, who approved it September 30, 1924, effective September 1, 1924.

Change in grade in the present case differs materially from either an original allocation of position by the Classification Board or a reallocation upon reconsideration by said board. It is a promotion of an employee from a position in a lower to one in a higher grade, both positions having previously been allocated to respective grades. The matter of filling positions after they have been allocated to proper grades is one for the consideration of the head of the department in which the persons involved are employed and not one falling under the jurisdiction of the Classification Board. That is to say, after a position has once been allocated by the board based on the described duties in the classification sheet, regardless of the name at the top thereof, or whether there is any name at the top thereof, appointments or promotions to that position when it becomes vacant need not be reported to the Personnel Classification Board as a matter of statutory requirement, or as necessary to make the appointment or promotion effective, and if nevertheless reported, should be considered merely as advising the board relative to the status of the position, and not as requiring or justifying any reallocation.

The qualifications of individuals for appointment and promotion to vacant positions which have already been allocated is a matter for consideration of the administrative office and the Civil Service Commission.

If the position involved in this case had been of the class to which the law authorizes appointments or promotions by the Secretary of the Treasury only, the promotion would not have been effective until the date of the Secretary's action, and accordingly payment at the increased rate would have been authorized from September 30, 1924, only. But it is understood from the record that the position involved is of the class to which appointments and promotions are authorized by "the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury." See act of March 3, 1917, 39 Stat. 1091, and act of July 3, 1918, 40 Stat. 779. Such being the case, it would have been within the administrative discretion of the Secretary to approve the promotion as effective from the date of entrance upon duty after action by the commissioner. 3 Comp. Gen. 559. But since the approval was not so made, the Secretary's action specifically making the promotion effective from September 1, 1924, it must be held that the promotion was effective from that date only and that payment of the increased compensation from an earlier date is not authorized.

Upon review the settlement is sustained.

(A-9342)

CLASSIFICATION OF CIVILIAN EMPLOYEES—MIXED DUTIES

Employees whose paramount duties are those of automobile mechanics or machinists, together with their skilled helpers, are employed in a "recognized trade or craft," and as such are excepted from the provisions of the classification act of March 4, 1923, 42 Stat. 1489.

The status with respect to the classification act of employees whose duties are divided between those of a class subject to the classification act and those in a "recognized trade or craft" is dependent upon the paramount duty of the position held, which question is primarily for determination of the Personnel Classification Board on the reports of the administrative office.

Acting Comptroller General Ginn to the Secretary of the Treasury, May 20, 1925:

I have your letter of April 21, 1925, requesting decision whether compensation of employees occupying the positions of automobile mechanic or machinist and skilled helper to automobile mechanic in the Bureau of Engraving and Printing is for determination under the provisions of the classification act of 1923.

Section 5 of the classification act of March 4, 1923, 42 Stat. 1489, provides in part as follows:

> That the compensation schedules * * * shall not apply to employees in positions the duties of which are to perform or assist in apprentice, helper, or journeyman work in a recognized trade or craft and skilled and semiskilled laborers, except such as are under the direction and control of the custodian of a public building or perform work which is subordinate, incidental, or preparatory to work of a professional, scientific, or technical character * * *.

The question here for determination is whether the duties of an automobile mechanic or machinist and his skilled helper can be regarded as embraced within the clause "apprentice, helper, or journeyman work in a recognized trade or craft and skilled and semiskilled laborers," as used in the act.

The positions have heretofore been allocated to grades 5, 6, and 7 of the custodial service. You describe the duties of those in grades 6 and 7 as follows:

> To repair and rebuild motors, transmissions, and differentials; to fit parts of motors, such as bearings, bushings, starters, generators and other equipment. (The Bureau garage is required to keep two types of cars in repair, gasoline and electric. Of the gasoline type there are about six different makes of passenger cars and trucks.)

You describe the duties of the one position in grade 5 as follows:

> To remove motors from chassis, disassemble motors and replace rebuilt motors on chassis, to tighten fenders, adjust wheels, install fan belts, change spark plugs, and assist mechanics.

It is understood that the duties of these positions do not require services as chauffeur or other duties "under the direction and control of the custodian of a public building." Automobile mechanic or machinist would appear to be in a recognized trade or craft. It requires specialized training, experience, and skill to occupy such a position, and is considered as a manual pursuit or employment as distinguished from a clerical. Any duties described under the various grades in the custodial service in the classification act, which might be construed to include those of a trade or craft, have reference to the positions mentioned in section 5 in the clause "except such as are under the direction and control of the custodian of a public building" which are subject to classification. From the descriptions which you now submit of the duties of these positions they do not appear proper for classification under grades 5, 6, and 7 of the custodial service. See the outline of duties under said grades in the classification act of March 4, 1923, 42 Stat. 1497, and the specifications for positions in said grade as prescribed by the Personnel Classification Board.

It may be held generally that where the duties of a position are exclusively those of an automobile mechanic or machinist, or his skilled helper, compensation of employees occupying such positions may be paid under rules and regulations of the administrative office without regard to the schedules fixed in the classification act.

Where the duties of an individual position are such as to be partly excluded and partly included under classification, the paramount duties of the position must control, and the findings of the Personnel Classification Board based on the reports of the administrative office must in general be accepted as finally determining the matter.

While it would appear from your statements that the positions submitted properly might be considered as excluded from classification, it is suggested that the question be submitted to the Personnel Classification Board in the light of this decision holding generally that automobile mechanics and machinists and their skilled helpers may be regarded as in a recognized trade or craft and as such excluded from classification.

(A-8669)

NAVY PAY—PROMOTION—PRIOR FAILURE ON PROFESSIONAL EXAMINATION

Where an ensign eligible for promotion to lieutenant (junior grade) after three years' service, whose examination is delayed through no fault of his own, is not found qualified professionally, is suspended from promotion for six months under section 1505, Revised Statutes, as amended, and on his second examination is found professionally qualified, he is entitled to pay of the higher grade from the date stated in his commission, if such date is not prior to six months after the date of his original eligibility for promotion.

The General Accounting Office has the same jurisdiction as the courts to inquire whether there has been compliance with substantive law regulating the creation of a status entitling an officer of the Navy to pay and allowances.

Decision by Acting Comptroller General Ginn, May 21, 1925:

Frank W. Rasch, lieutenant, United States Navy, requests review of settlement 034240, dated January 9, 1925, of his claim for difference between the pay and allowances of ensign and lieutenant (junior grade), United States Navy, from June 30, 1922, to March 23, 1923, due to promotion from ensign to lieutenant (junior grade) to rank from June 30, 1922. The settlement disallowed the claim and charged claimant with such difference of pay received by him from March 24, 1923, to January 21, 1924, on the ground that he was not entitled to the pay of a lieutenant (junior grade) prior to January 22, 1924, date he qualified for promotion by passing the required examination.

The records show that Lieutenant (Junior Grade) Frank W. Rasch failed on his first professional examination on April 30, 1923, and was suspended from promotion for a period of six months on June 4, 1923, in accordance with the provisions of section 1505, Revised Statutes, as amended by the act of March 11, 1912. He was again examined professionally on January 22, 1924, and qualified. He qualified physically as required by section 1493, Revised Statutes, on both of these examinations. He completed three years' commissioned service on December 31, 1921, and as a result of his professional failure and suspension from promotion he was given rank as lieutenant (junior grade) to date from June 30, 1922.

In the case of officers of the Navy eligible for promotion by length of service only and who on their first examination for promotion fail professionally and are suspended from promotion pursuant to section 1505, Revised Statutes, as amended by the act of March 11, 1912, 37 Stat. 73, there has been a diversity of opinion as to when the officer is entitled to pay in the higher rank when after the suspension he passes the required examination. The extreme view is that under the terms of the act of March 4, 1913, 37 Stat. 892, the only question for ascertainment by the accounting officers is the date stated in the officer's commission. The act of 1913, cited, provides:

> That all officers of the Navy who, since the third day of March, eighteen hundred and ninety-nine, have been advanced or may hereafter be advanced in grade or rank pursuant to law shall be allowed the pay and allowances of the higher grade or rank from the dates stated in their commissions.

This view finds some support in the case of *Smith* v. *United States*, 50 Ct. Cls. 244, where the court, speaking by Judge Barney and referring to the provisions of section 1562, Revised Statutes, and the act of March 4, 1913, says:

> * * * These provisions of the law are so absolutely inconsistent that they can not both stand and be construed *in pari materia*, and the one last enacted must stand as the law.
>
> If the latter act means anything it was intended by Congress thereby to confer upon the appointing power the right to name the date from which an officer advanced in grade or rank should take such grade or rank * * * This is the plain language of the law, and we see no reason for going afield to give it any strained construction even if we were allowed that privilege.

Its judgment in that case seems to be in accord with the view thus expressed, the court adding, however, that the Navy Department's determination of the date stated in the commission "was but doing him justice."

In the case of *Crapo* v. *United States*, 50 Ct. Cls. 337, the court, speaking by Judge Booth, says:

> We are not called upon in the face of the record to determine whether the claimant would be entitled to the benefits of the act of March 4, 1913, if there had been no vacancy to which he could have been advanced, because in our view of the case there was a vacancy in the rank and grade to which he was advanced * * * The claimant having been appointed in pursuance of law to the office for which he was commissioned, it follows that under the act of March 4, 1913, he is entitled to the pay and allowances of the same from the date stated in his commission.

The Smith case was decided April 19, 1915, and the Crapo case May 24, 1915, but in that short period it will be observed the court, notwithstanding its broad language in the Smith case, determines in the Crapo case that the appointment was "in pursuance of law," and because of that fact the act of March 4, 1913, entitled the petitioner to pay from the date stated in the commission.

In *Toulon* v. *United States*, 51 Ct. Cls. 87, the court further restricted its language in the Smith case, and by Chief Justice Campbell said:

It may be urged with considerable force that where there has been an advancement in grade or rank at all, if at that time any advancement could be made, it should, under the terms of the statute, be held that he has been advanced "pursuant to law," and therefore that he is entitled to be paid from the date stated in his commission, because the statute so says. But this would lead to a too literal view of the act. The date which the statute contemplates would be stated in the commission is that upon which the officer becomes eligible to promotion, because the statute regulates the pay during the period of constructive service, and therefore the court's attention must be directed to the date when such constructive service can begin pursuant to law. It is true that the ascertainment of that date is confided in the first instance to the appointing power. The language of the court in *Smith's case*, 50 C. Cls. 244, 249, that "it was intended by Congress thereby to confer upon the appointing power the right to name the date from which an officer advanced in grade or rank should take such grade or rank and to receive pay and allowances accordingly" implies, as a matter of course, that in so naming the date positive law is not ignored. "The law fixes the officer's status." *Crapo's case*, 50 C. Cls. 342. "All the officers of the Government from the highest to the lowest are creatures of the law, and are bound to obey it," per Mr. Justice Miller, in *Kaufman* v. *Lee*, 106 U. S. 196, 220. We would not hesitate to say that the advancement in grade or rank of an assistant surgeon within the prescribed three years' service would not be an advancement pursuant to law within the terms of the act of 1913, unless it were for some exceptional cause authorized by law. And for the like reason we can not say that an advancement within the six months of suspension would be "pursuant to law." * * *.

In *Downes* v. *United States*, 52 Ct. Cls. 237, the court, speaking by Chief Justice Campbell, and addressing itself to a claim from date stated in the commission solely under the provision of the act of March 4, 1913, says:

* * * We have had occasion in several cases to consider the effect of that act. *Smith case*, 50 C. Cls. 244; *Crapo case*, 50 C. Cls. 342; *Toulon case*, 51 C. Cls. 87. There is no inconsistency between these cases. The court has not held, and does not now hold, that said act authorizes the fixing of a date in the commission from which the rank begins which is controlling on the court regardless of whether the promotion was made pursuant to law or not * * *.

* * * In both the Smith and Crapo cases it appeared that the claimant was eligible to promotion on the date stated in the commission, and effect was given to the commission accordingly. But in the Toulon case the claimant was not eligible to promotion on the date stated in the commission, and the court refused to give recognition to the erroneous date * * *.

In the case of *Hooper* v. *United States*, 53 Ct. Cls. 90, a claim for pay and allowances from date stated in the commission, the court, speaking by Judge Hay, says, on page 94:

* * * The question involved is, Was the plaintiff advanced in grade or rank "pursuant to law?"

And on page 96:

* * * The mere fact that his commission was dated June 27, 1915, can not control the pay and allowances to be received by him, for if it did it would then be in the power of the executive branch of the Government to nullify an act of Congress by arbitrarily writing a date in a commission, although that commission was not issued in pursuance of law * * *.

There were three concurring opinions in this case. The following is quoted from that of Chief Justice Campbell, page 106:

Having announced in the *Crapo case*, 50 C. Cls. 337, and the *Toulon* and *Downes cases*, *supra*, that the court had the right, and would exercise it, to examine into the legality of promotion it was plainly implied, and may now be stated again, that cases brought under the provisions of the act of March 4, 1913, must largely depend upon the facts of the particular case * * *.

The extensive quotations from the decisions of the Court of Claims in cases arising under the identical provision of law here in question have seemed appropriate because of the frequent urging that the determination of the status of an officer of the Navy is a function of the Secretary of the Navy which is not open to question by the accounting officers. The Court of Claims, it will be observed, is not bound by the finding or action of the Secretary of the Navy in this respect. Indeed, in the Hooper case counsel for the Government conceded the correctness of the petitioner's proposed findings of fact, but referred to the Treasury report on file. That report being all the evidence in the case, the findings of fact by the court were based thereon with the statement that the admissions of counsel are not controlling and reached its conclusion contrary to the determination of the Secretary of the Navy. The Secretary of the Navy thereafter addressed certain questions to the Court of Claims in connection with the case of Hooper which the court declined to answer. See 53 Ct. Cls. 370.

If, therefore, the action of the Secretary of the Navy in fixing the date is conclusive on the accounting officers there are two bases of settlement of claims for pay and allowances. One in the Navy Department, effect being given to the department's conclusions by settlements of the accounting officers, and the other in the courts, where independent and uncontrolled determinations of the rights of officers under applicable laws are made. If this is a sound view, few cases requiring the court's consideration for the protection of the Government will reach the court. All of the cases cited were filed in the Court of Claims after adverse action by the accounting officers; in the Toulon case the accounting officers were sustained in part, and in the Hooper case, which was practically undefended by the Government, the accounting officers were sustained entirely. It would therefore seem too plain for argument that if the interests of the Government, as well as of claimants, are to be adequately protected, whatever inquiry is proper for the courts in determining the legal rights of claimant is a proper subject of inquiry by the accounting officers, and where law regulates the creation of a status entitling to pay and allowances this office has jurisdiction to inquire whether the laws authorizing the creation of the status have been complied with. This claim can not be allowed solely under the act of March 4, 1913, and it is necessary to inquire whether the date stated in the commission is the date contemplated; that is, in the language of the Court of Claims, whether the claimant was promoted in pursuance of law.

Section 7 of the act of March 3, 1899, provides:

* * * Officers, after performing three years' service in the grade of ensign, shall, after passing the examinations now required by law, be eligible to promotion to the grade of lieutenant (junior grade) * * *.

Section 1496, Revised Statutes, provides:

No line officer below the grade of commodore, and no officer not of the line shall be promoted to a higher grade on the active list of the Navy until his mental, moral, and professional fitness to perform all his duties at sea have been established to the satisfaction of a board of examining officers appointed by the President.

Section 1562, Revised Statutes, provides:

If an officer of a class subject to examination before promotion shall be absent on duty, and by reason of such absence, or of other cause not involving fault on his part, shall not be examined at the time required by law or regulation, and shall afterwards be examined and found qualified, the increased rate of pay to which his promotion would entitle him shall commence from the date when he would have been entitled to it had he been examined and found qualified at the time so required by law or regulation; and this rule shall apply to any cases of this description which may have heretofore occurred. And in every such case the period of service of the party, in the grade to which he was promoted, shall, in reference to the rate of his pay, be considered to have commenced from the date when he was so entitled to take rank.

While the Court of Claims in the Smith case held that this section was repealed by the act of March 4, 1913, in the Toulon case it asserted jurisdiction to go back of the date stated in the commission and in its statement of facts it is stated that the officer completed his three years' service required for promotion December 3, 1910, but "his examination was delayed without fault on his part until October 9, 1911," and on page 91 the court says:

Clearly at the end of three years' service the officer becomes eligible to promotion, subject to examination. Though his examination be delayed, he takes his rank from the date he becomes eligible to promotion if he passes his examination, and under the provisions of section 1562 he, meeting its condition, may also get the pay of his rank from that date * * *.

It appears evident from the later cases cited that the court's reason for holding in the Smith case that section 1562, Revised Statutes, had been repealed by implication by the inconsistent provision of the act of 1913 has been abandoned; there seems to be no repugnancy between the two statutes and they may be properly considered as in *pari materia.*

Section 1505, Revised Statutes, as amended by the act of March 11, 1912, 37 Stat. 73, provides:

Any officer of the Navy on the active list below the rank of commander who, upon examination for promotion, is found not professionally qualified, shall be suspended from promotion for a period of six months from the date of approval of said examination, and shall suffer a loss of numbers equal to the average six months' rate of promotion to the grade for which said officer is undergoing examination during the five fiscal years next preceding the date of approval of said examination, and upon the termination of said suspension from promotion he shall be reexamined, and in case of his failure upon such reexamination he shall be dropped from the service with not more than one year's pay: *Provided,* That the provisions of this Act shall be effective from and after January first, nineteen hundred and eleven.

Prior to its amendment in 1912, section 1505, Revised Statutes, provided:

Any officer of the Navy on the active list below the grade of commander, who, upon examination for promotion, is not found professionally qualified, shall be

suspended from promotion for one year, with corresponding loss of date when he shall be reexamined, and in case of his failure upon such reexamination he shall be dropped from the service.

The changes made by the amendment included a reduction of the period of suspension, a definite fixing of the date from which such suspension operates, a reduction in, and change of method for determining, the loss of numbers or "loss of date," and the provision for a year's pay when dropped from the Navy on a failure on reexamination.

The Court of Claims in the case of *Austin* v. *United States*, 20 Ct. Cls. 269, in construing the original provision held that an officer who failed professionally on the first examination and claimed pay of the advanced grade after one year from the date upon which he would have been promoted had he not failed, held that section 1562, Revised Statutes, in giving increased rank for pay purposes from the date entitled to promotion where the examination therefor was delayed without fault on the part of the officer, gave such right on the presumption of competency, but that where the officer's failure on the first examination subsequent to the date of eligibility for promotion demonstrated his incompetency, the presumption of competency contemplated by the statute was repelled and that the officer was entitled to pay only from the date he qualified by passing the second examination.

It is to be observed that the statutory penalty has a double aspect. It provides (1) an immediate suspension from promotion and (2) for a loss of numbers, which after the expiration of the period of suspension does not militate against the officer's promotion to the next higher grade where promotion is by reason of length of service alone, but does operate to defer future promotions based on seniority, the officer's loss of numbers requiring his being placed below officers to whom otherwise he would be senior.

The Comptroller of the Treasury adopted the view of the Court of Claims in the Austin case under the amended law. See in re *Canine*, 22 Comp. Dec. 623. The matter subsequently came before the Court of Claims on the claim of *Toulon* v. *United States*, 51 Ct. Cls. 87 (theretofore denied by the Comptroller of the Treasury, decision of October 15, 1913, 67 MS. Comp. Dec. 194). The court called attention to the great variation in the penalties inflicted upon officers where there was a delay in the examination through no fault of the officer, in Toulon's case 10 months, so that on his failure, by applying the rule announced in the Austin case, the suspension from promotion would be 16 months, not 6 months, as the statute prescribed, while in the usual case where the officer is examined immediately prior to or very shortly after eligibility for promotion the suspension would be for the statutory period alone, and held that a

date of rank 6 months after the original eligibility constituted a promotion in pursuance of law.

Some confusion has arisen by reason of reference to statutes giving a right to pay from date of eligibility or vacancy where there was a delay in examination; for example, section 1562, Revised Statutes, and the act of June 22, 1874, 18 Stat. 191, the courts having described this right to pay in the higher grade or rank from an anterior date as a "constructive" promotion as distinguished from the actual promotion as the result of the delayed examination or, as in the Austin case, on a presumption of qualification which is repelled by the fact of failure in the examination after date from which the presumption originally attached. But whatever may have induced enactment of the law giving pay from such anterior date, it gives the pay, and where, under section 1505, a definite period of suspension is provided, that period of suspension should operate uniformly, not 6 months in one case, 10, 15, or 20 months in other cases. The statute does not contemplate this inequality of treatment. Where the delay in the examination is not due to the fault of the officer, the statutory period of suspension should not be modified and the officer charged with an excessive penalty, in direct violation of the terms of section 1562, Revised Statutes, where he fails on his first professional examination and after the period of suspension required by the statute is again examined and found qualified. In classes of cases such as herein described this office holds, in agreement with the Court of Claims in the Toulon case, that where the date of rank is stated 6 months after the date the officer was originally eligible for promotion on passing his second professional examination, for pay purposes he has been promoted in pursuance of law and is entitled to pay from the date stated in his commission under the act of March 4, 1913. Contrary decisions of the accounting officers will not be followed hereafter.

Settlement of the claim of Lieutenant Rasch will be made accordingly.

(A–8848)

PRIVATE PROPERTY—LOST OR DAMAGED BY FOREST SERVICE—GRATUITOUS BAILMENTS

Under the act of March 4, 1913, 37 Stat. 843, the owners of horses, vehicles, or other equipment loaned gratuitously to the Forest Service, pursuant to requests of employees of that service for use on official work may be reimbursed for loss or destruction of or damage to such property while being so used on official work. 21 Comp. Dec. 153, distinguished.

Acting Comptroller General Ginn to the Secretary of Agriculture, May 21, 1925:

I have your letter of March 31, 1925, setting forth at length the difficulties encountered in connection with unavoidable damages to privately owned equipment borrowed without charge from ranchers and others for use of the field forces of the Forest Service. You state that for various reasons the owners often prefer to lend such equipment without charge and it is felt that they should be reimbursed for damages to their property since the loan was for the sole benefit of the Government, but that doubt has arisen as to your right to do so by reason of the decision of the former Comptroller of the Treasury reported in 21 Comp. Dec. 153.

The act of March 4, 1913, 37 Stat. 843, provides:

> * * * the Secretary of Agriculture is authorized to reimburse owners of horses, vehicles, and other equipment lost, damaged, or destroyed while being used for necessary fire fighting, trail, or official business, such reimbursement to be made from any available funds in the appropriation to which the hire of such equipment is properly chargeable.

In the case forming the basis of the decision in 21 Comp. Dec. 153 certain wagons belonging to employees of the Forest Service had been furnished by them voluntarily and on their own initiative and used on the work of the Forest Service, resulting in damages to the wagons for which the employees claimed reimbursement covering the cost of repairs. Based on this state of facts, the former Comptroller of the Treasury denied the claims, stating as follows:

> * * * It would thus appear that the employees furnished the wagons solely pursuant to their own judgment, and however commendable their action in so doing may have been from the standpoint of economy and public-spiritedness, it is apparent that they acted as volunteers, and that as such they are not entitled to reimbursement for damages to their wagons so voluntarily furnished * * *.

Where, however, the horses, vehicles, or other equipment are loaned by other than Government employees on request of employees of the Forest Service, the case is distinguishable from the case decided in 21 Comp. Dec. 153, referred to above. See 3 Comp. Gen. 117; 27 Comp. Dec. 131 and 759. While the decision in 21 Comp. Dec. 153, commented on the necessity of a contract for the hire of the equipment it is believed that such a requirement was merely for the purpose of establishing the real nature of the bailment. Where, therefore, horses, vehicles, or other equipment are loaned to the Forest Service, pursuant to requests of employees of that service for the use of such property on the official work of the service, and such property is lost, damaged, or destroyed while being so used, the act of March 4, 1913, *supra*, confers authority to reimburse the owners therefor. The fact that the use of the property was requested for the Forest Service by an employee thereof should appear on the voucher making such reimbursement, together with a complete statement as to the circumstances of the loss or damage.

I would invite attention to the showing of facts necessary to be made and the rule to be followed, as set forth in decision of this office February 26, 1925, 4 Comp. Gen. 713, wherein it was said as follows:

The duties of the General Accounting Office relate specifically to the settlement of all claims and demands by or against the United States and the adjustment of accounts in which the United States appears as debtor or creditor. These duties necessarily involve the uses and availability of appropriations; and while in the performance of these duties, particularly in view of the present system of Government disbursements, the action taken is not initially by the General Accounting Office but by the administrative office concerned, yet action in the matter eventually and finally must be by the General Accounting Office. The duties of the General Accounting Office are pursuant to permanent substantive law applicable generally, so that appropriation authority or other legislative authority does not require the express reenactment of or specific subjection to such accounting duties, but on the contrary it would be necessary for express and specific statutory provision to appear to remove from the jurisdiction attendant upon the performance of such accounting duties. The authority given by the appropriation provision was primarily administrative, the same as any other administrative authority. The purpose was to give an administrative authority and there was neither purpose nor need to exclude the accounting duties; and the permanent substantive law relating to accounting for public funds must attach to the administrative authority given by the appropriation provision. The one need not, must not, take from the other.

The real and practical question apparently involved concerns the performance of the administrative authority so as to meet accounting requirements. The basic administrative course is limited to matters within the law of the appropriation. The basic accounting requirement is the examination of the matters to determine that the administrative course was within the law of the appropriation. Hence, in a claim for damages compromised under the appropriation authority there must appear facts showing that it was "by reason of the operations of the United States, its officers or employees, in the survey, construction, operation, or maintenance of irrigation works." The basic condition must always appear that there was a claim of the character specified by the law; and probably therein lies the most of administrative difficulty. If there be doubt of the claim being within the law the matter may be submitted to the Comptroller General for decision in advance of payment as authorized by law. Act of July 31, 1894, 28 Stat. 208. Likewise, the facts must support the amount claimed and thus also support the amount agreed upon in compromise.

(A–9212)

BURIAL EXPENSES OF VETERANS OF ANY WARS

The payment of burial expenses of a veteran of any war which the Veterans' Bureau is authorized by the act of March 4, 1925, 43 Stat. 1305, to make when the deceased did not leave sufficient assets to meet the expenses of burial, funeral, and transportation of the body, is limited to amounts actually and necessarily expended not in excess of $100, exclusive of flag, and not in excess of the difference between $100 maximum and the aggregate of the lesser amount of assets, if any, left by deceased and the amounts, if any, allowed for burial of the deceased by the several States or other political subdivisions, organization, or homes.

In computing the assets left by a deceased veteran of any war to determine the liability of the Veterans' Bureau for his burial expenses under the act of March 4, 1925, 43 Stat. 1305, there should not be taken into consideration any accrued pension, compensation, or insurance; any unpaid bonus from the United States or any State or other political subdivision when not payable to the veteran's estate; any unpaid amount under the adjusted compensation act when not payable to the veteran's estate; and any and all claims of life insurance on the life of the deceased payable to a desig-

nated beneficiary unless the designated beneficiary took out the policy without having an insurable interest in the life of the deceased.

The expenditures which may be reimbursed as burial expenses when expressly permitted by regulation and within the maximum amount allowed by the law and regulations may include reasonable and necessary minister's fee and reasonable and necessary payments to watchers and pallbearers when such services are not performed gratuitously.

Acting Comptroller General Ginn to the Director, United States Veterans' Bureau, May 21, 1925:

I have your letter of April 18, 1925, forwarding for consideration and approval proposed regulations governing "Burial and funeral expenses and transportation of bodies of veterans," necessitated by the act of March 4, 1925, 43 Stat. 1305, amending the World War veterans' act.

Each section has been given consideration and in the light of contentions made in your submission relative to past decisions of this office.

There would appear to be no legal objection to the proposed sections 8102, 8103, 8104, 8106, and 8108.

Section 8105 (2) proposes to provide as follows:

(2) For the purpose of this section the amount to be paid by the bureau will not exceed the difference between any assets left by the deceased and the actual expenses of funeral, burial, and transportation of the body, such difference not to exceed $100.00, exclusive of flag.

The decisions of this office governing past practice have held that the obligation of the Government for burial expenses is only for the difference between any assets left by the deceased and the sum of $100, exclusive of flag. 4 Comp. Gen. 501–503. You state that the effect of the quoted provision will be as follows:

Under this provision it will be possible to pay any amount up to $100.00 in any case where the veteran, in the judgment of the director, leaves insufficient assets to defray burial and funeral expenses. The language of the amendment surely indicates an intention on the part of Congress to make the allowance payable in any case where the facts show that the assets left by the deceased are inadequate to defray funeral and transportation expenses, leaving it to the director to determine when that condition exists.

The language of the act of March 4, 1925, *supra*, to which you refer, provides:

* * * and does not in the judgment of the director leave sufficient assets to meet the expenses of burial and funeral and the transportation of the body, the United States Veterans' Bureau shall pay * * * a sum not exceeding $100 to cover such items and to be paid to such person or persons as may be fixed by regulations * * *.

It is apparently your contention that the maximum of $100 may be paid over and above what assets may be left by the deceased if there is a difference of $100 between the amount of assets left and the actual expenditure for funeral or burial expenses. The sum of $100 has expressly been fixed as the maximum the Government will pay for the burial of a person dying while in the military or naval service of the United States, or for a veteran dying while under the jurisdiction of the Veterans' Bureau, in which cases sufficiency of

assets is not a factor. To authorize payment by the Government to the full amount of $100 in cases where sufficiency of assets is a factor, would to a great extent destroy the distinction which Congress has sought to establish between the two classes. An examination of the hearings on the act of March 4, 1925, particularly the statement of the Director of the United States Veterans' Bureau, discloses that the amount of $100 had been determined to be the reasonable cost of a funeral and burial to the Government. The director endeavored before the committee to show the necessity for and to obtain an increase to $125, but his recommendation was not adopted. The same limitation of $100 was made both as to persons buried by the Government and in payment of claims for reimbursement, but in the latter case with the stipulation as to the sufficiency of assets in the class of beneficiaries specified in the act. In practically all States funeral expenses are preferred claims against the estate of the deceased, and it is believed that this is what Congress had in mind when requiring the assets to be shown in certain cases. Accordingly I am constrained to hold that the sufficiency of assets has relation to the limitation of $100 and not to the total expenditure for the funeral or burial expenses. See also decision of May 14, 1924, A–8265. I have to advise therefore that paragraph (2) of section 8105 should be eliminated entirely or amended to read as follows:

(2) For the purpose of this section the amount to be paid by the bureau will not exceed the difference between any assets left by the deceased and the sum of $100, exclusive of flag.

Section 8105 (6) proposes to provide as follows:

(6) In determining the sufficiency of assets for burial and funeral expenses under the provisions of this section the following amounts will not be taken into consideration:
(a) Accrued pension, compensation, and insurance.
(b) Bonus from the United States, any State, or other political subdivision, when not payable to the veteran's estate.
(c) Any amount under the adjusted compensation act, when not payable to the veteran's estate.
(d) Any amounts allowed by the several States, or other political subdivisions of the United States, for burial.
(e) Amounts provided by national military homes.
(f) Amounts provided by the War or Navy Departments, including the Marine Corps.
(g) Any and all classes of insurance payable to a designated beneficiary.

The items under (a) have been expressly excluded from consideration as assets by the controlling statute. Assuming that the items under (b) and (c) relate to amounts unpaid at date of death they may not be considered as assets of estate of deceased veteran. To leave no room for doubt as to what is intended I suggest that the word unpaid be inserted before the word "bonus" under (b) and after the word "any" under (c). Items under (d) and (e) are not assets of the estate, it is true, but it must be borne in mind that

a claim against the United States lies only for amounts actually expended on behalf of indigent veterans, and no payment is authorized merely upon the showing of death. If the burial has been taken care of free of charge by a State or other political subdivision of the United States, or by a national military home, no claim may be asserted against the United States by the relatives or personal representatives of the deceased, except for actual and necessary expenses over and above the amounts allowed by the State, other political subdivision, or home, and the amount of assets left by the deceased. Therefore the provision as to items (d) and (e) should be eliminated under paragraph (6) of section 8105, and there should be inserted under paragraph (3) of the same section, which includes the information to be furnished in the affidavit by relative or friend, the following:

(h) Whether or not expenses of the burial were entirely or in part paid by a State or other political subdivision, or a national military home.

Relative to item (f) under section 8105 (6), I know of no statute which authorizes the War or Navy Departments to provide any sum for burial expenses of veterans after separation from the service. This item is misleading and should be omitted, as it might result in the filing of useless claims in the War and Navy Departments or in this office.

In connection with item (g) under section 8105 (6) which proposes to exclude from consideration as assets "Any and all classes of insurance payable to a designated beneficiary" reference is made to 4 Comp. Gen. 501, 503, wherein it was held:

> As to question 3, if the designated beneficiary had an insurable interest in the life of the deceased and the State laws do not make the proceeds of the policy subject to the burial expenses, such proceeds could not be considered assets of the deceased such as would bar payment of the burial expenses by your bureau. However, if the beneficiary had no insurable interest, any proceeds of the policy in excess of the premium paid by the beneficiary are assets of the estate of the deceased and must be applied to his burial expenses * * *.

You state as follows:

> It has been difficult for this bureau to reconcile this statement of the law as to the necessity of insurable interest where the insurance is taken out by the person insured with the doctrine laid down in the decisions of the courts. The law seems well settled that one has an unlimited insurable interest in his own life, and that he may take out insurance thereon and make it payable to whom he will. It is not necessary that the person for whose benefit it is taken out should have an insurable interest. * * *.

It was not the purpose or effect of the decision quoted, *supra*, to question the validity of insurance upon the ground that the beneficiary had no insurable interest in the insured. The decision holds only that the proceeds of insurance in such a case, over and above the amount of premium paid, should be applied to payment of burial and funeral expenses. In view of the amendments to the

law since said decision was rendered, no objection will be made by this office to the proposed provision if changed to read as follows:

(g) Any and all claims of life insurance on the life of the deceased payable to a designated beneficiary, unless the designated beneficiary took out the policy without having an insurable interest in the life of the insured.

Under section 8107 (1) it is proposed to make payment of claims for burial expenses, first, to the person or firm performing the service, and, second, to the representative or relative of the deceased if the person or firm performing the service has been paid. This would appear to be proper where the burial, etc., was arranged directly between the bureau authorities and the person or firm performing the service, and might also be authorized in all cases under the statutes, but I believe the Government's interest would be more closely safeguarded in the reimbursement cases where the sufficiency of assets is a factor by requiring the person or firm performing the service first to demand payment from relatives or the personal representative of the deceased, who are able to show more accurately what assets have been left, which is a requisite to any obligation of the Government. This section should be amended accordingly.

Under section 8107 (2) are listed the items and articles considered as reasonable expenses of preparation, burial, and funeral. Among these items appear "minister's fee," "watchers," and "pallbearers." Ordinarily these items do not involve an expense and the Government should be put to no greater expense than an individual in this regard, and no payment for these items should be allowed unless it is definitely shown as a necessary expense as distinguished from a gratuity, and particularly as to watchers and pallbearers; that is, the service was not otherwise obtainable, in which event the receipts of the minister, watchers, or pallbearers, as the case may be, should be presented. If retained in the regulations, the word "necessary" should be inserted before the three items in question and, for the purpose of uniformity, a limit as to the amount for each should be prescribed. 3 Comp. Gen. 723. This paragraph concludes with "* * * and such other reasonable burial and funeral expenses as may be approved by the officer to whom authority is delegated by the director, not to exceed the maximum allowed by law." The basis for payment of items under this provision must be the *reasonableness* of the burial and funeral expenses, and not necessarily the authorization of the bureau officer.

In paragraph (3) of section 8107 it is noted that section 4078, Revised Statutes, is stated as authorizing burial of veterans in a national cemetery. The correct citation is section 4878, Revised Statutes.

(A–401)

ACCOUNTABILITY FOR PUBLIC PROPERTY—REVISION OF CHARGE RAISED ON ADMINISTRATIVE CERTIFICATE

In order to authorize a revision on the records of the General Accounting Office of a charge raised against a superintendent and special disbursing agent of the Indian Service, on a certificate of the Commissioner of Indian Affairs finding him responsible for the loss of certain public property intrusted to his care, there should be furnished a certificate pursuant to the act of March 29, 1894, 28 Stat. 47, by the Commissioner of Indian Affairs upon whose certificate the charge was originally raised amending the findings of fact as to the value of the lost property.

Acting Comptroller General Ginn to the Secretary of the Interior, May 22, 1925:

I have your letter of March 26, 1925, in which you refer to settlement No. I–20658, dated February 7, 1923, of the final account of M. A. Sutton, superintendent and special disbursing agent, Red Cliff Indian School, Wis., which settlement, pursuant to the request of the Commissioner of Indian Affairs, was by decision of May 8, 1924, A–401, reopened and by settlement C–6009–In, dated June 12, 1924, Mr. Sutton was charged with $200 as representing the amount for which the Commissioner of Indian Affairs had found him chargeable on account of the loss of Government property (a garage) for which he had been responsible. Said settlement was affirmed upon reconsideration by decision of February 19, 1925. You request a revision of the settlement so as to charge Mr. Sutton with $50 instead of $200 for reasons stated as follows:

> Upon a reexamination and reconsideration of the facts concerning this transaction the following appears:
>
> That the garage in question was purchased in July of 1913 at a cost of $200; that this garage has been used by the Government for a number of years; that it has been moved from place to place; and that in 1922, when it was offered for sale, the highest bid received was $50.
>
> In view of the use which the Government has obtained from this garage, its age, and allowing the proper amount for deterioration, it is believed that its commercial value at this time does not exceed $50 and, therefore, that Mr. Sutton should not be required to reimburse the Government for more than its present valuation as determined by the one bid which was received.

The act of March 29, 1894, 28 Stat. 47, provides in part:

> That instead of forwarding to the accounting officers of the Treasury Department returns of public property intrusted to the possession of officers or agents * * * the Commissioner of Indian Affairs, or other like chief officers in any Department, by, through, or under whom stores, supplies, and other public property are received for distribution, or whose duty it is to receive or examine returns of such property, shall certify to the proper accounting officer of the Treasury Department, for debiting on the proper account, any charge against any officer or agent intrusted with public property, arising from any loss, accruing by his fault, to the Government as to the property so intrusted to him.
>
> SEC. 2. That said certificate shall set forth the condition of such officer's or agent's property returns, that it includes all charges made up to its date and not previously certified, that he has had a reasonable opportunity to be heard and has not been relieved of responsibility; the effect of such certificate, when received, shall be the same as if the facts therein set forth had been ascertained by the accounting officers of the Treasury Department in accounting.

The charge of $200 was made in Mr. Sutton's account upon the facts as found and reported by the Commissioner of Indian Affairs. Therefore, in order to make a complete record there should be furnished this office a certificate pursuant to the act of March 29, 1894, *supra*, amending the findings of fact as to the amount of the charge as reported in the commissioner's letter to this office under date of February 28, 1923, and adhered to in his letters of August 1 and 29, 1924.

(A-8008)

NAVY PAY—AVIATION DUTY

When the flight requirements fixed in the Executive order of July 1, 1922, are not complied with during any month, the deficiency must be made up within the two months next succeeding, and if in one of the two succeeding months there has not been compliance with the monthly requirements for that month, the failure in that month is included in the original three months' period and is not the beginning of another three months' period.

Acting Comptroller General Ginn to the Secretary of the Navy, May 22, 1925:

I have your letter of February 12, 1925, submitting proposed changes in section F of the printed "Instructions for carrying into effect the joint service pay bill, act of 10 June, 1922, with request for an expression of views as to whether the proposed changes in so far as they involve disbursements are in conformity with law.

The proposed changes deal with that part of the Executive order which reads as follows:

> 9. Each officer, warrant officer, or enlisted man of the Army, Navy, Marine Corps, or Coast Guard, who is detailed to duty involving flying, shall be required to make at least ten flights or be in the air a total of four hours during each calendar month; provided, that an officer, warrant officer, or enlisted man so detailed, who is unable to meet these requirements during any calendar month for any reason other than sickness or injury, shall be regarded as having met them if he performs a minimum of twenty flights or is in the air a minimum of eight hours prior to the end of the following calendar month; provided further, that an officer, warrant officer, or enlisted man so detailed, who is unable to meet this alternative requirement for any reason other than sickness or injury, shall be regarded as having met this requirement if he performs a minimum of thirty flights or is in the air a minimum of twelve hours prior to the end of the calendar month thereto succeeding. Failure to comply with the foregoing requirements shall have the effect of suspending the detail to duty involving flying, but only for the period during which the foregoing requirements as to flights are not complied with * * *.

Originally the instructions contained the Navy Department's interpretation of the Executive order of July 1, 1922, that no flight pay was payable for, say, the flights of July, August, or September where a record shows 5 flights in July, 12 in August, and 12 in September, for the reason that only 17 in all had been made to August 31, and only 29 to September 30, an aggregate of less than 20 for two months or 30 for three.

In decision of this office December 5, 1924, 40 MS. Comp. Gen. 213, it was held that flight pay was payable for every month in

which, under a detail to duty involving regular and frequent participation in flights, 10 flights or four hours of flying were made irrespective of failure in performance in a preceding or subsequent period.

This decision modified the instructions previously issued in that it held that where there had been a failure in a certain month to acquire the minimum flights required, the right to aviation pay for the next succeeding month was not contingent upon a minimum of 20 flights or 8 hours in the air at the close of the second month; and that where there was a failure in the first month not made up in the second the right to aviation pay for the second succeeding month was not contingent upon a minimum of 30 flights or 12 hours in the air at the close of the third month.

Accordingly a failure to fulfill the flight requirements occurs only when the minimum for a month has not been made, and the failure is not made up within the one or two months immediately following.

In decision of December 5, 1924, it was said:

> Under the regulations and procedure apparently to be followed pursuant thereto, it is intended to benefit an aviator who for some proper reason is unable to make the requisite number of ten flights within a given month. The regulations and the examples set forth therein apparently would deprive the flier of increased pay for a succeeding month or months for which the necessary number of flights appeared. This is not authorized. The requisite number of flights in each of the succeeding months appearing, payment therefor must be made. The combined total has reference only to the month in which the condition arose of nonperformance of the requisite number of flights, and that condition not having been cured within the prescribed period, it follows that for the month in question no increase of pay for flights may be made. But this does not affect the succeeding two months in which the requisite number of flights appeared.
>
> It may be added that if in the second month a similar condition of not having the fixed number of flights appeared, nevertheless such condition could be cured by the required flights during the succeeding or third month, but the number of flights appearing in the third month must determine the right to pay for the preceding two months, and if a total for the three months did not then appear, and only a sufficient number appeared to cover the third month, pay for the preceding two months would not be authorized, but only for the third month. In other words, a new three months' period does not arise by reason of the condition of performance of 10 flights in the second month, but the three months' period is one and continues according to the condition raised by the first month.

The modification in the instructions, with the examples suggested, proposes to include within a new three months' period, months in which the flying requirements were not met where there was an excess over the requirements in a month or months immediately succeeding the three months' period fixed by the first failure to comply with the monthly flying requirements. As stated in the decision of December 5, 1924, this is not permissible. The three months' period was fixed as a period of grace to give the officer an opportunity to comply with the requirements and that period of grace is by the regulations fixed as an entirety so far as noncompliance with the flying requirements is

concerned. To illustrate: One of the examples proposed, described as "*Case 8*," is as follows:

Flights in July	5
Flights in August	8
Flights in September	11
Flights in October	18

Credit flight pay for August, September, and October, as flight requirements for August and September were met in October.

Flight status for July has lapsed because flight requirements were not met in the two months thereafter succeeding.

In this example the officer is entitled to flying pay for September because he performed the required number of flights during that month. He is not, however, entitled to flying pay for August based upon flights made in October as August is included in the three months' period which commenced with July during which the Executive order required that he have the 10 flights per month, or 30 flights during the period. Not having had the 30 flights during the period, he is entitled to flying pay only during the month or months he performed 10 flights or had the requisite time in the air. While the failure in any month creates a right to flying pay upon compliance with the requirements in the succeeding two months, every month in which there is a failure does not commence the running of a new three months' period.

The proposed instructions are not therefore in accordance with the decision of December 5, 1924.

(A–9166)

PERSONAL SERVICES—STENOGRAPHIC REPORTING—UNITED STATES TARIFF COMMISSION

In the absence of specific statutory authority the stenographic reporting of public administrative hearings constituting a part of the regular work of a Government establishment in the District of Columbia is for performance by the regular employees of that establishment employed at rates of compensation specified in the classification act of March 4, 1923, 42 Stat. 1488.

Acting Comptroller General Ginn to the Chairman, United States Tariff Commission, May 22, 1925:

There has been received with your approval request by the secretary and disbursing officer of the United States Tariff Commission for decision of the question whether the commission is authorized to contract on a page basis for stenographic reporting and furnishing copies of the reports of public hearings held by the commission. With regard to the necessity of such services it is stated:

It has been the practice of the commission from the beginning to have its public hearings reported by contract with shorthand reporters equipped for such work. It would be impracticable for the commission to do otherwise without incurring needlessly increased expense to obtain the same service. The reporting of public hearings, including testimony and argument concerning many and diversified technical subjects matter, requires the services of

highly skilled reporters. Furthermore, in order that there may be furnished daily transcripts of the record, it is necessary that three or four reporters shall work in reliefs so that their notes may be transcribed immediately. In order that the requisite number of copies of the transcript may be available, it is necessary that the transcript be made upon stencils for use upon duplicating machines. It is therefore necessary that the reporters shall dictate their notes to phonograph machines, so that several typists may be employed at once in making the stencils, for which work persons experienced in this mode of operation must be employed. All of these facilities are readily obtained at the minimum cost through contract with reporting firms, which are equipped for and can execute work of this character in regular course.

If the Tariff Commission were to undertake to have this work performed through personnel of its own, under present conditions it would be necessary to engage at high salaries qualified reporters who would be unemployed during much of the time. It would be necessary to purchase phonograph machines and supplies which would be idle during much of the time. It would be necessary to add to the staff typists qualified to transcribe from such phonograph machines, as occasion required, directly upon stencil sheets. In the case of hearings held elsewhere than in Washington, it would be necessary for the commission to send all these employees and this equipment to the places of such hearings, and this course would necessitate additional heavy expense. Under its present contract the commission has the benefit of a low rate, because of the advantage allowed to the contractor in permitting him to sell copies of the transcripts to interested parties.

Transcripts of the records in public hearings before the commission are necessary in the work of the commission, as they are the only means, other than of memory, of preserving testimony and argument submitted to the commission. They are requisite to the completion of the record in such proceedings and are therefore a necessary expense to the commission, and no law is known to this office which inhibits the incurrence of such expenses in the administrative discretion of the commission. (See 19 Comp. Dec., 416; also secs. 315, 316, 317, act of Sept. 21, 1922, 42 Stat. L., p. 941.)

The act of August 5, 1882, 22 Stat. 255, prohibits the employment at the seat of government of any employees except pursuant to specific appropriations for such personal services, and prohibits the payment for personal services at the seat of government from any contingent expense, specific, or general appropriation unless such employment is authorized and payment therefor provided in the law granting the appropriation.

As a general rule the reporting of administrative hearings is for performance by the regular employees; there appears an exception where the agency of the Government concerned is of a temporary character as distinguished from a permanent one. Decision of October 14, 1921, 2 MS Comp. Gen. 632, with reference to a hearing by the commission to appraise the Washington Market, as to which it was stated:

> The stenographic reporting required in conducting the hearings is not necessarily connected with the services of the stenographer in an administrative capacity.

In order to authorize the contracting for stenographic reports in the District of Columbia, there must first be an appropriation available for such work and second the hearings must necessarily be of such nature as to preclude an intent that the reporting be done by the regular force of stenographers provided for the establishment.

The appropriation for the Tariff Commission for the fiscal year 1925 in the act of July 7, 1924, 43 Stat. 529, is in the following language:

> For salaries and expenses of the United States Tariff Commission * * * as authorized under Title VII of the Act * * * approved September 8, 1916, and under sections 315, 316, 317, and 318 of the Act * * * approved September 21, 1922, $671,980 * * *.

The act of September 8, 1916, 39 Stat. 795, referred to in the appropriation, created the United States Tariff Commission and provided that—

> * * * it shall have authority to employ and fix the compensations of such special experts, examiners, clerks, and other employees as the commission may from time to time find necessary for the proper performance of its duties.
>
> With the exception of the secretary, a clerk to each commissioner, and such special experts as the commission may from time to time find necessary for the conduct of its work, all employees of the commission shall be appointed from lists of eligibles to be supplied by the Civil Service Commission and in accordance with the civil-service law.
>
> * * * * * * *
>
> SEC. 706. That for the purposes of carrying this title into effect the commission * * * shall have power to summon witnesses, take testimony, administer oaths * * *.

The employees of the Tariff Commission in the District of Columbia have been classified under the classification act of March 4, 1923, 42 Stat. 1488. The authority given the commission by the act of September 8, 1916, *supra*, to employ personal services, does not authorize such employment in the District of Columbia by contract at rates other than as prescribed in the classification act. In view of the specific provision in the law for holding hearings, which apparently constitute a large part of its regular work, it may be presumed that the hearings were intended to be reported by the regular employees of the commission. It appears to have been the practice of the commission for some time to have its hearings reported by contract reporters and as its appropriations for the present fiscal year and the fiscal year 1926 have already been made, the existing practice will be permitted to continue until June 30, 1926. The suspensions in the accounts of John F. Bethune of payments on vouchers Nos. 3221 and 3450 to Smith & Hulse for stenographic reporting, will be removed in accordance with the foregoing.

If considered necessary or desirable to continue the practice of contracting for stenographic reporting of hearings after June 30, 1926, specific legislative authority therefor should be requested from Congress.

(A-9498)

TRANSPORTATION OF OFFICERS AND EMPLOYEES OF FOREIGN SERVICE, THEIR FAMILIES AND EFFECTS, ON AMERICAN VESSELS

The restriction in the acts of May 28, 1924, 43 Stat. 205, and February 27, 1925, 43 Stat. 1018, as to the expenditure of any part of the moneys appropriated for transportation on foreign vessels in the absence of a certificate from the Secretary of State that no American vessels are available is applicable to the families and effects of the officers and employees of the Foreign Service as well as to transportation of the officers and employees themselves. Compliance with such restriction will be required on and after July 1, 1925.

Decision by Acting Comptroller General Ginn, May 22, 1925:

There is for consideration in connection with the settlement of accounts of diplomatic and consular officers the question whether the requirement in the acts of May 28, 1924, 43 Stat. 205, and February 27, 1925, 43 Stat. 1018, of a certificate by the Secretary of State that no American vessels were available as a prerequisite to reimbursement for transportation on a foreign vessel of personnel of the diplomatic and consular service, now known as the Foreign Service, applies also to transportation of effects.

The act of May 28, 1924, *supra*, provides:

> To pay the itemized and verified statements of the actual and necessary expenses of transportation and subsistence, under such regulations as the Secretary of State may prescribe, of diplomatic and consular officers and clerks in embassies, legations, and consulates, including officers of the United States Court for China, and their families and effects in going to and returning from their posts, or of such officers and clerks when traveling under orders of the Secretary of State, but not including any expense incurred in connection with leaves of absence, $275,000: *Provided*, That no part of said sum shall be paid for transportation on foreign vessels without a certificate from the Secretary of State that there are no American vessels on which such officers and clerks may be transported.

The provisions of the act of February 27, 1925, 43 Stat. 1018, appropriating for the fiscal year 1926, are practically identical.

The respective acts appropriate lump sums for the actual and necessary expenses of transportation and subsistence of the various classes of officers and employees named therein and specifically include therein transportation of "their families and effects in going to and returning from their posts." The requirement that no part of the sums appropriated shall be paid for transportation on foreign vessels without a certificate from the Secretary of State that there were no American vessels available is accordingly applicable to transportation of the families and the effects of the officers and employees therein mentioned when going to and returning from their posts as well as to transportation of the officers and employees.

In view of the fact that the wording of the statute is not entirely free from ambiguity and may have resulted in its being given an erroneous construction by the administrative office, this decision will not be applied to require the disallowance of credit for payments

made to foreign vessels without the required certificate for transportation of effects when such transportation was furnished prior to July 1, 1925, and the payments are otherwise legal and proper.

(A-9594)

CLASSIFICATION OF CIVILIAN EMPLOYEES—VACANT POSITIONS

Vacant or newly created positions may not be included in determining the average salary of persons actually employed in the grade unless and until the said positions are filled by appointment, transfer, or promotion, the salary of any vacant position within the grade not being susceptible of definite determination prior to that time.

Acting Comptroller General Ginn to the Chairman, Interstate Commerce Commission, May 22, 1925:

I have your letter of May 8, 1925, requesting decision of a question presented as follows:

When new positions in a professional grade, in this inquiry Grade P 6, have been authorized and duly allocated by the Personnel Classification Board and appropriations have been made therefor, is the salary average within the grade determined by the actual number of persons now employed in that grade or may the total number of authorized positions be taken in computing the average?

The facts are these: On March 3, 1925, the Interstate Commerce Commission, for the purpose of expediting the completion of the valuation of the common carriers in this country within a limited period, and for which purpose an increased appropriation had been provided, created a new major section in its Bureau of Valuation to be known as the examining and reviewing section. A position of principal valuation examiner was created at a salary of $7,500. On March 9, Attorney-Examiner M. A. Pattison, then classified in professional grade 5, and receiving the maximum salary of $6,000 authorized for that grade, was transferred from the Bureau of Formal Cases to the newly created position. The duties of the position were allocated to professional grade 6 by the Personnel Classification Board and the transfer was approved by the Civil Service Commission. On May 4, Mr. Pattison was promoted by a minute of the commission from salary of $6,000 per annum to salary at the rate of $6,500 per annum, effective May 16.

At the time the promotion was made, there was included among the sections comprising the Bureau of Valuation the legal section headed by the solicitor of bureau. This latter position is classified professional grade 6 and the salary paid is $7,500. Provision was made to enlarge this section, seven of the additional employees to be classified in professional grade 6, the positions being now approved by the Personnel Classification Board. Under the law these employees will receive on appointment the minimum salary of $6,000 provided in that grade.

You will note from what has been said that there are now in the Bureau of Valuation nine positions in professional grade 6 authorized by the Interstate Commerce Commission and duly approved by the Personnel Classification Board, of which only two are filled. The recruiting of the personnel to fill these and other vacancies is actively in progress, but up to this writing no permanent appointments other than the one mentioned have been made.

It is upon this statement of facts that your opinion on the above inquiry is sought in order to determine whether the authorized salary of $6,500 may lawfully be paid to the appointee to the position of principal valuation examiner.

The appropriation "Valuation of property of carriers" for the fiscal year 1925, appears in the act of June 7, 1924, 43 Stat. 527, and for the fiscal year 1926, in the act of March 3, 1925, 43 Stat. 1205,

and is to be considered as an appropriation unit within the meaning of the average provision appearing in the same statute restricting payment of compensation to employees in the District of Columbia subject to the classification act.

The basis for computing "the average" is expressly provided to be the "total number of persons under any grade in any bureau, office, or other appropriation unit." Therefore it must be held that the basis is the total number of persons actually employed in a grade and not necessarily the total number of positions, both occupied and vacant, existing therein. 3 Comp. Gen. 1002. A reason for the provision in the law making the persons rather than the positions under the grade the basis is that positions are provided in a grade generally without reference to any particular salary rate. When a vacancy exists the salary of the vacant position is not necessarily at the minimum salary rate or the salary rate received by the last incumbent, but may be fixed by the administrative office in accordance with the rules and regulations pursuant to the classification act at any authorized salary rate within the grade which does not cause the proper average for the grade to be exceeded. 4 Comp. Gen. 127; *id.* 493. For instance, new appointments to vacant positions are required to be made at the minimum salary rate of the grade, but transfers to the grade from other offices and grades in the same office need not necessarily be at the minimum salary rate of the grade, hence until a vacancy is filled there would be no salary rate fixed for the position.

You are advised that newly created positions, or other existing positions may not be included in determining the salary average of persons actually employed in the grade unless and until the said positions are filled by appointment, transfer, or promotion.

So long as only one other person is employed in grade 6 of the professional and scientific service under the appropriation unit in question, and who is paid at the maximum salary rate of $7,500 per annum, M. A. Pattison is entitled to compensation at the minimum salary rate of $6,000 only, and may not be promoted to $6,500 per annum unless and until at least one other existing vacancy in that grade has been filled, and then only if such promotion, together with the salary rate of the additional employee, does not cause the mathematical average of salary rates for the grade, viz, $6,750 per annum, to be exceeded.

(A-8033)

ADVERTISING—ACCEPTANCE OF OTHER THAN LOWEST BID

When, in response to advertisements for proposals for an automobile to meet certain specifications, bids are submitted on three makes of cars at different prices but within the advertised specifications, an administrative determination by the head of the executive department or establishment that one of the automobiles other than the lowest priced one is best adapted to the particular needs of the service for which desired may be accepted as sufficient reason for the acceptance of other than the lowest bid.

Decision by Acting Comptroller General Ginn, May 23, 1925:

Byron A. Sharp, superintendent and special disbursing agent, Indian Service, requested February 2, 1925, removal of suspension against credit of $170.43 claimed on his voucher No. 10, June, 1924, accounts, as a part of the payment of $650 to the highest bidder, Sagar-Baynard Chevrolet Co. for one Chevrolet touring car.

Under date of June 6, 1924, the superintendent of the Umatilla Indian School, Pendleton, Oreg., advertised for proposals for furnishing to the school one new, light-weight, five-passenger touring car, equipped with a self-starter, demountable rims, one extra rim, and tire carrier. The Robert Simpson & Co. submitted a proposal to furnish a Ford touring car for $479.43; M. K. Long submitted a proposal to furnish a Star touring car for $580 or the same car with four-wheel brakes for $617; and the Sagar-Baynard Chevrolet Co. submitted a proposal for furnishing a Chevrolet touring car for $650. The three proposals were submitted to the Secretary of the Interior, and by letter dated June 24, 1924, the superintendent was directed to accept the proposal for furnishing the Chevrolet car. Credit for $170.57 of the payment of $650 for the Chevrolet car was suspended in the audit of the disbursing agent's account for reasons as follows:

> The agent gives as reasons for accepting highest bid that the Star is a new car on market and has not proved its worth and that the Ford "* * *. The parts wear out rapidly, and proportional to its first cost the repair bills are heavier than many other cars."
>
> The reasons given for not accepting the lowest bid appear to be based on the personal opinion of the agent and are not sufficient to show that the best interests of the Government were served.
>
> In Review No. 4764 of Aug. 16, 1923, it was held as follows:
>
> "The bid of the lowest responsible bidder should be accepted and a disbursing officer is not entitled to credit for the excess paid for supplies over and above the lowest responsible bid when it appears that the highest bid was accepted, not because of superiority of the supplies, but because of the predilection of the purchasing officer."

The decision referred to is not applicable to the facts in this case. It concerned the failure to accept the lowest bid for a quantity of negative paper, and for all that appears the paper proposed to be furnished by the various bidders was identical in quality. So, also, the services considered in 1 Comp. Gen. 304. As between proposals for furnishing the same make of cars or character of service, the low-

est must be accepted. Here the makes of automobiles proposed to be furnished were not identical and the rule to be applied is that stated in 1 Comp. Dec. 363; 22 *id.* 303, 421; 27 *id.* 640, 896; 3 Comp. Gen. 604, and is to the effect that there must be advertising and that the lowest bid to furnish material equally adapted to the needs of the service must be accepted. There was advertising and the question is whether the Star, Ford, or Chevrolet touring cars are equally adapted to the needs of the Umatilla Indian Agency; that is, which of the three makes of automobiles is the best and, if the Chevrolet, whether it is worth $170.57 more than the cheaper of the other two makes. The direction to the superintendent must be accepted as a determination by the Secretary of the Interior that the Chevrolet car would best serve the interests of the Umatilla Indian Agency, and there appears no reason to now question that determination, in view of the advantages to be found in the Chevrolet car for the service required.

The suspension will be removed and credit allowed for $170.57 as the balance of the purchase price for the automobile.

(A–8845)

TRAVEL ALLOWANCE—TRANSPORTATION IN KIND—ENLISTED MEN OF THE NAVY

An enlisted man of the Navy electing on discharge to receive transportation in kind and cash in lieu of subsistence instead of the travel allowance of 5 cents per mile may be furnished transportation in kind only to the point nearest his home that can be reached by a common carrier.

Decision by Acting Comptroller General Ginn, May 23, 1925:

Fred L. Holt, ex-seaman, second class, United States Navy, has applied for revision of settlement No. 045107–N, dated September 15, 1924, in which he was allowed 54 cents on his claim for $3 as reimbursement for cost of transportation from Hot Springs, Ark., to Pearcy, Ark.

The Bureau of Navigation, under date of July 25, 1924, reported:

* * * The above-named man was discharged from the Naval Hospital, Washington, D. C., by medical survey due to his own misconduct on 24 June, 1924. His home address is Pearcy, Ark. Inasmuch as there appeared to be no regular train service to Pearcy, Ark., transportation was furnished to Hot Springs only and Holt was instructed to pay own fare from Hot Springs to Pearcy and submit claim.

Claimant alleges that he traveled from Hot Springs to Pearcy by automobile at a cost of $3, for which he claimed reimbursement. In said settlement he was allowed 54 cents on the understanding that he could have traveled by rail.

It appears that formerly there was train service from Hot Springs to Pearcy, a distance of about 15 miles, but that such service was discontinued in 1923, prior to the travel in question.

The act of September 22, 1922, 42 Stat. 1021, provides:

> Hereafter an enlisted man discharged from the Army, Navy, or Marine Corps, except by way of punishment for an offense, shall receive 5 cents per mile for the distance from the place of his discharge to the place of his acceptance for enlistment, enrollment, or muster into the service * * *.

The naval appropriation act of January 22, 1923, 42 Stat. 1135, under the head of Bureau of Navigation, transportation and recruiting, provides:

> For travel allowance or for transportation and subsistence as authorized by law of enlisted men upon discharge * * * transportation to their homes, if residents of the United States, of enlisted men and apprentice seamen discharged on medical survey, with subsistence and transfers en route, or cash in lieu thereof * * *.

In instructions issued by the Paymaster General of the Navy relative to the payment of travel allowance and furnishing transportation to enlisted men on discharge, it was stated:

> 15. Enlisted men discharged pursuant to medical surveys are entitled to the regular travel allowance set forth in paragraph 2 hereof. However, under the terms of the act of March 3, 1901 (31 Stat. 1030), and of naval appropriation act of 1 July, 1922, they may be furnished transportation and subsistence, or cash in lieu of the latter, to their homes if residents of the United States. The furnishing of travel allowance or transportation and subsistence in lieu thereof shall be at the option of the men. See 2 Comp. Gen. 612, 618.

In accordance with said instructions it is assumed claimant exercised his option as to whether he would take the travel allowance at 5 cents per mile for the distance from the place of discharge to the place of his acceptance for enlistment, or transportation in kind to his home with subsistence and transfers en route or cash in lieu of such subsistence and transfers.

The said appropriation for transportation in kind must be read in connection with the practice and method employed in procuring such transportation, which is, where Government conveyances are not available by means of issuing transportation requests on common carriers to furnish the necessary transportation. So read, a man's home, within the meaning of the provision in the said appropriation, is the place nearest his home reached by a common carrier.

In this case claimant was furnished transportation in kind to Hot Springs, the nearest place to his home reached by a common carrier, including sleeper, and cash, $3.75, in lieu of subsistence en route. He is entitled to nothing further.

The settlement is reversed and the amount of Treasurer's check No. 46377, dated September 29, 1924, for 54 cents, issued in payment of amount found due in said settlement, will be covered into the Treasury for credit to the appropriation on which drawn.

(A-8959)

SUBSISTENCE—TAX ON LODGING EXPENSES—WAIVER OF REGULATIONS

A tax imposed in foreign countries upon the landlord's charge for lodgings constitutes a part of subsistence expenses and when the employee is traveling on an actual expense basis is only allowable as such within the maximum amount permitted by the act of April 6, 1914, 38 Stat. 318.

The statutory limit of $5 per day for actual expenses of subsistence fixed by the act of April 6, 1914, 38 Stat. 318, is not affected by any waiver of administrative regulations while the employee is traveling in foreign countries.

Acting Comptroller General Ginn to the Secretary of the Treasury, May 23, 1925:

I have your letter of April 2, 1925, as follows:

This department invites your attention to a practice obtaining in the General Accounting Office of treating as subsistence city taxes paid on rooms occupied by foreign representatives of this department while performing official travel in European countries. These taxes range from 20 to 40 per cent of the rate charged for lodging, and are usually included in the receipts obtained by the traveler when paying for lodging. Exception is taken by this department to the practice of including these taxes in items of subsistence where they are clearly distinguishable from the regular lodging charge. There is no way for the traveler to escape such taxes even though he be traveling on official business for this Government. The tax is usually fixed by local government, and this department's representatives have not heretofore been in any position to claim immunity from such taxes.

The holding of your office that no officer of the Special Agency Service may be reimbursed for subsistence in excess of $5.00 per day places foreign representatives of this service at a distinct disadvantage when the General Accounting Office insists that taxes of this nature are to be treated as items of subsistence.

This department has never construed subsistence to include items other than lodging, meals, bath, laundry, pressing clothes, fees to waiters, fees to maids, and fees to bell boys. To include this lodging tax, as much in many instances as 40% of the lodging charge, along with other items of subsistence would, in the opinion of this department, be imposing an extreme hardship upon officers of the Foreign Service and unwarranted in the light of present law.

For two years officers and employees of the Special Agency Service in foreign stations have been performing travel without regard to the travel regulations of this department, such regulations having been waived by authority of the Secretary of the Treasury under date of July 7, 1923, a copy of such waiver being enclosed herewith.

A ruling of your office is requested as to whether or not this lodging tax is to be considered as a part of the subsistence charge.

Section 5 of the act of March 4, 1923, 42 Stat. 1454, provides:

That all customs officers and employees, including customs officers and employees in foreign countries, in addition to their compensation shall receive their necessary traveling expenses and actual expenses incurred for subsistence while traveling on duty and away from their designated station, and when transferred from one official station to another for duty may be allowed, within the discretion and under written orders of the Secretary of the Treasury, the expenses incurred for packing, crating, freight, and drayage in the transfer of their household effects and other personal property, not exceeding in all five thousand pounds.

The act of April 6, 1914, 38 Stat. 318, which limits subsistence expenses to $5 per day, provides as follows:

On and after July first, nineteen hundred and fourteen, unless otherwise expressly provided by law, no officer or employee of the United States shall be allowed or paid any sum in excess of expenses actually incurred for sub-

sistence while traveling on duty outside of the District of Columbia and away from his designated post of duty, nor any sum for such expenses actually incurred in excess of $5 per day * * *.

Your submission raises the question whether the tax on lodging should be regarded as a part of subsistence expenses in determining whether the maximum per day has been exceeded or whether it may be considered as an authorized traveling expense in addition to the amount authorized for subsistence.

The tax in question is a tax upon a subsistence expense. It is a percentage increase added to the landlord's charge for lodgings and constitutes a part of the amount which must be paid for the lodgings. Accordingly, I have to advise that the tax under consideration must be and is considered a part of subsistence and therefore only allowable as such.

If the high cost of subsistence resulting from such taxes or other causes imposes a hardship upon Government employees traveling in foreign countries, the matter would appear to be for consideration of the Congress.

There is noted your statement to the effect that the travel regulations of the Treasury Department have been waived with respect to foreign travel. In that connection it should, of course, be understood that the $5 statutory limitation upon subsistence can not be affected by any administrative waiver of regulations. With reference to the general question of waiving regulations see 21 Comp. Dec. 482; 26 *id.* 99; 1 Comp. Gen. 13; 2 Comp. Gen. 342; 4 Comp. Gen. 363; *id.* 480; *id.* 767.

(A-9112)

NATIONAL GUARD PAY—RETIRED WARRANT OFFICERS AND ENLISTED MEN OF THE ARMY

Retired warrant officers and enlisted men of the Regular Army, when duly appointed or enlisted and federally recognized as officers, warrant officers, or enlisted men of the National Guard, are entitled to the pay accruing to members of the National Guard pursuant to sections 94, 97, 99, 109, and 110 of the national defense act of June 3, 1916, 39 Stat. 166, as amended, in addition to their retired pay.

Retired officers, warrant officers, or enlisted men of the Regular Army appointed or enlisted in the National Guard, when called into the actual service of the United States with their organization or drafted into the Army under section 111 of the national defense act and entitled to the full pay and allowances of the National Guard rank or grade, are not entitled to retired pay from the date so called or drafted into the actual service of the United States.

Acting Comptroller General Ginn to the Secretary of War, May 23, 1925:

There has been received your letter of April 11, 1924, with respect to pay under the provisions of sections 92, 94, 97, and 99 of the national defense act of June 3, 1916, 39 Stat. 177, as amended, to

retired warrant officers and retired enlisted men of the Regular Army who are members of the National Guard, and specifically you request decision of three questions, as follows:

> Is a retired warrant officer of the Regular Army entitled to such pay when he is an officer in the National Guard? When he is a warrant officer in the National Guard?
>
> Is a retired enlisted man of the Regular Army entitled to such pay when he is an officer in the National Guard? When he is a warrant officer in the National Guard? When he is an enlisted man in the National Guard?
>
> If your answer to any of these questions is in the affirmative, then your decision is also requested on the question of whether the retired pay of the warrant officer or enlisted man would be affected.

Section 92 makes no provision for pay; it prescribes certain training, including armory drills for the National Guard. It is assumed that this portion of the question relates to armory drill pay provided by sections 109 and 110 of the national defense act, as amended, including the pay prescribed for warrant officers not belonging to organizations (in view of the amendment of section 109 of the act of June 3, 1924, 43 Stat. 364), and the pay of enlisted men of the sixth and seventh grades contained in section 14 of the act of June 10, 1922, 42 Stat. 632, and the question will be answered on this basis.

Warrant officers in the Army were authorized by section 4a of the national defense act, as amended June 4, 1920, 41 Stat. 761, and that act provides that they shall be entitled "to retirement under the same conditions as commissioned officers; and shall take rank next below second lieutenants and among themselves according to the dates of their respective warrants." While their tenure of office is not otherwise indicated it is apparently contemplated that it shall be as fixed as that of commissioned officers. Section 2 of the national defense act, as amended, 41 Stat. 759, provides that the Regular Army shall consist of, among other components, "officers and enlisted men of the retired list." The term "officers," as used in this latter provision, may be considered as including retired warrant officers.

The National Guard—i. e., the militia—is a military force of the respective States, recognized and provided for by the Constitution, which may be utilized for certain specified Federal purposes. In addition, by section 111 of the national defense act as amended, members of the National Guard are subject to draft as individuals in the Army of the United States under the conditions therein prescribed. The question presented by your submission arises by reason of the dual status which retired warrant officers and retired enlisted men have when they become members of this State military force.

Section 100 of the national defense act of June 3, 1916, 39 Stat. 208, authorizes the detail of officers on the active list of the Army to duty with the National Guard of any State, and provides:

* * * officers so detailed may accept commissions in the National Guard, with the permission of the President and terminable in his discretion, without vacating their commissions in the Regular Army or being prejudiced in their relative or lineal standing therein. * * * But nothing in this section shall be so construed as to prevent the detail of retired officers as now provided by law.

Section 74 of the national defense act as amended, 41 Stat. 781, provides:

Persons hereafter commissioned as officers of the National Guard shall not be recognized as such under any of the provisions of this Act unless they shall have been selected from the following classes, and shall have taken and subscribed to the oath of office prescribed in the preceding section of this Act; officers or enlisted men of the National Guard; officers, active or retired, reserve officers, and former officers of the Army, Navy, Marine Corps, enlisted men and former enlisted men of the Army, Navy, or Marine Corps who have received an honorable discharge therefrom * * *.

There is no provision fixing the qualifications for appointment as warrant officer in the National Guard, nor is a special oath provided for warrant officers, although a form of oath is prescribed both for enlisted men and for commissioned officers. The age of officers and warrant officers in the National Guard is fixed at from 21 to 64 years by the amendment of section 58 of the national defense act, February 28, 1925. By including warrant officers in the term "officers," as used in the phrase fixing eligibility of "officers, active or retired * * * of the Army, Navy, or Marine Corps," there is specific provision for the appointment of warrant officers as commissioned officers in the National Guard.

The qualifications for enlistment in the National Guard are by sections 57 and 58 of the national defense act fixed as able-bodied males of the regularly enlisted militia between the ages of 18 and 45, with provision for reenlistment between the ages of 45 and 64 in section 58 as amended by the act of February 28, 1925, 43 Stat. 1075. Among the persons eligible for appointment as officers of the National Guard, as described in section 74, are "enlisted men and former enlisted men of the Army, Navy, or Marine Corps who have received an honorable discharge therefrom." The phrase "who have received an honorable discharge therefrom" can only have application to "former enlisted men" and the eligibility of enlisted men of the Army for appointment as officers is therefore provided by law. Retired enlisted men are included in the composition of the Regular Army and come within the term as used in section 74 of "enlisted men * * * of the Army." If the appointment of enlisted men on the active list is provided for, the appointment of retired enlisted men is equally within the reason of the law. The eligibility of retired enlisted men for appointment as officers in the National Guard is, it would seem, established by law. What was said in 23 Comp. Dec. 649, respecting the objection to payment of armory drill pay to a retired enlisted man serving as a commissioned

officer of the National Guard was based on section 74 as it appeared in the act of June 3, 1916; no provision having been made therein for the appointment of enlisted men of the Regular Army as officers of the National Guard. The amendment to this section, June 4, 1920, has specifically provided for the eligibility of enlisted men as herein shown.

As has been stated, no provision fixes the qualifications for appointment as warrant officers in the National Guard. This is perhaps due to the fact that warrant officers were established in the Army so recently and the extent of the use of that form of appointment in the National Guard had not been foreseen. Until June 4, 1920, the Army was (with the exception of cadets, nurses, and field clerks) composed of two distinct classes—officers and enlisted men. Individuals of both classes were by law recognized as eligible for appointment as officers in the National Guard. It is evident it was contemplated by the legislation that the retired personnel of the Regular Army should be available for service in the National Guard. Appointment of retired warrant officers or retired enlisted men of the Army as warrant officers in the National Guard is therefore within the policy of the law and not contrary to the intent or purpose of any provision of the national defense act.

So far as enlistment in the National Guard of retired enlisted men of the Army is concerned, there is no legal objection thereto provided the original or first enlistment in the National Guard is entered into before the enlisted man is 45 years of age, required by section 58 of the national defense act, as amended.

The appointment of retired warrant officers and retired enlisted men of the Regular Army as commissioned officers, warrant officers, or the enlistment of such retired persons in the National Guard being within the law; that force when not in the actual service of the United States being a State force, and the provision for pay for certain forms of training of the National Guard being indirectly a contribution from the Federal Government to the States for the proper training of the militia, such retired warrant officers and retired enlisted men are entitled to any pay properly accruing under their appointment or enlistment in the National Guard when not in Federal service and such payments will not affect their retired pay. 23 Comp. Dec. 444 and 649; 27 *id.* 995. Where, however, organizations of the National Guard of which retired officers, warrant officers, or enlisted men of the Army are members are called into the actual service of the United States or are drafted into the Army of the United States under section 111 of the national defense act and become entitled to receive by reason of such entry into the Federal service, the full pay and allowances prescribed by law for their rank or grade in the National Guard in the actual service of the United

States, they will not be entitled to their retired pay. 23 Comp. Dec. 344. Your questions are answered accordingly.

(A-7576)

DISBURSING OFFICERS—RESPONSIBILITY FOR PAYMENTS

Under the act of August 23, 1912, 37 Stat. 375, disbursing officers are required to make only such examination of vouchers as may be necessary to ascertain whether they represent legal claims against the United States. Credit will accordingly be allowed in the accounts of disbursing officers for illegal payments made on vouchers properly certified and approved by administrative officers and containing nothing on the face thereof that would put the disbursing officer on notice that payments thereon would be illegal.

A pay roll showing on its face that the payments to be made thereon covered increases by promotions made subsequent to the rendition of the service constitutes notice to the disbursing officer of the illegality of the payments and the act of August 23, 1912, 37 Stat. 375, affords no protection to the disbursing officer for illegal payments so made.

Decision by Acting Comptroller General Ginn, May 25, 1925:

The Secretary of the Treasury requested January 10, 1925, that J. L. Summers, disbursing clerk, Treasury Department, be relieved from personal liability for $597.91 and $295, disallowed in his accounts as erroneous payments made to employees of the Public Health Service and the custodian service, respectively. The request for relief was based on the act of August 23, 1912, 37 Stat. 375, which provides:

> Hereafter the administrative examination of all public accounts, preliminary to their audit by the accounting officers of the Treasury, shall be made as contemplated by the so-called Dockery Act, approved July thirty-first, eighteen hundred and ninety-four, and all vouchers and payrolls shall be prepared and examined by and through the administrative heads of divisions and bureaus in the executive departments and not by the disbursing clerks of said departments, except those vouchers heretofore prepared outside of Washington may continue to be so prepared and the disbursing officer shall make only such examination of vouchers as may be necessary to ascertain whether they represent legal claims against the United States.

The vouchers covering payments to employees of the custodian service were in regular form, duly certified and approved, and there was nothing therein to put the disbursing clerk on notice that payment of said vouchers would be illegal. It was not until the audit by this office that it was discovered that the employee in one instance was paid in violation of the act of May 10, 1916, 39 Stat. 120, as amended by the act of August 29, 1916, *id.* 582, which prohibits payment to persons receiving more than one salary when the combined amount of said salaries exceeds $2,000 per annum. In the other instances in the custodian service the vouchers were erroneously certified. The erroneous certification deceived the administrative office and the vouchers were duly approved as certified.

The voucher for $318.75, in favor of Dr. H. K. Best, was also in proper form, and was duly certified and approved. The payment

was for commutation of quarters, heat, and light, and in this case, also, there was nothing to raise any question as to the legality of the payment.

The disallowances totaling $279.16, arising in the case of payments to employees of the Public Health Service for retroactive promotions, stand on a different footing. The vouchers for these payments were pay rolls and showed clearly on their face that they were payments of the increases covered by promotions made subsequent to the date of rendition of service. The notations carried in the "Remarks" column are to the effect that the employees' rate of pay was changed, effective July 1, 1921, by authority of telegram of September 24, 1921.

The disallowance of payments made on the last-named vouchers was made and affirmed on the basis of information contained on the face of the vouchers themselves. The provisions of the act of August 23, 1912, have no application to a situation of this kind. See decision of May 1, 1922, Appeal 37315.

The amount of $613.75 is hereby certified for credit in the accounts of J. L. Summers, disbursing clerk, Treasury Department. See decision of August 28, 1920, Appeal 31788.

The disallowance as to the items aggregating $279.16 is affirmed.

(A-9333)

POSTAL SERVICE—CREDIT FOR MILITARY, MARINE, AND NAVAL SERVICE—RAILWAY MAIL SERVICE

The provision in the postal reclassification act of February 28, 1925, 43 Stat. 1065, authorizing credit for military, marine, and naval service during the World War in determining the right to promotion of employees who were in the Postal Service October 1, 1920, is applicable to positions in the Railway Mail Service in which longevity is the basis for determining automatic promotion.

Railway postal employees transferred from some other branch of the Postal Service subsequent to October 1, 1920, are not entitled to credit for military, marine, or naval service under the provisions of the act of February 28, 1925, in determining their right to automatic promotions.

The right to credit for military, marine, and naval service in determining the right to annual promotions in the Postal Service under the act of February 28, 1925, extends no further than through the automatic grades, and is not a controlling factor in the selection of an employee to fill a position in a competitive grade.

Acting Comptroller General Ginn to the Postmaster General May 25, 1925:

I have your letter of April 24, 1925, requesting decision of several questions hereinafter stated that have arisen under the provision in the postal reclassification act of February 28, 1925, 43 Stat. 1065, as follows:

Postal employees and substitute postal employees who served in the military, marine, or naval service of the United States during the World War and have not reached the maximum grade of salary shall receive credit for all time served in the military, marine, or naval service on the basis of one day's

credit of eight hours in the Postal Service for each day served in the military, marine, or naval service, and be promoted to the grade to which such postal employee or substitute postal employee would have progressed had his original appointment as substitute been to grade 1. This provision shall apply to such postal employees and substitute postal employees who were in the Postal Service on October 1, 1920.

1. Does this provision apply to the Railway Mail Service?

The provision, except the last sentence thereof, first appeared in the act of March 1, 1921, 41 Stat. 1157, in the form of an amendment to a provision in the act of June 5, 1920, 41 Stat. 1049. In decision of April 12, 1921, 27 Comp. Dec. 887, 889, the Comptroller of the Treasury held that the provision had "no application to employees in the Railway Mail Service," for the reason that the amendatory proviso must be read in connection with the original provision of law thereby amended, which governed exclusively the compensation of clerks in first and second class post offices and regular and substitute letter carriers in the City Delivery Service. The last sentence of the provision was first enacted as an amendment in the act of June 19, 1922, 42 Stat. 662. As to the effect of this amendment see 2 Comp. Gen. 492. The provision as quoted above from the act of February 28, 1925, appears as a separate paragraph of section 11 of the act after all the provisions for fixing the compensation of employees in the various divisions of the Postal Service, including the Railway Mail Service, and immediately follows a paragraph which places clerks in the Railway Mail Service on the same basis as clerks in first and second class post offices and carriers in the City Delivery Service in so far as counting substitute service on appointment to regular positions is concerned. Thus the reason for limiting application of the provision as it appeared in earlier laws, as set forth in 27 Comp. Dec. 887, to clerks in first and second class post offices and carriers in the City Delivery Service no longer exists; and accordingly it must be held that the provision is applicable to clerks in the Railway Mail Service as well as to clerks in first and second class post offices and carriers in the City Delivery Service. For the manner in which credit for military, marine, or naval service is to be computed see 1 Comp. Gen. 580; *id.* 724; 2 *id.* 492.

2. Does the law apply to an employee who was in some other branch of the Postal Service October 1, 1920, and who later transferred to the Railway Mail Service, granting his service in the Post Office Department was continuous from October 1, 1920?

The act of May 27, 1908, 35 Stat. 413, provided: "That hereafter railway postal clerks on entering the service shall receive the salary of the lowest grade." In section 7 of the act of February 28, 1925, it is provided: "All original appointments shall be made to the rank of substitute railway postal clerk." The last-named act, in section 11, also authorizes the Postmaster General to transfer employees

from the position of clerk to the position of carrier, or vice versa, and authorized interchange of clerical force between the post office and the motor-vehicle service, the transfer to be made to corresponding grades and salaries, but there is no authorization therein for the transfer of employees from any other service to the Railway Mail Service to corresponding grades and salaries, and there does not appear to be any other statutory authority now in force under which employees may be transferred to the Railway Mail Service with the privilege of counting longevity for service in the other branch from which transferred for the purpose of automatic promotions. The provision applies to such only of the Railway Mail Service employees in the service on February 28, 1925, as were in the Railway Mail Service either as substitutes or regulars on October 1, 1920, and have remained continuously in said service since that date. Question 2 must be and is answered in the negative.

In the case of Clerk Felix G. Long, submitted by you, who was transferred from the position of clerk at the Atlanta, Ga., post office, to the Railway Mail Service as a substitute July 15, 1921, no credit for his military service from June 6, 1918, to December 12, 1918, is authorized.

3. You ask how to proceed in giving credit for military service in the case of John J. Welch, whose record is set forth in your letter as follows:

"John J. Welch entered the military service July 5, 1918, and was discharged January 8, 1919. He became a substitute railway postal clerk July 5, 1919, and after performing 313 days' substitute service was appointed unassigned in accordance with a provision in the postal appropriation act approved March 3, 1917, reading as follows:

"'*Provided*, That hereafter any substitute railway postal clerk shall, after having performed service equivalent to three hundred and thirteen days, be appointed railway postal clerk of grade one, and in computing such service credit shall be allowed for service performed prior to the approval of this Act.'

"On July 1, 1920, according to your decision of March 13, 1925, he again became a substitute at $1,600 per annum and was promoted to grade two at $1,700 per annum October 1, 1920. He was appointed September 1, 1923, to the St. Louis Terminal R. P. O., a grade three assignment, and promoted October 1, 1923, to grade three at $1,850 per annum. On January 1, 1924, he was selected to fill a grade four assignment and promoted to that grade October 1, 1924. His assignment became grade five January 1, 1925, under the postal reclassification act of February 28, 1925."

It is understood from your statement that this employee was "selected to fill a grade four assignment," that the grade in which he is now serving is a selective or competitive grade and not an automatic grade. See in this connection 4 Comp. Gen. 299. The right to credit for military service extends no further than through the automatic grades, and is not a controlling factor, in so far as statutory right to annual promotion is concerned, when an employee in the highest automatic grade is selected to fill a competitive position. In other words, the provision in question has no application to an employee who has reached the maximum grade to which he may be automatically promoted on the basis of length of service alone. Therefore, on the basis that John J. Welch is occupying a position

in a competitive grade, as distinguished from an automatic grade, no credit for his military service is authorized.

4. Are postal employees who received credit for military or naval service, under the provisions of section 9 of the act of July 2, 1918, 40 Stat. 754, entitled to further credit under the act of February 28, 1925, *supra*?

Section 9 of the act of July 2, 1918, is as follows:

Employees, including substitute employees, of the Postal Service who have entered the military or naval service of the United States or who shall hereafter enter it during the existence of the present war, shall, when honorably discharged from such service, be reassigned to their duties in the Postal Service at the salary to which they would have been automatically promoted had they remained in the Postal Service, provided they are physically and mentally qualified to perform the duties of such positions.

This provision had reference to postal employees reinstated in the Postal Service after discharge from the military or naval service during the World War. Its purpose was to prevent their losing credit for longevity for the time served in the military or naval forces. The act of February 28, 1925, applies to all employees who were in the Postal Service October 1, 1920, who had military or naval service during the World War, whether or not they had previously been in the Postal Service, provided they have remained continuously in the service since October 1, 1920. It is not apparent how a case could arise in which an employee who had received credit for his military or naval service under the act of July 2, 1918, would be entitled to any further credit under the provision in the act of February 28, 1925, here under consideration. If it should be contended in any such case that further credit is authorized under the provision in the act of February 28, 1925, a statement of all facts with reference thereto should be submitted to this office for further consideration.

(A–9629)

BURIAL EXPENSES—ENLISTED MEN OF NAVY AFTER DISCHARGE

An enlisted man of the Navy who entered the service for the first time since July 2, 1921, is not a "veteran of any war" within the purview of the World War veterans' act, and his admission after discharge to a Veterans' Bureau hospital does not obligate the Government to pay his burial expenses.

Decision by Acting Comptroller General Ginn, May 25, 1925:

The United States Veterans' Bureau has forwarded to this office for direct settlement approved voucher for $100 in favor of MacMartin and Chamberlain, representing reimbursement of expenses incident to the burial of Jack Jones, who died June 8, 1924, while in a Veterans' Bureau hospital receiving treatment under authority of the Veterans' Bureau.

It is disclosed that Jack Jones enlisted in the Navy December 17, 1923, and was discharged April 2, 1924; that he was admitted to the Veterans' Bureau hospital June 4, 1924; and that he had no other military or naval service prior to his enlistment of December 17, 1923.

The burial was performed by claimant at the request of the authorities of the Veterans' Bureau under contract entered into with the bureau effective from October 1, 1923, to June 30, 1924, providing in part as follows:

(a) TO PROVIDE A RESPECTABLE BURIAL of beneficiaries of the U. S. Veterans' Bureau entitled to burial and other expenses in accordance with the provisions of paragraph 2 of Section 3 of the Act of March 4, 1923, (42 Stat. 1523), dying in U. S. Veterans' Hosp No 85 Walla Walla, Wash at the rates specified after each item when the specified service is ordered and furnished.

The act of March 4, 1923, mentioned in the contract and pursuant to which same was executed, as reenacted and amended by the World War veterans' act dated June 7, 1924, 43 Stat. 617, in force when this man died, provides for burial expenses payable by the Government only of persons dying while in the military or naval service and of persons having the status of "veteran of any war" who die after discharge or resignation from the service. See also act of March 4, 1925, 43 Stat. 1305. The deceased in this case does not fall within either of these classes; that is, he was not in the military or naval service when he died and he was not a "veteran of any war." That phrase is defined in section 8102, United States Veterans' Bureau Regulations, effective August 15, 1923, as follows:

For the purpose of this regulation (sections 8102 to 8113, inclusive) the term "veteran of any war" shall mean any person who dies after discharge or resignation from the service and who served (*a*) in the military or naval forces of the United States during any period of the Mexican War, the Civil War, the Spanish-American War, or the World War; or (*b*) with forces which were mobilized for participation in the Indian wars, the Philippine insurrection, Boxer expedition, Cuban pacification, Nicaraguan campaign, Vera Cruz expedition, or the punitive expedition into Mexico.

See Supplement No. 3, dated March 31, 1924. This definition was based on 2 Comp. Gen. 791.

The World War ended July 2, 1921, in so far as the applicable provisions of the war risk insurance act and the World War veterans' act are concerned. See section 212 of the World War veterans' act of June 7, 1924, 43 Stat. 623. Military or naval service entered into subsequent to that date may not be considered as service during any war. The deceased was not therefore a "veteran of any war." Whatever authority there may have been for the hospitalization of the deceased, the fact that he was in a Veterans' Bureau hospital when he died does not obligate the Government to pay for his burial except possibly as a sanitary measure, which is not alleged or shown in this case.

There is also involved the action of the administrative officer of the Veterans' Bureau in authorizing claimant to perform the burial of the deceased. This office has in a few instances authorized payment of claims for medical and hospital treatment in contract hospitals of persons not lawfully entitled thereto when the treatment was erroneously ordered by the administrative officers of the

Veterans' Bureau and there was no notice on the part of the hospital performing the service of the administrative irregularity. In decision of April 21, 1924, A–8834, it was held, however, that there existed no general authority for such a procedure, but that each case must be forwarded to this office for settlement on the particular facts involved.

The reasons which have prompted the occasional action of this office in authorizing payment of claims for medical treatment as indicated above are not applicable to the present case. The provisions of the statute relative to burial expenses so definitely fixed the persons coming within their terms that administrative irregularity and lack of actual notice thereof by claimants will not be accepted in any case as a basis for payment of burial expenses by the Government for burial of persons not entitled thereto. It is believed that preliminary administrative action should be such as to avoid directing the burial of persons not coming within the terms of the Veterans' Bureau act. Disposition of remains of persons not coming within the terms of the controlling statute unclaimed by relatives or friends is a matter generally between the local authorities and the hospital.

The claim is disallowed in its entirety.

(A–9119)

CONSOLIDATED BONDS—REGISTERS OF LOCAL PUBLIC LAND OFFICES

The duties of register and receiver of local public land offices having been consolidated by the act of March 3, 1925, 43 Stat. 1145, effective July 1, 1925, under the title of register, the surety bond required of that official may be in a consolidated form stated in terms broad enough to cover the faithful performance of all the duties that hereafter may be required by law of a register and also the duties of special disbursing agent when required to perform such duties by the Secretary of the Interior, and in a sum sufficient to satisfy the requirements of both section 2236 and section 3614, Revised Statutes. A consolidated account may also be rendered thereunder.

Acting Comptroller General Ginn to the Secretary of the Interior, May 26, 1925:

I have your letter of April 13, 1925, requesting decision whether under the provisions of the act of October 28, 1921, 42 Stat. 208, and the act of March 3, 1925, 43 Stat. 1145, providing for the consolidation of the offices of register and receiver of land offices, it would be lawful to discontinue the requirements for a separate bond as disbursing agent and to require an accounting for all funds received, advanced, returned, or disbursed under one bond as register or acting register as the case may be. You state it has been the practice to designate receivers of public moneys at the several land offices as special disbursing agents and to require the filing of bonds as such separate from the bond required by law as receiver and to have separate accounts stated.

Section 2234, Revised Statutes, as amended by the act of January 27, 1898, 30 Stat. 234, provides for the appointment of a register and a receiver of public moneys for each land district established by law, and section 2236, Revised Statutes, provides that each register and receiver shall, before entering on the duties of his office, give bond in the penal sum of $10,000, with approved security for the faithful discharge of his trust.

Section 3639, Revised Statutes, provides:

> The Treasurer of the United States, all assistant treasurers, and those performing the duties of assistant treasurer, all collectors of the customs, all surveyors of the customs, acting also as collectors, all receivers of public moneys at the several land-offices, all postmasters, and all public officers of whatsoever character, are required to keep safely, without loaning, using, depositing in banks, or exchanging for other funds than as specially allowed by law, all the public money collected by them, or otherwise at any time placed in their possession and custody, till the same is ordered, by the proper Department or officer of the Government, to be transferred or paid out; and when such orders for transfer or payment are received, faithfully and promptly to make the same as directed, and to do and perform all other duties as fiscal agents of the Government which may be imposed by any law, or by any regulation of the Treasury Department made in conformity to law. The President is authorized, if in his opinion the interest of the United States requires the same, to regulate and increase the sums for which bonds are, or may be, required by law, of all district attorneys, collectors of customs, naval officers, and surveyors of customs, navy agents, receivers and registers of public lands, paymasters in the Army, commissary-general, and by all other officers employed in the disbursement of the public moneys, under the direction of the War or Navy Departments.

There is no doubt as to the authority of the Secretary of the Interior under the provisions of section 3639, Revised Statutes, to require the receiver of a land office to perform the duties of special disbursing agent in addition to his regular duties as receiver.

Section 3614, Revised Statutes, provides:

> Whenever it becomes necessary for the head of any Department or office to employ special agents, other than officers of the Army or Navy, who may be charged with the disbursement of public moneys, such agents shall, before entering upon duty, give bond in such form and with such security as the head of the Department or office employing them may approve.

The act of October 28, 1921, 42 Stat. 208, provides:

> That the President is authorized to consolidate the offices of register and receiver in any district land office, and to appoint, by and with the advice and consent of the Senate, a register for such land office and to abolish the office of receiver of such land office upon sixty days' notice of such abolition mailed to such register and receiver whenever the total compensation for both register and receiver of such land office shall fall below the sum of $4,000 per annum, and in his opinion the interests of the service warrant such abolition.

The act of March 3, 1925, 43 Stat. 1145, provides:

> Registers: For salaries and commissions of registers of district land offices, at not exceeding $3,000 per annum each, $175,000; *Provided*, That the offices of register and receiver of such land offices as may now have two officials shall be consolidated, effective July 1, 1925, and the applicable provisions of the Act approved October 28, 1921, shall be followed in effecting such consolidations.

The purpose and effect of the two last-quoted provisions is to discontinue the office of receiver of land offices and to confer and impose upon the register all powers and duties formerly vested in and

exercised by the receiver; and there would appear to be no doubt as to the authority to assign to the register the additional duty of special disbursing agent.

While section 2236, Revised Statutes, requires a bond covering the duties of register and section 3614, Revised Statutes, requires a bond covering the duties of special agent, there is no statutory requirement that said bonds be separate instruments. You are advised, therefore, that a consolidated form of bond stated in terms broad enough to cover the faithful performance of all the duties that hereafter may be required by law of a register and the duties of special disbursing agent, and in a sum sufficient to satisfy the requirements of both section 2236 and section 3614, Revised Statutes, and the rendering of a consolidated account thereunder, is authorized.

(A-9609)

MEDICAL TREATMENT—VETERANS' BUREAU—REIMBURSEMENT TO STATES

State hospitals or institutions may not be reimbursed by the United States for medical care and treatment of its public charges who are also beneficiaries of the Veterans' Bureau prior to the time the Veterans' Bureau assumes jurisdiction and control of such persons and authorizes their hospitalization.

Decision by Acting Comptroller General Ginn, May 26, 1925:

The United States Veterans' Bureau has forwarded to this office for direct settlement approved vouchers aggregating in amount the sum of $6,010 in favor of the Buffalo State Hospital, representing reimbursement for hospital care furnished insane, poor, and indigent patients of the State of New York for various periods between July 1, 1920, to June 30, 1922:

The facts appear to be that all of these patients were receiving disability compensation under the provisions of the war risk insurance act during the periods covered by the present claim, but that their hospitalization was not expressly authorized as bureau beneficiaries or wards of the United States Government until later, under contracts between the bureau and the hospital. The rate on which the claim is based is $2 per day, the amount charged to other inmates of hospital for the same service.

The present claim, as well as other claims now pending before this office, are the result of conferences between the State authorities of New York and representatives of the United States Veterans' Bureau based on the decision of this office dated October 31, 1923, involving reimbursement for hospital care for period covered by retroactive award of disability compensation in State institutions, wherein it was held in part as follows:

In case number 1, therefore, reimbursement may be made for medical and hospital treatment to the insane beneficiary from December 3, 1918, date of admission to the State institution, which was also within two years prior to claim for compensation. Such reimbursement, however, is not to be based on the contract with the institution for any period prior to its effective date, but for such period reimbursement is limited to the amount actually charged for the veteran's treatment at a rate not in excess of that charged for other residents of the State for the same service. Such amount is payable to the person or persons who paid for the treatment, and then only upon the submission of properly receipted bills. To authorize payment to the institution in all cases might result in its being paid twice for the same service. Payment may be made to the institution for period prior to the effective date of the contract and subsequent to the date the veteran becomes a beneficiary of the bureau only where clear evidence is submitted that a bill has been rendered to the committee or other person responsible for the insane veteran, and that such bill has not been paid. Any period of treatment which the State would have in any event given free should not be paid for by the Government.

The last sentence of the quotation had particular reference to periods prior to date of authorization of hospitalization by the United States Veterans' Bureau, and had no reference to periods subsequent to authorization and execution of contracts between the bureau and State institutions, at which time the Government assumed responsibility for care of veterans as wards of the Government under the provisions of the war risk insurance act. That decision was quoted with approval in decision of April 24, 1924, 3 Comp. Gen. 798, and claim allowed in favor of legal guardian of an insane veteran for care in a State institution for period prior to authorization of treatment by the Veterans' Bureau, but subsequent to the retroactively effective date of the award for disability compensation, citing 26 Comp. Dec. 485, 699; 27 *id.* 774; 1 Comp. Gen. 230; 3 *id.* 286, 365.

In the present case and others pending before this office the claims are not filed by anyone on behalf of the beneficiaries but directly by the State institution wherein the beneficiaries were hospitalized. These patients were public charges of the State of New York during the periods covered by the claims, and it is stated in the conference report made to the Director of the United States Veterans' Bureau under date of January 7, 1924, that because of the poor and indigent status of patients bills will not be and have not been submitted to the beneficiaries or anyone on their behalf, but that if so submitted the rate would be at $2 per day now claimed, which is the amount called for by the subsequent contracts and is not in excess of that charged to other residents of the State for the same service. It is reported also as follows:

It was further reported that there are approximately 1,000 claimants in State hospitals, of which number 600 are in the hospitals at present whose bills for hospitalization have not been paid for either part or entire hospitalization. These bills cover a period of approximately three to four years. There are approximately 500 men whose hospitalization was authorized and whose bills are being paid at present. In 300 of these 500 cases hospitalization was not authorized from date of admission but at some subsequent date. These 300 cases are included in the 1,000 cases enumerated, and that no payments have been made on any of the authorized bills beginning July 1, 1923,

as the contracts for the fiscal year with the New York State hospitals remain unapproved.

The office is not advised whether all of these cases have been included in the several claims now pending before the office.

The submission of the Director of the United States Veterans' Bureau on which the decision of October 31, 1923, was based expressly excluded from the submission patients having the status of "poor person" or "indigent person" and included only those whose relatives or estates were called upon to bear the expenses of hospital treatment under State statutes. That is to say, those persons who had been determined to be public charges on the State of New York were not considered by the director at that time as coming within the terms of the provisions of the war-risk insurance act, providing for hospital treatment, prior to the actual date of authorization of the treatment by the bureau. Hence the decision referred to considered only those cases where reimbursement was claimed by the relatives or estate of the beneficiaries.

The instant cases present the question whether the State of New York may be relieved of past obligations to care for its public charges, as defined by its own laws, by recognizing such patients as wards of the United States Government from the effective date of their disability compensation award but prior to express authority by the bureau for hospitalization and execution of contracts.

Prior to June 7, 1924, date of World War veterans' act, there was no express statutory provision authorizing reimbursement for cost of medical treatment procured for or on behalf of beneficiaries through private sources prior to authorization by the United States Veterans' Bureau. In emergency cases and where the claimants were ignorant of their right to governmental treatment, this office and the former office of Comptroller of the Treasury consistently authorized reimbursement for treatment procured through private sources. The cases have hereinbefore been cited. These decisions were intended to relieve beneficiaries who were actually required to pay for such treatment and did not and could not relieve State institutions from past obligations to care for its public charges under its statutes.

Section 202 (9) of the World War veterans' act of June 7, 1924, 43 Stat. 620, provides in part as follows:

* * * *Provided*, That where a beneficiary of the bureau suffers or has suffered an injury or contracted a disease in service entitling him to the benefits of this subdivision, and an emergency develops or has developed requiring immediate treatment or hospitalization on account of such injury or disease, and no bureau facilities are or were then feasibly available and in the judgment of the director delay would be or would have been hazardous, the director is authorized to reimburse such beneficiary the reasonable value of such service received from sources other than the bureau.

This statute gave recognition and approval to the prior decisions and authorized continuance of the practice, but it will be noted the

director is authorized to reimburse only the beneficiary, and the statute could not be held to relieve a State of its otherwise lawful past obligations for care of its public charges prior to the date the Veterans' Bureau assumes jurisdiction and control of such persons as beneficiaries and authorizes the hospitalization.

In the absence of a statute definitely authorizing payment from Government funds for periods of hospitalization prior to the date the Veterans' Bureau assumed jurisdiction and authorized hospitalization, such payment is not authorized.

The claim must be and is disallowed.

(A–9640)

POSTAL RECLASSIFICATION—RURAL CARRIERS—EFFECTIVE DATE

The decision of the General Accounting Office of April 22, 1925, 4 Comp. Gen. 884, being an original construction of the act of February 28, 1925, 43 Stat. 1063, is effective, not from the date of the decision or any date fixed by administrative action, but from the effective date of the statute, viz, January 1, 1925.

Decision by Acting Comptroller General Ginn, May 26, 1925:

In the audit of the accounts of the postmaster at Omaha, Nebr., there is for decision the correct computation of pay for the quarter ended March 31, 1925, of Rural Letter Carrier William E. Payne serving a triweekly route 51.4 miles in length out of Ogallala, Nebr.

The carrier was paid for said quarter in accordance with the following statement apparently under the construction placed by the Post Office Department on section 8 of the act of February 28, 1925, 43 Stat. 1063, providing the method for computing the salary of rural letter carriers from January 1, 1925:

Basic lump-sum compensation at	$1,860.00
27 miles (being difference between 51 miles and 24 miles), at $15 per mile	405.00
Total annual rate	2,265.00
Quarterly rate, less retirement deductions of 2½ per cent	552.09
Equipment maintenance allowance, ¼ of annual rate of $312.12 (51 miles times .04 times 153 days)	78.00
	630.09

The provisions of section 8 of the act of February 28, 1925, as affecting rural letter carriers serving triweekly routes, were construed by decision of this office dated April 22, 1925, A–9027, 4 Comp. Gen. 884. With respect to those carriers serving triweekly routes, one-half the length of which are in excess of 24 miles, it was held:

It would be only in case one-half the actual mileage of the triweekly route exceeded twenty-four miles that the provision for paying additional compensation for mileage in excess of twenty-four is for application. For instance, if a triweekly route were sixty miles in length, the carrier would be entitled

to $1,800 per annum, which is the lump-sum rate fixed in the statute for a twenty-four-mile route served six days in the week or a forty-eight-mile route served three days a week, and to equipment allowance of four cents per mile on the basis of a thirty-mile route served 306 days per year, or a sixty-mile route served 153 days per year, or $367.20, and also to additional salary of $15 per mile per annum for twelve (60–48) miles, or $180, a total of $2,347.20 per annum.

The correct computation of the salary of William E. Payne under the law is as follows:

Maximum basic lump-sum compensation	$1,800.00
3 miles (being difference between 51 miles and 48 miles) at $15 per mile	45.00
Total annual rate	1,845.00
Quarterly rate less retirement deductions at 2½ per cent	449.72
Equipment maintenance allowance, ¼ annual rate of $312.12 (51 miles times .04 times 153 days)	78.00
Total quarterly rate	527.72

The Post Office Department has issued order No. 106, dated May 7, 1925, restating salaries of 635 rural carriers in accordance with the decision of this office dated April 22, 1925, proposing to make the change effective from May 1, 1925. The decision of this office was an original construction of the act of February 28, 1925, and is effective not from the date of the decision nor May 1, 1925, as proposed by the Postmaster General, but from the effective date of the statute construed, viz, January 1, 1925.

William E. Payne has been overpaid for the quarter ended March 31, 1925, in the amount of $102.27, which must be charged against him and in the accounts of the paying postmaster.

(A–9677)

CLASSIFICATION OF CIVILIAN EMPLOYEES—TRANSFERS FROM FIELD TO DEPARTMENTAL SERVICE

The provision in the appropriation act of the Treasury Department for the fiscal year 1926, 43 Stat. 764, that the average restriction on the salaries of civilian employees should not require the reduction in salary of any person transferred from one position to another position in the same or different grade in the same or different bureau, office, or appropriation unit is applicable only to transfers between departmental grades in the District of Columbia, and does not authorize the transfer of a field employee to a departmental position in the District of Columbia at a salary in excess of the minimum salary of the grade to which transferred, his subsequent promotion to be subject to the average restrictions and his efficiency rating as compared with the other employees already in the grade.

Acting Comptroller General Ginn to the Secretary of the Treasury, May 27, 1925:

I have your letter of May 13, 1925, as follows:

A customs field employee whose salary is paid from the appropriation for collecting the revenue from customs, and for the detection and prevention of frauds upon the customs revenue, is detailed to the office of the Secretary of the Treasury, under authority of existing law (sec. 525, tariff act of 1922). This employee receives a compensation of $5,000 per annum. The department

desires on July 1, 1925, to transfer this employee to the departmental roll, "Salaries, office of the Secretary," at his present compensation of $5,000 per annum and to assign him to a position in grade 11, C. A. F. Service.

The act making appropriations for the Treasury and Post Office Departments for the fiscal year ending June 30, 1926, provides:

"That in expending appropriations or portions of appropriations contained in this act for the payment for personal services in the District of Columbia in accordance with 'the classification act of 1923,' the average of the salaries of the total number of persons under any grade in any bureau, office, or other appropriation unit shall not at any time exceed the average of the compensation rates specified for the grade by such act, and in grades in which only one position is allocated the salary of such position shall not exceed the average of the compensation rates for the grade: *Provided*, That this restriction shall not apply (1) to grades 1, 2, 3, and 4 of the clerical-mechanical service, or (2) to require the reduction in salary of any person whose compensation was fixed as of July 1, 1924, in accordance with the rules of section 6 of such act, (*3*) *to require the reduction in salary of any person who is transferred from one position to another position in the same or different grade in the same or a different bureau, office, or other appropriation unit*, or (4) to prevent the payment of a salary under any grade at a rate higher than the maximum rate of the grade when such higher rate is permitted by 'the classification act of 1923,' and is specifically authorized by other law."

Your decision is requested as to whether under the provision above underscored [italicized] or any other provision of law this employee may be transferred to a grade 11 position in the departmental service at his present rate of compensation.

The average provision quoted in your letter appearing in the act of January 22, 1925, 43 Stat. 764, appropriating for the Treasury and Post Office Departments for the fiscal year 1926, as well as the average provisions appearing in the other appropriation acts for the fiscal years 1925 and 1926, have relation expressly and exclusively to "appropriations or portions of appropriations contained in this act for the payment for personal services in the District of Columbia."

The salary rates of classified positions in the District of Columbia, under the provisions of the act of December 6, 1924, 43 Stat. 710, were authorized for the field service of the Treasury Department during the fiscal year 1926, by the act of January 22, 1925, *supra*, but the third exception expressed in the enactment protects against reduction in the salary of employees only on being transferred between grades in the same or different bureau, office, or other appropriation unit, and is limited in its application to transfers between departmental grades in the District of Columbia, and has no application to an employee transferred from a field service position to a departmental position in the District of Columbia.

It has been held by this office that under a transfer from an unclassified position in the field service to a classified position in the departmental service the compensation to be paid would be the minimum salary rate of the grade to which transferred as constituting in effect a new appointment. 3 Comp. Gen. 1006. This holding was affirmed in decision of September 4, 1924, 4 Comp. Gen. 263, and again on November 29, 1924, 4 Comp. Gen. 493, 499. I am constrained to hold that under present enactments employees transferred from the field service to the departmental grades may be transferred

only at the minimum salary rate of the grade to which transferred.

The salary rate received by the employee whose case you submit, and which is paid under the field appropriation, is $5,000 per annum, which corresponds to the maximum salary rate of grade 11 in the clerical, administrative, and fiscal service, to which it is proposed to transfer him. The minimum salary rate in that grade is $3,800 per annum. You are advised, therefore, that the transfer to said grade would be authorized only to a vacant position therein at the salary rate of $3,800 per annum, subject to the usual requirements of law and regulations. The creation of a new position in the grade by the transfer would be authorized only with the consent and approval of the Personnel Classification Board, and, if authorized, the salary rate would likewise be $3,800 per annum. The promotion of the employee to a salary rate above the minimum rate for the grade would be subject to the average restrictions and depend upon the efficiency of the employee as compared to those employees already in the grade. 4 Comp. Gen. 77; *id.* 544.

(A–7805)

MEDICAL TREATMENT—ENLISTED MEN OF THE NAVY AND NAVAL RESERVE FORCE ON DETACHED DUTY

The expenses incident to necessary medical and hospital treatment of enlisted men of the Navy and Naval Reserve Force on detached duty when such services are rendered by civilian physicians and hospitals due to the unavailability of medical and hospital facilities of the Navy are chargeable to the naval hospital fund. 4 Comp. Gen. 783, adhered to, but will be considered as effective on and after July 1, 1925.

Comptroller General McCarl to the Secretary of the Navy, June 1, 1925.

There has been received your request of May 13, 1925, for reconsideration of the decision of this office of March 19, 1925, 4 Comp. Gen. 783, in so far as it held that the naval hospital fund and not the appropriation for contingent expenses, Bureau of Medicine and Surgery, was available for medical treatment by private physicians of enlisted men of the Navy and Naval Reserve Force when on detached duty and otherwise entitled to such treatment. In support of your request for reconsideration it is stated:

2. From the attached letter of the Bureau of Medicine and Surgery it is apparent that the practice for over fifty years has been to pay from the appropriation "Contingent, Medicine and Surgery," expenses incurred for services rendered by civilian physicians to the personnel of the Navy or Marine Corps when on detached duty where hospital treatment was not involved. With reference to treatment in civil hospitals and medical care while patients therein, payment for expenses incurred therefor have been payable from the naval hospital fund. The estimates for the fiscal year 1925 were prepared on the above basis, and this department believes that there is no valid reason for changing the previous practice of the department.

The naval hospital fund had its inception in the act of July 16, 1798, 1 Stat. 605, requiring a deduction of 20 cents per month from the pay of all seamen on American vessels, and section 3 of the act provided that the President of the United States was authorized, out of such collections—

> * * * to provide for the temporary relief and maintenance of sick or disabled seamen, in the hospitals or other proper institutions now established in the several ports of the United States, or, in ports where no such institutions exist, then in such other manner as he shall direct * * *.

The act of March 2, 1799, 1 Stat. 729, directed the deduction of a like amount of 20 cents per month from the pay of officers, seamen, and marines of the Navy of the United States and provided—

> That the officers, seamen and marines of the navy of the United States, shall be entitled to receive the same benefits and advantages, as by the act above mentioned are provided for the relief of the sick and disabled seamen of the merchant vessels of the United States.

The act of February 26, 1811, 2 Stat. 650, directed that thereafter the funds collected by virtue of the act of March 2, 1799, *supra*, should be paid to a board designated as the commissioners of Navy hospitals, composed of the Secretaries of Navy, Treasury, and War, and appropriated out of the funds previously collected $50,000 which, together with the other collections authorized, "shall constitute a fund for Navy hospitals." Section 2 of the act of 1811, *supra*, directed that all fines imposed on Navy officers, seamen, and marines should be paid to the commissioners of Navy hospitals, and section 3 directed the commissioners to procure sites for Navy hospitals and to cause the necessary buildings to be erected thereon. The act of July 10, 1832, 4 Stat. 572, directed the discharge of the commissioners of Navy hospitals, constituted the Secretary of the Navy the trustee of the funds, and transferred to him all the powers and duties imposed on the commissioners by the laws then in force. These statutes were carried in the Revised Statutes as follows:

> SEC. 4807. The Secretary of the Navy shall have the general charge and superintendence of Navy hospitals.
>
> SEC. 4808. The Secretary of the Navy shall deduct from the pay due each officer, seaman and marine, in the Navy, at the rate of twenty cents per month for each person, to be applied to the fund for Navy hospitals.
>
> SEC. 4809. All fines imposed on navy officers, seamen, and marines shall be paid to the Secretary of the Navy, for the maintenance of Navy hospitals.
>
> SEC. 4810. The Secretary of the Navy shall procure at suitable places proper sites for Navy hospitals, and if the necessary buildings are not procured with the site, shall cause such to be erected, having due regard to economy, and giving preference to such plans as with most convenience and least cost will admit of subsequent additions, when the funds permit and circumstances require; and shall provide, at one of the establishments, a permanent asylum for disabled and decrepit Navy officers, seamen, and marines.
>
> SEC. 4811. The asylum for disabled and decrepit Navy officers, seamen, and marines shall be governed in accordance with the rules and regulations prescribed by the Secretary of the Navy.
>
> SEC. 4812. For every Navy officer, seaman, or marine admitted into a Navy hospital, the institution shall be allowed one ration per day during his continuance therein, to be deducted from the account of the United States with such officer, seaman, or marine.

SEC. 4813. Whenever any Navy officer, seaman, or marine, entitled to a pension, is admitted to a Navy hospital, the pension, during his continuance in the hospital, shall be paid to the Secretary of the Navy and deducted from the account of such pensioner. (See 14 Comp. Dec. 602).

The naval hospital fund is not an appropriation from the Treasury of the United States, but is made up of moneys from the following sources:

(*a*) By the deduction of 20 cents per month from the pay of each officer, seaman, and marine. (Secs. 1614 and 4808, R. S.)
(*b*) By fines imposed on officers, seamen, and marines. (Sec. 4809, R. S.)
(*c*) By the value of one ration per day allowed for each officer, seaman, and marine during his continuance in hospital, the value of the ration for this purpose being specified under "Provisions," annually, in the naval appropriation act. (Sec. 4812, R. S.)
(*d*) By relinquishment of disability pensions due officers, seamen, and marines during continuance in hospital. (Sec. 4813, R. S.)
(*e*) By forfeitures on account of desertion. (Naval appropriation act, June 7, 1900.)
(*f*) By proceeds of sale of naval hospital fund property, when so authorized, as by act of June 12, 1858, and July 2, 1890, when the naval hospital fund was reimbursed for land transferred and sold in the sums of $50,000 and $92,000 at Chelsea and Brooklyn, respectively.

In the hearings before the subcommittee of the House Committee on Appropriations, 1926, it was estimated that there would remain over normal expenditures each fiscal year approximately $282,000, and that there would be an estimated balance in the hospital fund July 1, 1925, of $4,153,629.62. Of this amount Congress has authorized for hospital construction for the fiscal year 1926, 43 Stat. 874, but $715,500. It was stated that the revenues accruing to the hospital fund have been recently augmented approximately $500,000 a year by the change in the Navy policy stopping all remission of fines formerly remitted in whole or in part on discharge of the enlisted men.

While the exhibits shown in the Budget estimates for the fiscal years 1925 and 1926 contain items under the heading "Contingent, Bureau of Medicine and Surgery," for medical and dental services to men on detached duty, no items of that description are carried in the actual appropriations made under that heading in either the act of May 28, 1924, 43 Stat. 197, or the act of February 11, 1925, 43 Stat. 874, for the fiscal years 1925 and 1926, respectively. The language of the appropriation under the heading "Contingent, Bureau of Medicine and Surgery," in both of the acts cited, identical except as to amount, is as follows:

CONTINGENT, BUREAU OF MEDICINE AND SURGERY

For tolls and ferriages; purchase of books and stationery; hygienic and sanitary investigation and illustration; sanitary, hygienic, and special instruction, including the issuing of naval medical bulletins and supplements; purchase and repairs of nonpassenger-carrying wagons, automobile ambulances, and harness; purchase of and feed for horses and cows; maintenance, repair, and operation of three passenger-carrying motor vehicles for naval dispensary, Washington, District of Columbia, and of one motor-propelled vehicle for official use only for the medical officer on out-patient medical service at the Naval Academy; trees, plants, care of grounds, garden tools, and seeds; inci-

dental articles for the Naval Medical School and naval dispensary, Washington, naval medical supply depots, sick quarters at Naval Academy and marine barracks; washing for medical department and Naval Medical School and naval dispensary, Washington, naval medical supply depots, sick quarters at Naval Academy and marine barracks, dispensaries at navy yards and naval stations, and ships; and for minor repairs on buildings and grounds of the United States Naval Medical School and naval medical supply depots; rent of rooms for naval dispensary, Washington, District of Columbia, not to exceed $1,200; for the care, maintenance, and treatment of the insane of the Navy and Marine Corps on the Pacific coast, including supernumeraries held for transfer to the Government Hospital for the Insane; for dental outfits and dental material; and all other necessary contingent expenses; * * *.

While it may have been the administrative purpose to have covered medical and dental treatment to men on detached duty in this appropriation, such purpose is not expressed in the language quoted from which the intent of the legislation must be gathered. An exhibit in the Budget is not controlling and is for consideration only when the language of the appropriation is doubtful. 2 Comp. Gen. 517. And see 6 Comp. Dec. 617 as to general words in an appropriation.

Taking into consideration the history of the naval hospital fund, its ultimate object and purpose appears to be to furnish efficient and adequate care and treatment to sick and disabled officers, seamen, and marines of the naval forces and, while primarily this is to be accomplished in naval hospitals, when by reason of the isolated or detached duty of the officer, seamen, or marine a naval hospital is not available, no reason is seen for shifting the burden of such treatment to an appropriation not otherwise available therefor. In view of the estimated surplus of $282,000 each year there is evidently no lack of funds in the hospital fund to meet such an expense which is estimated by your department at a maximum amount of $8,000 per annum. Nor can any reason be seen for the distinction stated to have been made between treatment in civilian hospitals and treatment by civilian physicians, charging the one to the naval hospital fund and the other to contingent expenses, Bureau of Medicine and Surgery. No convincing reason is advanced why such expenses should not be borne by the naval hospital fund except that it has been the practice to do otherwise for a long period of time. The long continuance of an erroneous practice is not of itself sufficient to warrant further continuance thereof.

The decision of March 19, 1925, must be and is adhered to, but will be considered as effective on and after July 1, 1925.

(A–9288)

WORLD WAR ADJUSTED COMPENSATION ACT—ERROR IN COMPUTATION OF AMOUNT OF SERVICE

Where due to an error in computing the correct amount of a veteran's adjusted service credit, an adjusted service certificate was issued for less than the correct amount and upon the death of the veteran payment was made thereunder to the designated beneficiary, the additional amount found due upon discovery of the error may also be paid to the beneficiary.

Comptroller General McCarl to the Director, United States Veterans' Bureau, June 1, 1925:

I have your letter of April 22, 1925, in connection with the claim of Miss Lucy M. Courtney, as the beneficiary named in the adjusted service certificate issued to John Aloysius Courtney, now deceased, pursuant to the World War adjusted compensation act, for the balance due her on account of an error made by the Secretary of the Navy in computing the amount of the veteran's adjusted service credit, and requesting decision as to whether payment thereof is authorized.

It appears that John Aloysius Courtney, the veteran, filed a valid application in accordance with the provisions of the World War adjusted compensation act; that an adjusted service certificate was issued to the veteran in the amount of $1,266, in accordance with the certification of the adjusted service credit by the Secretary of the Navy; that the veteran died on November 30, 1924; that on January 14, 1925, the amount of the certificate was duly paid to the beneficiary; that thereafter, on April 9, 1925, the Secretary of the Navy transmitted a corrected certification of the veteran's adjusted service credit, showing that the veteran was entitled to a credit of $625, which would entitle the said veteran to a certificate in the amount of $1,582, or $316 more than the amount of the certificate issued to him and paid to the beneficiary. Your doubt as to the payment of the additional amount seems to be because of the acceptance of the payment of the amount of the adjusted service certificate.

The act provides that the amount of adjusted service credit shall be computed by allowance for each day of actual service in excess of 60 days in the military or naval forces of the United States after April 5, 1917, and before July 1, 1919, as shown by the service or other record of the veteran, as follows: $1.25 for each day of oversea service and $1 for each day of home service; but the amount of credit for a veteran who performed no oversea service shall not exceed $500, and the amount of the credit for a veteran who performed oversea service shall not exceed $625. The Director of the Veterans' Bureau was also directed and required to issue to the veteran designated therein, upon filing of application, etc., and certification by the Secretary of War or the Secretary of the Navy as provided in section 303 of the said act, a nonparticipating, adjusted service certificate of a face value equal to the amount in dollars of 20-year endowment insurance that the amount of the adjusted service credit increased by 25 per cent, etc., would purchase.

It thus appears that the Congress not only fixed the method of payment but definitely fixed the amount to be paid each veteran upon compliance with certain conditions, based upon his actual service, and that the computation of the number of days' service

for which the veteran was entitled to receive adjusted service credit by the Secretary of War or the Secretary of the Navy was purely a ministerial act and a mistake in the computation thereof could not and would not affect the rights or the amount of adjusted service credit conferred upon the veteran by the provisions of the act.

The papers accompanying your submission are returned herewith, and you are advised that there appears no legal objection to the payment of the additional amount.

(A-9778)

NATIONAL GUARD CONTRACTS

Under section 1661, Revised Statutes, as amended by section 3 of the act of June 22, 1906, 34 Stat. 450, contracts for the expenditure of Federal funds by property and disbursing officers of the National Guard of the respective States are required to be made as similar contracts are made for the Regular Army. They must be made under the direction of the Secretary of War and must comply with all Federal requirements and, as Federal contracts, be filed in the General Accounting Office in support of vouchers making payments thereunder. The requirements of sections 3744 and 3747, Revised Statutes, must be observed, and the officer entering into National Guard contracts must be appointed by the Secretary of War or by the chiefs of procurement bureaus of the War Department.

Comptroller General McCarl to the Secretary of War, June 3, 1925:

There has been received your letter dated May 22, 1925, in reference to a letter from this office dated April 14, 1925, with respect to the failure to execute and furnish the General Accounting Office contracts for expenditure of Federal funds made by the property and disbursing officers of the National Guard of the respective States. You state that "the National Guard is not a part of the Army of the United States except when it is in Federal service," and that—

When funds appropriated for the National Guard are apportioned to a State and turned over to it on requisition of the governor under the provisions of section 67, national defense act, and disbursement thereof is to be made for an authorized project, the contract made to carry out such project is entered into by the property and disbursing officer of the State. In the past the policy of neither the Militia Bureau nor the military division of the General Accounting Office has been consistent. Leases for the acquisition of rifle ranges, maneuver and camp sites have uniformly been made on Form No. 17, Militia Bureau, which specifically provides that the property and disbursing officer concerned acts for and on behalf of his State. Some other contracts have been made in the name of the United States, others in the name of the State concerned, and still others in the name of both the United States and the State. Some have been executed on regular War Department forms, such as are used in the Regular Army, and others have been specially drafted. In some cases all of the provisions of law and regulations which relate to the execution of Army contracts have been carried out, while in other cases they have not. There has been considerable confusion in the practice of the Militia Bureau, the military division of the General Accounting Office, and among the States, though in theory the Militia Bureau has been of the opinion that the contracts are State contracts.

In order that this important matter may be settled, your decision is requested on the following questions:

(*a*) Are contracts for the disbursement of Federal funds, appropriated for the support of the National Guard, apportioned to the States, and paid over to the property and disbursing officer thereof, to be considered as Federal or State contracts?

(*b*) May such contracts be entered into by any officer duly delegated by the governor of the State concerned, or is the property and disbursing officer of the State the only person who may execute such contracts?

(*c*) If you hold that such contracts are State contracts, are the provisions of law referred to by the Chief Military Division in his letter, applicable thereto, and are there any other provisions of law applicable?

In answering these questions you are requested to disregard the provisions of Army and National Guard Regulations. The National Guard Regulations are now being revised and it is urged that your decision be expedited, so that it may be made the basis of appropriate regulations to be included in such revision.

Section 67 of the act of June 3, 1916, 39 Stat. 199, as amended, among other things provides that a sum of money shall thereafter be appropriated annually for the support of the National Guard, including the expense of providing arms, ordnance stores, quartermaster stores, camp equipage, and all other military supplies for issue to the National Guard, together with such other expense pertaining to said guard as was then or may thereafter be authorized by law. Said section further provides that the sum of money so appropriated shall be apportioned among the States and Territories; that the apportionment shall be paid over to the property and disbursing officers of the respective States and Territories upon proper requisitions; and that said property and disbursing officers shall render through the War Department such accounts for the Federal funds paid over to them as may be required by the accounting officers of the United States. Section 1661, Revised Statutes, as amended by section 3 of the act of June 22, 1906, 34 Stat. 450, provides:

That the purchase or manufacture of arms, ordnance stores, quartermaster stores, and camp equipage for the militia under the provisions of this Act shall be made under the direction of the Secretary of War, as such arms, ordnance and quartermaster stores, and camp equipage are now manufactured or otherwise provided for the use of the Regular Army, and they shall be receipted for and shall remain the property of the United States, and be annually accounted for by the governors of the States and Territories and by the commanding general of the National Guard of the District of Columbia, for which purpose the Secretary of War shall prescribe and supply the necessary blanks and make such regulations as he may deem necessary to protect the interests of the United States.

This statute recognizes, as is pointed out in the request for decision, that the National Guard is not a part of the Army of the United States except when in Federal service by the requirement that the purchase or manufacture of arms, ordnance stores, quartermaster stores, and camp equipage for the National Guard shall be made under the direction of the Secretary of War "as such arms, ordnance and quartermaster stores, and camp equipage are now manufactured or otherwise provided for the use of the Regular

Army." Sections 3709 and 3744 to 3747, inclusive, Revised Statutes, provide in general, how such material shall be purchased for the Regular Army and such provisions must be followed with respect to the purchase, etc., of the material for the National Guard. The requirement that the "Secretary of War shall prescribe and supply the necessary" blank forms for such contracts and make such regulations as shall be deemed necessary is similar to the requirements in section 3747, Revised Statutes, and clearly contemplates that there shall be uniformity as to both the forms for contracts and the procedure of contracting for the National Guard.

The law may be said to require that such contracts be made as similar contracts are made for the Regular Army and to require property accountability as property of the United States. In so far then as accountability for the funds used is concerned, and so understanding question (*a*), the contracts must comply with all Federal requirements, and as such be filed in this office in support of vouchers making payments thereunder. Since the law requires the contracts to be made under the "direction of the Secretary of War," and as contracts are made for the Regular Army, the requirements of sections 3744 and 3747, Revised Statutes, must be observed, and the officer entering into National Guard contracts must be appointed by the Secretary of War or by the chiefs of procurement bureaus of the War Department. See War Department General Orders, Nos. 47 and 55, 1918. It necessarily follows that the governor of the State concerned has no authority in the matter of appointing contracting officers and that the Secretray of War may appoint the property and disbursing officer or some other qualified officer of the National Guard of the State concerned to make such contracts on forms prescribed and in accordance with regulations issued for him.

The answer to the first question seems to render unnecessary any further answer to the third question, except to state that in the absence of specific exceptions to the contrary all laws applicable to purchases for the Regular Army are required to be observed in making purchases for the National Guard. The reason for such requirement would appear to be obvious. Under the national defense act, as amended, the National Guard is one of the three components of the Army of the United States, and it is entirely fitting and proper that its peace-time activities and practices should be simulated as nearly as may be to the activities and practices of the other two components, particularly of the Regular Army.

Your questions are answered accordingly.

(A-8966)

TRAVELING EXPENSES OF OFFICIALS OF THE DEPARTMENT OF JUSTICE

The Solicitor General and other officials of the Department of Justice, when sent by the Attorney General to attend to any interest of the United States, are entitled, under the provisions of section 370, Revised Statutes, as amended by the act of March 4, 1923, 42 Stat. 1503, to reimbursement of actual expenses not to exceed $6 per day, but they are not entitled to a per diem in lieu thereof. Payments of a per diem in lieu of subsistence not exceeding $4 heretofore made will not be disturbed, however. [Modified by 4 Comp. Gen. 1066.]

Officers of the Department of Justice, referred to in department circular No. 1122, dated November 1, 1920, when sent by the Attorney General to attend to any interest of the United States, may be reimbursed for transportation expenses incurred which are not specifically authorized under department regulations—such as charges for drawing room on train and tips—in such amounts as may be approved by the Attorney General, subject only to statutory limitations.

Decision by Comptroller General McCarl, June 4, 1925:

There is for consideration in connection with the settlement of the accounts of Don C. Fees, disbursing clerk, Department of Justice, the question (1) whether the Solicitor General and other officers of the Department of Justice are entitled to a per diem in lieu of subsistence when sent by the Attorney General to attend to any interest of the United States, and (2) whether the officers referred to in Circular No. 1122, issued by the Attorney General November 1, 1920, may be reimbursed for transportation expenses—such as charges for drawing room on train and tips—which are not specifically authorized under regulations.

Section 370, Revised Statutes, as amended by the act of March 4, 1923, 42 Stat. 1503, provides as follows:

> Whenever the Solicitor General, an attorney, an assistant attorney, a special assistant to the Attorney General, or any other officer of the Department of Justice is sent by the Attorney General to any State, district, Territory, or country to atend to any interest of the United States, the person so sent shall receive, in addition to his salary and the necessary expenses of travel, his actual expenses incurred for subsistence, not to exceed $6 per day while absent from the seat of government, the account thereof to be verified by affidavit.

As this statute makes specific provision for these particular officers when engaged on the duty specified, thereby excepting them from the limitations prescribed in the act of April 6, 1914, 38 Stat. 318, and makes no provision for the payment of per diem in lieu of subsistence, it must be held that such officers when sent by the Attorney General to attend to any interest of the United States are not entitled to a per diem in lieu of subsistence. See 2 Comp. Gen. 619. However, this decision will not be applied to require the disallowance of credit for payments heretofore made by disbursing officers of a per diem not exceeding $4 in lieu of actual expenses of subsistence in such cases. The first question is answered accordingly.

The appropriation for traveling expenses for the Department of Justice (see act of May 28, 1924, 43 Stat. 216, for current fiscal year) is in the following terms:

For traveling and other miscellaneous and emergency expenses, including advances made by the disbursing clerk, authorized and approved by the Attorney General, to be expended at his discretion, the provisions of section 3648, Revised Statutes, to the contrary notwithstanding, $7,500.

The published regulations governing traveling expenses of the Department of Justice, dated February 1, 1921, provide:

The following regulations shall govern the allowance of traveling expenses incurred for travel on official business, except where specific laws, regulations, or orders provide otherwise.

Circular No. 1122, issued by Attorney General Palmer on November 1, 1920, which is still in force, reads:

It is hereby ordered that the circulars and orders of the Attorney General with respect to allowances for traveling expenses, the issue and exchange of transportation requests, and the rendition of accounts be, and the same hereby are, waived as to the Attorney General, Solicitor General, assistant to the Attorney General, Assistant Attorneys General, private secretary and assistant to the Attorney General, and the chief clerk and administrative assistant of the department, and said officials will be allowed their actual and necessary traveling expenses within the limitations of law and will be allowed to issue and exchange transportation requests irrespective of such regulations.

The provision just quoted exempts from the restrictions and limitations of the travel regulations the officers therein designated. Therefore, such officers are entitled to reimbursement of expenses incurred while traveling on official business for such items and in such amounts as may be authorized or approved by the Attorney General subject only to limitations and restrictions prescribed by statute. Accordingly question 2 is answered in the affirmative.

(A–8037)

ACCOUNTING, SET-OFF—INDEBTEDNESS OF GENERAL COURT-MARTIAL PRISONERS TO THE UNITED STATES

Where the United States has suffered loss of money or property through embezzlement, theft, forgery, or other causes for which persons in the naval service have been tried by general court-martial, convicted, and sentenced to confinement in prison, the amount thereof constitutes an indebtedness of the prisoner to the United States which must be liquidated from accrued pay, viz, the balance standing to the credit of the prisoner at date of approval of sentence and pay that may thereafter accrue before any forfeiture for credit to the naval hospital fund can begin to run. Payments made by disbursing officers prior to July 1, 1925, will not be questioned, but the rule laid down by this decision will be followed on and after that date.

Comptroller General McCarl to the Secretary of the Navy, June 5, 1925:

I have your letter of February 14, 1925, as follows:

I am advised by the supply officer, naval prison, Portsmouth, N. H., that credit has been suspended in his accounts for payments on discharge to

general court-martial prisoners who had been convicted of "embezzlement, theft, forgery, and other charges which might result in an indebtedness to the Government."

Under the terms of general court-martial sentences involving confinement, all pay accruing to the accused during the period prescribed is to be applied to the discharge of his indebtedness to the United States at date the sentence is approved, and the balance, if any, is to be forfeited with the exception of certain specified amounts. The liquidation of his indebtedness to the United States is thus a matter of bookkeeping. Should the pay accruing to the accused after conviction be insufficient to discharge his indebtedness, then and then only could the question arise as to whether balance due him at date of conviction should be withheld.

In this connection it would appear, as stated by the supply officer, that—

"If the General Accounting Office contends that such balances are available to liquidate all such indebtedness to the United States, it is believed that claims should be formulated and set up against the prisoner as soon as the indebtedness shall have been ascertained while the person is under naval jurisdiction rather than delay such action until after the prisoner has been discharged after which, in most cases, no recourse can be had. In the majority of the cases suspended in my account the prisoners had served sentences averaging a period of two years, which is believed to have been sufficient time for final determination of the amount of indebtedness in every case."

In view of the foregoing it is requested that the suspensions referred to be removed and that appropriate instructions be issued to the Military Division of your office for its guidance in future cases.

The standard form in which general courts-martial sentences are stated provides that the person found guilty is "to suffer all the other accessories of said sentence as prescribed by section 883, Naval Courts and Boards."

As defined by section 883, "all the other accessories of said sentence" includes:

* * * and after his accrued pay * * * shall have discharged his indebtedness to the United States at the date of approval of such sentence and sufficient funds have accrued to his credit to defray the cost of transportation to his home or place of enlistment, subsistence en route, and the civilian clothes to be furnished upon discharge, shall forfeit all pay * * * that may become due him during a period equivalent to the term of such confinement * * * except the sum of $3 per month during such confinement for necessary prison expenses, and if dishonorably discharged * * * pursuant to such sentence a further sum of $20 to be paid him when discharged.

Within the meaning of the term any balance of pay standing to the credit of a prisoner at the date of approval of his sentence is "accrued pay." This together with pay credited subsequent to that date is by the terms of the sentence first to be applied to liquidate indebtedness to the United States.

The imposing of a forfeiture of pay by sentence of court-martial deprives the individual of his pay as a penalty, not as liquidation of indebtedness, and by section 4809 of the Revised Statutes the amounts thereof are transferred to and made available for disbursement from naval hospital fund. All pay accruing is a charge to the pay appropriation, whether applied to liquidate indebtedness, credited to naval hospital fund, or paid to the prisoner through exemptions from forfeiture, and the imposition of a forfeiture does

not change the situation. The terms of general court-martial sentences relative to indebtedness to the Government are that the Government shall be reimbursed for those items of cost, disbursement, or loss which have not been liquidated at date of approval of sentence before forfeiture shall begin to run for credit to the naval hospital fund.

If from the embezzlement, theft, or forgery the Government has suffered a loss of cash or property, the value thereof is due the United States and should be considered as an "indebtedness to the United States" to be reimbursed from the pay appropriation through application thereto of accrued pay before any forfeiture to the credit of naval hospital fund can begin. And in all cases of conviction under the fourteenth article for the government of the Navy the amount of loss, if any, sustained by the Government by reason of the wrongful act of the man should be determined and set up as a debit item in the man's account.

It appears that this element of indebtedness has not in the past been taken into consideration, and that since the decision of this office of January 20, 1923, 17 MS. Comp. Gen. 789 (published in S. and A. Memo. No. 246, p. 7067), but one supply officer has applied this decision to a discharged prisoner. The military division of this office reports:

> As far as this office is able to determine, no payments of the kind in question have been made by the disbursing officers of the above-mentioned prisons, subsequent to the receipt of their statement of differences for the fourth quarter, 1924.

Considering the practice in the past both as to disbursements and audit of accounts, and the fact that the decision of January 20, 1923, was not specifically upon a naval court-martial case, the items suspended on this account if otherwise correct, will be passed to the credit of the disbursing officers. In order to give the Navy Department ample time in which to give notice to the service of the present decision no payments because of the question herein involved made prior to July 1, 1925, will be questioned on this account. On and after July 1, 1925, no disbursing officer should make payment in money to or on account of any man serving sentence in confinement under general court-martial until the amount of his indebtedness to the United States, if any, arising from the offense for which tried and found guilty, has been determined, entered as a debit in his accounts, and the account properly adjusted.

In the event, on and after July 1, 1925, a prisoner is due for discharge, and the determination has not then been made as to whether from the nature of the offense he is liable to be indebted to the United States or the amount thereof has as yet not been determined, no payment in money other than the gratuity authorized by

the act of February 16, 1909, 35 Stat. 622, should be made to him. Transportation and civilian clothing may be furnished as prescribed in the act of March 3, 1909, 35 Stat. 756, notation of this fact being entered on the pay account and the prisoner should be instructed to file claim with this office for any arrears of pay to which he may consider himself entitled.

(A–9744)

PERSONAL SERVICES—EXPERT WITNESSES

Under the act of April 4, 1924, 43 Stat. 71, the temporary employment for a short period, by the Commissioner of Internal Revenue, of an expert appraisal engineer to examine buildings for the purpose of qualifying as an expert witness for the Government in a tax appeal case before the Board of Tax Appeals is authorized, where such employment is necessary and there is no person already in the employ of the Bureau of Internal Revenue qualified to render the service.

Decision by Comptroller General McCarl, June 5, 1925:

The Commissioner of Internal Revenue has forwarded to this office for direct settlement approved voucher for $200 in favor of F. J. Batchelder for performing personal services as expert appraisal engineer to qualify as an expert witness in appeal of Elsie Eckstein, Chicago, Docket No. 679, before the Board of Tax Appeals.

On February 10, 1925, the Commissioner of Internal Revenue authorized the supervising internal revenue agent, Chicago, Ill., to employ F. J. Batchelder, an expert appraisal engineer, for not to exceed two days at a rate not to exceed $100 per day to qualify himself to testify in the above-mentioned case when heard as to the expected useful life and concerning the possible obsolescence before the expiration of such expected useful life of the North American Building and the Mercantile Building in Chicago for the purpose of substantiating, if possible, the contention of the Government as to the rate of 1½ per cent depreciation on each building determined by the Commissioner of Internal revenue in his adjudication of the tax case.

The appropriation "Collecting the internal revenue, 1925," act of April 4, 1924, 43 Stat. 71, under which it is proposed to make payment of the amount of the claim, provides expressly for "employment of the necessary * * * experts * * * to be appointed as provided by law." The employment of this expert is shown to have been necessary in this instance for the protection of the interests of the Government, there having been no qualified person already in the employ of the Bureau of Internal Revenue to render the service required, and the employment appears to have been made as provided by law.

Accordingly the claim is allowed.

(A–8956)

COAST GUARD—USE OF SEIZED VESSELS FORFEITED TO THE UNITED STATES

When vessels that are forfeited to the United States under the provisions of the act of March 3, 1925, 43 Stat. 1116, are turned over to the Coast Guard for use in the enforcement of the customs laws the regularly authorized personnel of the Coast Guard may be assigned to man said vessels and their pay and allowances paid from Coast Guard appropriations.

As the act of March 3, 1925, 43 Stat. 1116, specifically provides that the appropriations for enforcement of the customs laws and national prohibition act shall be available for the payment of expenses of maintenance, repair, and operation of vessels and vehicles forfeited to the United States and used in the enforcement of those laws, the Coast Guard whose duty it is to enforce the customs laws may, in the first instance, pay the expenses of maintenance, repair, and operation of such vessels and secure reimbursement by transfer of funds from the appropriations chargeable.

Comptroller General McCarl to the Secretary of the Treasury, June 8, 1925:

I have your letter of May 1, 1925, received May 11, 1925, in part as follows:

> Should forfeited vessels be delivered to the Treasury Department for use by the Coast Guard in the enforcement of the customs laws under the provisions of the act approved March 3, 1925, it is presumed that officers and men of the Coast Guard may be detailed to operate such vessels and that the pay and allowances of such officers and men may be defrayed from the regular Coast Guard appropriations. This presumption is predicated upon the provision of the act of August 29, 1916 (39 Stats. 600), which reads "Any commissioned or warrant officer, petty officer, or other enlisted man in the Coast Guard may be assigned to any duty which may be necessary for the proper conduct of the Coast Guard." The enforcement of the customs laws of the United States has been one of the most important duties of the Coast Guard throughout its entire history. If this presumption be not correct, I request that you advise me accordingly.
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> With respect to the payment of expenses of maintenance, repair, and operation (other than pay and allowances of officers and men detailed to operate such vessels) of vessels forfeited to the United States and delivered to the Treasury Department for use by the Coast Guard in the enforcement of the customs laws, your decision is requested as to whether such expenses may be defrayed by the Coast Guard, the Coast Guard appropriation being reimbursed by transfers of funds thereto from the appropriation for defraying the expenses of collecting the revenue from customs or from the appropriation for enforcement of the national prohibition act.

By the act of January 28, 1915, 38 Stat. 801, there was established, in lieu of the then existing Revenue Cutter Service and the Life Saving Service, the Coast Guard to constitute a part of the military forces of the United States, to operate under the Treasury Department in time of peace, and to operate as a part of the Navy, subject to the orders of the Secretary of the Navy, in time of war, or when so directed by the President. Said act further provides that except as modified thereby, all existing laws relating either to the Life Saving Service or to the Revenue Cutter Service shall remain in force as far as applicable to the Coast Guard and that the offices, positions, operations, and duties shall in all respects be held and construed to impose the same duties upon the positions and their incumbents in

the Coast Guard as theretofore were imposed upon the corresponding positions and incumbents in the said two organizations.

The Revenue Cutter Service was originally established by the act of August 4, 1790, 1 Stat. 145, for the enforcement of the customs laws and the protection of the seacoast, there being at that time no Naval Establishment.

Section 2760, Revised Statutes, provides:

> The officers of the revenue-cutters shall respectively be deemed officers of the customs, and shall be subject to the directions of such collectors of the revenue, or other officers thereof, as from time to time shall be designated for that purpose * * *.

Section 2762, Revised Statutes, provides:

> The officers of revenue-cutters shall perform in addition to the duties hereinbefore prescribed, such other duties for the collection and security of the revenue as from time to time shall be directed by the Secretary of the Treasury, not contrary to law.

The act of August 29, 1916, 39 Stat. 601, provides:

> Any commissioned or warrant officer, petty officer, or other enlisted man in the Coast Guard may be assigned to any duty which may be necessary for the proper conduct of the Coast Guard * * *.

There can be no doubt, in view of the statutes quoted above, that the enforcement of the customs laws constitutes one of the major duties of the Coast Guard, and under the provisions of the act of August 29, 1916, *supra*, the Secretary of the Treasury is authorized to assign members of the authorized personnel of the Coast Guard to man vessels forfeited to the United States under the provisions of the act of March 3, 1925, 43 Stat. 1116, and used in connection with the enforcement of the customs laws, their pay and allowances to be paid from the Coast Guard appropriations the same as though they were serving on regular Coast Guard vessels.

Your second question relates to the payment of expenses of maintenance, repair, and operation of the forfeited vessels. The act of March 3, 1925, 43 Stat. 1116, specifically provides that certain appropriations shall be available for the payment of the expenses of maintenance, repair, and operation of the vessels and vehicles forfeited to the United States and used in connection with the enforcement of the customs laws or the national prohibition act, and the decision of April 23, 1925, A–8956, held that such provision is exclusive and precludes the use of Coast Guard appropriations for the payment of such expenses. The question now presented is whether such expenses other than pay and allowances of regular personnel as mentioned in the preceding paragraph may be paid in the first instance from Coast Guard appropriations, said appropriations to be thereafter reimbursed from the appropriations for collecting the revenue from customs and for enforcing the national prohibition act.

There would appear to be no objection to the procedure outlined, provided no expenditures are made other than such as are legally and properly chargeable to the appropriations for the customs or prohibition services.

(A-9788)

COMPENSATION, DOUBLE—SMITHSONIAN INSTITUTION

In the absence of specific statutory authority therefor, the payment of extra compensation to employees of the National Museum or other bureaus under the jurisdiction of the Smithsonian Institution for services rendered as watchmen on Sundays is not authorized.

In view of the fact that employment of extra watchmen for Sunday opening of the National Museum will be limited to one day per week, fifty-two times the amount paid for the one day's service may be regarded as the annual rate of compensation in determining whether an employee of another establishment may be appointed to the position of Sunday watchman in the National Museum without violating the provisions of the act of May 10, 1916, 39 Stat. 120, as amended.

Comptroller General McCarl to the Secretary, Smithsonian Institution, June 8, 1925:

I have your letter of May 20, 1925, requesting decision of questions presented, as follows:

The appropriation "Preservation of collections, 1926," was increased to provide for the employment of extra watchmen in the National Museum buildings on Sundays.

I beg to ask you for a decision on the following points:

(1) Can regular monthly employees (mechanics, laborers, messengers) of the National Museum and other Government bureaus under the direction of the Smithsonian Institution, other than watchmen, be detailed for this work at a daily rate of $3 for each Sunday employed?

(2) In order that payment will not exceed the $2,000 yearly limit for employment in two positions, can this rate of $3 be computed on a 52-day basis, instead of 312 days, as is the case with general per diem employees?

Section 1764, Revised Statutes, prohibits the payment of allowances or compensation for any extra service whatever which any officer or clerk may be required to perform unless expressly authorized by law. Section 1765, Revised Statutes, prohibits any person in the public service from receiving additional pay or compensation for any other service or duty whatever unless authorized by law and the appropriation specifically states that it is for such additional pay or compensation.

The appropriation "Preservation of collections, 1926," act of March 3, 1925, 43 Stat. 1207, which you state was increased to provide for the employment of extra watchmen in the National Museum Building on Sundays, provides as follows:

For continuing preservation, exhibition, and increase of collections from the surveying and exploring expeditions of the Government, and from other sources, including necessary employees, all other necessary expenses * * * $441,082, of which amount not to exceed $428,598 may be expended for personal services in the District of Columbia.

There is no specific authorization in this appropriation for payment of extra compensation to employees of the National Museum or other bureaus under the jurisdiction of the Smithsonian Institution for Sunday service, and I know of no general statutory provision giving such authority.

You are advised, therefore, that payment to employees under the jurisdiction of the Smithsonian Institution of extra compensation for Sunday service is not authorized. See 24 Comp. Dec. 350.

In answer to the second question presented for decision, in view of the fact that employment of extra watchmen for Sunday opening of the National Museum will be limited to one day per week, fifty-two times the amount paid for the one day's service may be regarded as the annual rate of compensation in determining whether an employee of another establishment may be appointed to the position of Sunday watchman in the National Museum without violating the provisions of the act of May 10, 1916, 39 Stat. 120, as amended.

(A-6401)

NAVY PAY—REFUND OF COURTS-MARTIAL FORFEITURES

Where, under article 53 for the government of the Navy, section 1624, Revised Statutes, the sentence of a general court-martial of an enlisted man of the Navy to confinement and loss of pay is carried into execution upon the approval of the convening authority and the sentence is subsequently set aside under the act of February 16, 1909, 35 Stat. 621, by the Secretary of the Navy, the enlisted man is entitled to payment from appropriations current when the checkage was made of the sums checked against his pay prior to the sentence being set aside. 1 Comp. Gen. 609; 2 *id.* 445; 3 *id.* 342; *id.* 627; *id.* 660, overruled.

Comptroller General McCarl to the Secretary of the Navy, June 9, 1925:

There has been received your request dated November 15, 1924, for review of settlement No. N-157124, dated February 8, 1922, wherein was disallowed the claim of William Lawrence Davis, boatswain's mate, second class, for $158 checked against his pay pursuant to the sentence of a general court-martial approved August 27, 1921, by the commander of the mine force, Atlantic Fleet, but which sentence was set aside by the Secretary of the Navy on September 22, 1921. The claim of the enlisted man for refund of the deduction was disallowed on the ground that the setting aside of the sentence of the general court-martial did not operate to restore the checkages theretofore accomplished while you contend that it so operated and submit in support of your contention the argument and opinion, dated May 8, 1924, of the Attorney General that you have authority to set aside and modify the sentences of Navy general courts-martial, but that the question as to the pay actually due in such a case is for the de-

termination of this office. In view of your contentions, concurred in by the Attorney General, the entire matter will be considered herein on its merits.

Davis was tried by a general court-martial aboard the U. S. S. *San Francisco*, found guilty by the specification of assaulting and striking another person in the Navy, and sentenced to be confined for a period of two months and to forfeit $237 in pay. The proceedings, findings, and sentence were approved August 27, 1921, by the commander of the mine force of the Atlantic Fleet, but the loss of pay was reduced to $158. The sentence as approved and reduced was carried into effect and the proceedings forwarded to the Navy Department, where the Secretary of the Navy set aside the proceedings, findings, and sentence. In the meantime the sum of $158 had been checked against the pay of the enlisted man and the object of the request for review is to secure the restoration of said amount.

Article 53 for the government of the Navy, section 1624, Revised Statutes, provides that with the exception of sentences extending to the loss of life or dismissal of a commissioned or warrant officer, all sentences of a general court-martial may be carried into execution on confirmation of the commander of the fleet or officer ordering the court. The act of February 16, 1909, 35 Stat. 621, authorizes the convening of a general court-martial by the President, Secretary of the Navy, the commander in chief of a fleet or squadron, or by the commanding officer of any station beyond the continental limits of the United States. The general court-martial was properly convened, and under the articles for the government of the Navy had jurisdiction of the offense charged in this case; that is, of striking another person in the Navy. It follows, therefore, that the sentence in this case was not subject to collateral review. See *Givens* v. *Zerbst*, 255 U. S. 11; *Collins* v. *McDonald*, 258 *id.* 416. It appears that subsequent to the act of June 8, 1880, 21 Stat. 164, establishing the office of Judge Advocate General of the Navy, where, under the direction of the Secretary of the Navy, were received, revised, and recorded the proceedings of general courts-martial, the procedure grew up, without any express statutory authority, to actually mitigate or set aside sentences where there had been an abuse of power, either in the court-martial or in the commanding officer. See Laws Relating to the Navy (annotated), page 1042, note. In other words, abuses of power led to the assumption of review not authorized by law, and as the result the act of February 16, 1909, 35 Stat. 621, made provision for automatic review of sentences of naval general courts-martial in language as follows:

*** * * The Secretary of the Navy may set aside the proceedings or remit or mitigate, in whole or in part, the sentence imposed by any naval court-martial convened by his order or by that of any officer of the Navy or Marine Corps.**

There can be no question as to sentences of general court-martial involving loss of life or separation of a commissioned or warrant officer from the service, for such sentences can not be carried into execution without confirmation by the President. The question arises with reference to sentences of general courts-martial involving discharge of enlisted men and loss of pay or confinement or both of officers and enlisted men which may be carried into effect upon approval of the sentence by the convening authority but which are subject to the subsequent review of the Secretary of the Navy. Unless there has been a discharge from the service in the case of enlisted men, it is unquestionably true that the subsequent setting aside of the sentence by the Secretary of the Navy under the provision in the act of February 16, 1909, *supra*, for his automatic review of all sentences of naval courts-martial operates to relieve the officer or enlisted man from the unexecuted fines and penalties; that is, the remainder of the sentence of confinement and the unaccrued and unchecked forfeitures of pay. It is obvious, however, that the subsequent setting aside of a sentence of confinement can not blot out the served imprisonment; that is, restore physical freedom for a period that has passed, and the question here is whether such setting aside is equally impotent as to the accrued and checked forfeitures of pay.

There is authority for the proposition that the result of the deliberation, findings, and sentence of a court-martial is in the nature of a recommendation to the reviewing authority and that a sentence of a court-martial is interlocutory and inchoate until approved by the reviewing authority. In re *Brodie*, 128 Fed. Rep. 665. Here there are two reviewing authorities—the officer convening the court-martial and the Secretary of the Navy. The effect of the approval of the first reviewing authority must be to authorize the carrying of the sentence into execution subject to setting aside or modification by the Secretary of the Navy. See *United States* v. *Fletcher*, 148 U. S. 84. The accrued forfeitures and checkages of pay pursuant to the sentence of general courts-martial are not carried to the general fund of the Treasury, from whence, under Article I, section 9, of the Constitution, they could not be withdrawn save in consequence of an appropriation made by law, but eventually are credited to the naval hospital fund, Revised Statutes, section 4809. See 1 Comp. Gen. 291; 23 Comp. Dec. 340; 12 *id.* 276. As a practicable matter, therefore, when a sentence of a general court-martial is subsequently set aside upon review, there is no insuperable obstacle to debiting the appropriation with the accrued and checked forfeitures, and the view may be adopted that the intent of the hereinbefore-quoted provision of the act of February 16, 1909, *supra*, is that when the Sec-

retary of the Navy sets aside the sentence of a naval court-martial the officer or enlisted man, in so far as pay is concerned, shall be restored, as nearly as may be, to the condition he would have been in had there been no sentence of him by a court-martial. See *Lecorchick* v. *United States*, decided December 1, 1924, by the Court of Claims. So much of the decisions in 1 Comp. Gen. 609; 2 *id.* 445; 3 *id.* 342, 627, 660, as conflict with the views herein expressed will not be followed hereafter.

Upon review, the sum of $158 checked against the pay of Davis during the first quarter, 1922, is certified due him, chargeable to the appropriation for the pay of the Navy then current; appropriate adjustment of the naval hospital fund of the amount herein authorized to be refunded will also be made.

(A–9068)

PURCHASES, NEWSPAPERS AND PERIODICALS—GENERAL ACCOUNTING OFFICE, ORAL OPINIONS

The appropriation "Reserve Officers' Tfaining Corps," act of June 7, 1924, 43 Stat. 507, is not available for the purchase of newspapers and periodicals for use in training camps for reserve officers.

Opinions expressed orally by officers and employees of the General Accounting Office are not authorized, do not constitute official action, and can not under any circustances be recognized as controlling the action of the office on any matter that may come before it for official determination.

Decision by Comptroller General McCarl, June 9, 1925:

Lieut. C. H. Lamb applied March 31, 1925, for review of settlement M–11709–W of February 28, 1925, in which credit was disallowed for payments aggregating $85.40 for newspapers and magazines for use in a training camp for reserve officers.

It appears that administrative authority to use the appropriation "Reserve Officers' Training Corps" for the payment of the subscriptions to newspapers and purchase of periodicals during the period of encampment at summer training camps was requested by letter of November 15, 1923, from the office of the corps area commander to The Adjutant General of the Army. Approval of the request was recommended in an indorsement of December 5, 1923, from the office of the Chief of Finance, as follows:

1. In view of the informal action of the General Accounting Office in stating, in effect, that vouchers for recruiting and incidental expenses in connection with the establishment and maintenance of training camps may be paid from the training appropriation as explained in 6th indorsement of this office dated December 3, 1923 (copy herewith), it is recommended that the request in basic communication for authority to subscribe to newspapers and purchase periodicals during the period of encampment at summer training camps, under purpose number 4743, be paid for from the C. M. T. C. and R. O. T. C. appropriations, be approved.

The sixth indorsement dated December 3, 1923, referred to in the quotation is not with the papers in this case and the reference

to "informal action of the General Accounting Office" is not clear. Assuming that the reference is to an opinion expressed orally by some officer or employee of this office, I may take this occasion to state that such opinions are not authorized and must of necessity be regarded as personal views only, given for whatever they may be worth in the way of assisting the administrative offices in the solution of their problems. The expression of such opinions does not constitute an official action and can not under any circumstances be recognized as controlling the action of this office on any matter that may come before it for official determination. An authoritative decision on any matter within the jurisdiction of this office may be obtained at any time by an officer authorized by law to submit the question involved, and if any such officer, instead of following the authorized procedure in such matters, elects to present the question informally to some one connected with this office, he thereby assumes the risk of basing his action upon advice which, due to incomplete presentation or otherwise, may not be in accord with the official action which this office thereafter may take with reference to the matter.

Furthermore, it is noted that the indorsement hereinbefore quoted does not state that the "informal action" referred to was with reference to subscriptions to newspapers or purchase of periodicals. In this connection it may be stated that even a formal decision by this office to the effect that the appropriation in question is available for recruiting and incidental expenses in connection with the establishment and maintenance of training camps would not authorize the use of said appropriation in procuring newspapers and periodicals in the absence of a showing that they were necessary in connection with the recruiting for or maintenance of the camp.

The disallowance of credit for the payments here under consideration was not based on lack of administrative authority for the expenditures, as apparently assumed by the disbursing officer, but was because the appropriation was not available for such expenditures. Said appropriation (see act of June 7, 1924, 43 Stat. 507) contains no provision that could be construed as authorizing payment for newspapers and magazines not shown to be necessary to the maintenance of the camp. The character of the newspapers and magazines for which the payments in question were made would indicate that they were in no way connected with the prescribed courses of instruction or training but were for the general information, diversion, or entertainment of the officers in charge of or in attendance at the camp, and as such the expense thereof is not a proper charge against the appropriation.

Upon review the disallowances must be and are sustained.

(A–7563)

GRATUITIES, REENLISTMENT ALLOWANCE—NAVY

Absence without leave on the part of an enlisted man of the Navy is not absence due to misconduct within the purview of the act of August 29, 1916, 39 Stat. 580, as amended by the act of July 1, 1918, 40 Stat. 717, and does not automatically extend the length of the enlistment period. An agreement to extend a four-year enlistment in which there was an absence without leave for two days, accordingly becomes effective four years from the date of the original enlistment and entitles the enlisted man to a reenlistment allowance of $50 multiplied by the number of whole years for actual service during that enlistment period; i. e., as the enlisted man only served 3 years 11 months and 28 days, he is only entitled to a reenlistment allowance as for 3 years of service. 3 Comp. Gen. 330 modified.

Decision by Comptroller General McCarl, June 10, 1925:

Charles A. Free, SK, first class, United States Navy, requested October 23, 1924, review of settlement O38861, October 6, 1924, by which was disallowed his claim for $50 additional enlistment allowance on extension of enlistment January 27, 1923. The claim was disallowed for the following reasons:

> The records show that claimant was absent over leave two days from his enlistment, January 27, 1919, to January 26, 1923, date of extension of enlistment, having 3 years 11 months and 28 days' active duty during the enlistment. He had three full years' service, and was paid $150 enlistment allowance on extension of enlistment at $50 per each full year of service in the said enlistment. He has been paid all the enlistment allowance to which he is entitled.

This action was in accordance with 2 Comp. Gen. 633, and 162, 166. In the latter case, construing the Army law, section 9 of the act of June 10, 1922, 42 Stat. 629, in the portion material here identical with the Navy law contained in section 10 of the same act, it was said:

> The enlistment allowance fixed in the statute is to be "multiplied by the number of years served in the enlistment period from which he has last been discharged." A year is the unit of service, and nothing less than a year is to be included in the computation.
>
> The enlistment allowance may not, therefore, be pro rated for fractional parts of years served in the enlistment from which last discharged. The foregoing is the general rule.

In an application of this holding to a discharge on expiration of enlistment notwithstanding absence without leave for 2 months and 20 days during the enlistment and not made good, it was held that the act of August 29, 1916, 39 Stat. 580, as amended by the act of July 1, 1918, 40 Stat. 717, which requires the making good of time lost in excess of 1 day because of "injury, sickness, or disease resulting from his own intemperate use of drugs or alcoholic liquors, or other misconduct" included in the term "misconduct" absence without leave; that the enlistment was automatically extended 2 months and 20 days beyond the date of original expiration, but that in that case the discharge on the original date of expiration was a

discharge within 3 months before expiration of enlistment under the act of August 22, 1912, 37 Stat. 331, and that under the last-named act authorizing discharge within 3 months of expiration of enlistment "without prejudice to any right, privilege, or benefit that he would have received * * * had he served his full term of enlistment or extended enlistment," the claimant was entitled to enlistment allowance on reenlistment within 3 months from date of actual discharge as for serving a complete enlistment. 3 Comp. Gen. 330.

Claimant suggests in his request for review that as under that decision he would have been entitled to the enlistment allowance for an additional year had he been discharged and reenlisted, under the terms of the act of August 22, 1912, 37 Stat. 331, providing that enlisted men who extend enlistments as therein provided "shall be entitled to and shall receive the same pay and allowances in all respects as though regularly discharged and reenlisted immediately upon expiration of their term of enlistment" his claim is allowable.

Claimant's enlistment was extended from January 26, 1923, date of expiration; he was not discharged. If therefore an absence without leave in excess of one day operates to automatically extend the term of enlistment of a man in the Navy, the extension could not have become effective until January 29, 1923. The agreement entered into January 3, 1923, was to extend the enlistment for two "full years from the date of its expiration on January 26, 1923, namely, until January 26, 1925." The enlistment and extension thus total six years, not six years and two days. The direction of the statute that the enlistment allowance shall be "multiplied by the number of years served in the enlistment period from which he has last been discharged" can not be made effective in such a situation, and the holding in 3 Comp. Gen. 330, is for further consideration.

The act of August 29, 1916, 39 Stat. 580, as amended by the act of July 1, 1918, 40 Stat. 717, provides:

> Hereafter no officer or enlisted man in the Navy or Marine Corps in active service who shall be absent from duty on account of injury, sickness or disease resulting from his own intemperate use of drugs or alcoholic liquors, or other misconduct, shall receive pay for the period of such absence, the time so absent and the cause thereof to be ascertained under such procedure and regulations as may be prescribed by the Secretary of the Navy: *Provided*, That an enlistment shall not be regarded as complete until the enlisted man shall have made good any time in excess of one day lost on account of injury, sickness or disease resulting from his own intemperate use of drugs or alcoholic liquors, or other misconduct.

Misconduct only is not penalized by this statute. So far as misconduct is concerned, it is absence "from duty on account of injury, sickness, or disease resulting from his own * * * misconduct" that is penalized, and it is only such absence which automatically extends an enlistment. The time so absent and the cause thereof, it

will be noted, are to be ascertained under such procedure and regulations as may be prescribed by the Secretary of the Navy. This latter requirement has no application to an absence without leave, but is important where injury, sickness, or disease results in absence from duty and the cause of the injury, sickness, or disease and the time such injury, sickness, or disease incapacitated the man for duty must be ascertained.

On further consideration it appears that absence without leave is not within the language, meaning, or intent of the act of August 29, 1916, and does not under that statute have the effect of automatically exending the enlistment of a man so absent. Decisions to the contrary are modified accordingly.

Applying the foregoing to the present case, during claimant's enlistment of four years, January 27, 1919, to January 26, 1923, he served 3 years 11 months and 28 days. The enlistment allowance for claimant's grade at $50 each year served amounts to three times $50, or $150. He has been paid this amount and the settlement disallowing his claim for an additional amount is accordingly sustained.

(A–9258)

PROPERTY, PRIVATE—LOSS OF WHILE HIRED BY THE GEOLOGICAL SURVEY

The United States is not liable for the loss of horses while under hire to the Geological Survey by a formal agreement, providing that the United States shall use all reasonable care and that none of the animals shall become injured or lost, when no convincing evidence of negligence or lack of reasonable care on the part of the United States is submitted.

Decision by Comptroller General McCarl, June 10, 1925:

S. B. McHenry has applied for review of settlement of January 14, 1925, No. 062194, disallowing his claim of $70 for two horses which were lost while under hire by the United States Geological Survey.

The contract under which the horses were hired provided:

ARTICLE 1.—The party of the second part [S. B. McHenry] agrees to furnish to the party of the first part saddle animals, which saddle animals shall be healthy and sound and which shall be capable of climbing mountains. Party of the first part agrees to feed and care for the said saddle animals and keep same shod and to return same, when no longer needed in the work of surveying for which the said saddle animals are to be used, to be returned to said party of the second part at Murray, Utah.

Party of the first part shall use all reasonable care that none of said saddle animals shall become injured or lost, but in case of any dispute, none of said animals shall be held to be worth more than forty dollars.

* * * * * * *

Party of the first part agrees to pay to party of the second part for the use of said saddle animals at the rate of twelve dollars ($12) per month per head while said animals are in use by said party of the first part. Vouchers to be rendered at the end of each calendar month.

J. H. Wilke, the associate topographic engineer, who signed the contract on behalf of the Government, makes the following report concerning the circumstances surrounding the loss of the two animals:

On July 11 the black, which had been tied at camp the night before, was found missing, the halter having been slipped off, it seems. The bay was last seen the same morning, hobbled in a small draw a mile above camp. As soon as the teamster returned from a trip to town (camp was in lower part of Lamb's canyon) I had him ride in every direction to look and inquire for the animals. He never found any tracks nor did anyone say that either of them had been seen by anyone of whom inquiry was made. I myself followed on the second morning what appeared to be their tracks until they reached dense brush at the head of the canyon where they could not be tracked further.

The second day after their disappearance the teamster, myself, and recorder rode to find them on Sunday. The third day after their disappearance the teamster made a trip to Murray, where the animals were hired, to see if they perhaps had gone home, but McHenry said they had not come there; also said that they would not be likely to come there, as he had only shortly before hiring them out kept them there. Besides the teamster riding almost daily for over a week, and whenever he could after that, I myself rode over mountains and draws on the two following Sundays. Many tourists frequented the canyon and hoof prints did not show up long; the horses all were in the habit of staying together, and only the previous night the black had broken its halter rope and ran over to where the other horses were. The bay was always known to run to where the other animals of the bunch were whenever left alone.

So, after being unable to find trace of them, all in camp pretty well agreed that they were stolen; this was the opinion of the sheriff of Summit County. The sheriff of Salt Lake County also had his deputies, who rode the hills, to be on the lookout for them. The sheriff of Summit County said that most likely a "bootlegger" or a sheepherder rode them off.

I had put in the Salt Lake Tribune, at my expense, a four-line advertisement on Saturday and Sunday, stating the loss and offering a reward for information.

At every opportunity I had of seeing anyone who rode the hills I inquired if anyone had seen the lost animals.

I feel that I put forth every reasonable effort to locate the horses, and am very sorry that such a thing occurred. I worried over the matter a great deal. I feel, however, that it could not be helped; I was a bit consoled by the thought that several others told me of similar losses of animals without recovering same.

The claimant states that he has since been notified by the sheriff that one of the horses had been located at Midvale, Utah, "which had accrued against it a feed bill since away last fall," and that "it is very evident that the animals were not stolen, but were permitted to stray away."

The contract for hire did not make the United States the absolute insurer of the animals, and the Government was only required to use reasonable care to prevent their injury or loss. 16 Comp. Dec. 68; 1 Comp. Gen. 192. No evidence is submitted tending to show a failure on the part of the Government's agents to exercise reasonable care. The fact that one of the horses has since been found is no evidence of negligence or lack of reasonable care on the part of the Government agents or employees at the time of loss or disappearance.

Furthermore, even had negligence been established by competent evidence, the contract does not make any agreement to reimburse the owner for the loss of the animals, and the only relief which could be afforded the owner in the case of negligence would be under the act of December 28, 1922, 42 Stat. 1066, which is a matter for administrative determination and certification to Congress and not for payment by or through the General Accounting Office.

Upon review the settlement is sustained.

(A–9967)

CLASSIFICATION OF CIVILIAN EMPLOYEES—TRANSFERS, RETRANSFERS AND DETAILS BETWEEN DEPARTMENTAL AND FIELD SERVICES

When an employee whose position is allocated to a grade in the departmental service under the classification act of 1923 is temporarily detailed to the duties of a position in the field service, he is entitled only to continue in receipt of the compensation of his departmental position and may not be paid a higher rate of compensation from a field service appropriation.

Where employees of the United States Tariff Commission are completely separated from the departmental service by transfer to the field service, regardless of the length of time remaining in the field service, by previous arrangement or otherwise, their retransfer to the departmental service must be at the minimum salary rate of the grade to which retransferred.

Comptroller General McCarl to the Chairman, United States Tariff Commission, June 10, 1925:

I have your letter of June 4, 1925, requesting decision of a question presented, as follows:

The Tariff Commission desires to send three of its special experts from its departmental service in Washington temporarily on a special mission to Europe in the field service. In this connection, and in view of the additional expense to which these representatives will be subjected, the commission desires to grant them a slightly increased compensation while on this special mission.

At the conclusion of this mission these representatives will be retransferred to the commission's departmental service in Washington. It is requested that the commission be advised as to whether under these circumstances, and in view of the fact that their retransfer to Washington will be at their present rates of compensation, such retransfers may be made without prejudicing their salary standing in their present classification grades.

The classification act and the average restrictions appearing in the annual appropriation acts for 1925 and 1926 are applicable only to positions in the District of Columbia. See decision of May 27, 1925, 4 Comp. Gen. 1003, wherein it was held that transfers from an unclassified position in the field service to a classified position in the departmental service must be made at the minimum salary rate in the departmental grade to which transferred, citing 3 Comp. Gen. 1006; 4 *id.* 263; *id.* 493, 499.

When an employee is completely separated from the departmental roll and transferred to a field position and paid from a field appropriation, he is a field service employee and no longer holds a

position in the departmental service. The length of time the employee remains in the field-service position, whether by previous arrangement or otherwise, does not alter the character of the complete transfer and consequent separation from the departmental position so as to constitute it a temporary detail of a departmental employee to field work. It has been held that an employee whose position is allocated to one grade in the departmental service under the classification act when temporarily detailed to duties of a position in a higher grade will be entitled only to continue in receipt of the compensation of the lower grade. 4 Comp. Gen. 126. Likewise, when an employee whose position is allocated to a grade in the departmental service is temporarily detailed to a position in the field service, he is entitled only to continue in receipt of the compensation of his departmental position, and may not be paid at a higher rate of compensation from the field service appropriation.

Accordingly, if the employees you mention are completely separated from the departmental service by transfer to a field service position, their retransfer to the departmental service must be, under existing law, at the minimum salary rate of the grade to which retransferred.

The question submitted is answered accordingly.

(A–9417)

RECLAMATION SERVICE—CONTRACTS FOR PERSONAL SERVICES AND EQUIPMENT

In the absence of express statutory provision therefor, the Reclamation Service is without authority to engage by contract of employment persons "with horse," "with team," or "with automobile" and pay them compensation higher than that paid to persons employed without a horse, team, or automobile; but in view of the long-existing practice of doing so, objection to such procedure will not be interposed prior to June 30, 1926; however, after that date compensation may be paid only on the basis of the personal services rendered.

Comptroller General McCarl to the Secretary of the Interior, June 12, 1925:

I have your letter of April 30, 1925, referring to decision of this office dated February 6, 1925, A–7303, holding that in the absence of specific authority of law rangers in the National Park Service may not be paid additional compensation for hire of their personally owned and used saddle horses, as being in violation of secton 1765, Revised Statutes, and requesting decision whether, on account of that decision, the Bureau of Reclamation may continue a long existing practice of engaging by contract of employment persons "with team" or "with automobile," the wages paid such employees being higher than to those employed without team or automobile.

You state that current organization sheets cover the employment of this class of employees under the following-named designation:

Autho. No.	Designation
34a	Ditch rider, with 1 horse.
34b	Ditch rider, with 2 horses.
34c	Ditch rider, with auto.
104a	Patrolman, with 1 or 2 horses.
128	Teamster, with 1 horse.
129	Teamster, with 2 horses.
130	Teamster, with 3 horses.
131	Teamster, with 4 horses.
132	Teamster, with 6 horses.
133	Teamster, with 8 horses.
142a	Watermaster, with horses.
142b	Watermaster, with auto.
143a	Watermaster, assistant, with horses.
143b	Watermaster, assistant, with auto.

Section 10 of the reclamation act of June 17, 1902, 32 Stat. 390, provides as follows:

> That the Secretary of the Interior is hereby authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this Act into full force and effect.

The annual appropriation acts for the Reclamation Service provide funds "For all expenditures authorized by the act of June 17, 1902 (Thirty-second Statutes, page 388), and acts amendatory thereof or supplementary thereto, known as the reclamation law." See act of June 5, 1924, 43 Stat. 415. Under this authority of law regulations heretofore issued have provided for the employment under contract of persons with horse, team, or automobile at an increased rate of compensation to reimburse the employee for the use of his horse, team, or automobile. No objection has ever been raised against this practice by the accounting officers of the Government, but on the contrary same has been given recognition. 22 Comp. Dec. 383, 384. See also 3 Comp. Gen. 321, involving the employment under contract of a game warden with equipment.

The employments you mention under the regulations of the Reclamation Service are original contracts of employment for the person and his necessary equipment to perform the work for which engaged. Such was not the situation involved in the decision of February 6, 1925. The rangers of the National Park Service there considered had been appointed originally at a specific rate of compensation to perform work, the nature of which would require saddle horses. That is to say, their original employment contemplated that the rangers would properly equip themselves for the position to which appointed, or would be furnished horses owned or controlled by the Government and to authorize payment of any additional amount for horse hire under rental agreement entered into subsequent to the original appointment or employment, would be in

contravention of section 1765, Revised Statutes. The decision of February 6, 1925, was not intended to and does not disturb the practice of entering into original contracts of employment including personal services and equipment under the regulations of the Reclamation Service. The practice of entering into contracts of employment on the basis of equipment furnished by the employees is questionable, particularly in view of the contemplated classification of positions in the field services and the fixing of uniform rates of compensation for like grades of personal services, and such practice should obtain only in those cases in which the services of a man and the specified equipment properly may be procured by written contract after advertising in accordance with the provisions of sections 3744 and 3709, Revised Statutes. In this connection see 20 Comp. Dec. 137; 26 *id.* 157.

The existing practice in the matter of engaging personal services including specified equipment may be permitted to continue until June 30, 1926. But in the absence of express statutory authority therefor, the practice must be discontinued June 30, 1926, and thereafter compensation paid solely on the basis of the personal services rendered.

(A-9422)

PUBLIC LAND—REFUND OF EXCESS PURCHASE MONEY

A request from an attorney for information is not a "request for the repayment" by one or all of the heirs within the meaning of the act of December 11, 1919, 41 Stat. 366, providing for the refund of excess purchase money paid for public land, and an application or request for repayment filed after the expiration of the time limit can not be held to relate back to the filing of a request for information so as to entitle to refund.

Decision by Comptroller General McCarl, June 12, 1925:

Review has been requested for and in behalf of the widow and children of William J. Corkrum, deceased, of settlement 051270 of October 11, 1924, disallowing the claim of the widow and children for refund of excess purchase money paid by him November 18, 1881, on preemption entry for the southeast quarter of section 30, township 8 north, range 37 east, Willamette meridian. The disallowance was upon the ground that the application for refund was not filed within the time limits fixed by the act of December 11, 1919, 41 Stat. 366.

The land embraced in the entry was within primary limits of the grant to the Northern Pacific Railroad Co. as fixed by the map of general route and was paid for at $2.50 per acre as being double minimum lands. The grant was forfeited by failure of the railroad to construct the line, and accordingly those who paid more than the minimum price of $1.25 per acre were entitled to a refund of the

excess if claim therefor was presented within the time prescribed by law. See decision of January 29, 1921, by the Secretary of the Interior, 47 L. D. 628.

The act of December 11, 1919, 41 Stat. 366, requires all applications for refund of excess purchase moneys paid in connection with public-land entries to be filed within two years after the date of patent or the rejection of the entry or within two years after the date of the act. The last date upon which an application for refund could be filed in this case was, therefore, December 12, 1921 (December 11, 1921, falling on Sunday). See 2 Comp. Gen. 379.

On July 20, 1921, the General Land Office received a letter from one Joseph Rosslow in the following tenor:

> William J. Corkum made entry on SE. ¼ of sec. 30 in T. 8 N. R. 37 E W. M. in Walla Walla County, Washington, paying $1.25 per acre more than required by law, apparently because within Northern Pacific Railroad grant. I understand the question has been settled so that upon proper application the department will order a refund of the excess.
> If so, please advise me, so that application may be made for refund.

Rosslow again wrote the General Land Office September 28, 1921, letter received October 3, 1921, requesting further information, but in neither communication did he furnish a power of attorney from the widow or any of the heirs nor make any definite application for refund.

Nothing further appears to have been received in the General Land Office with reference to the matter until May 8, 1922, when an application for repayment signed by Martha A. Corkrum was filed in which she alleges that she is the widow of the deceased entryman and appoints Joseph Rosslow "my true and lawful attorney." This application was acknowledged April 21, 1922, before Joseph Rosslow as notary public. Thereafter, on August 29, 1922, additional affidavits were filed by the various heirs making formal application and acknowledging the appointment of Rosslow as attorney. The widow also filed thereafter an affidavit dated July 28, 1923, alleging that she had been authorized orally by all of the heirs prior to July 16, 1921, to represent them in procuring repayment of the excess moneys, and that she had also prior to that date employed Joseph Rosslow to act for and on behalf of all the heirs entitled thereto.

The act of December 11, 1919, 41 Stat. 366, requires:

> * * * That such person or his legal representatives shall file a request for the repayment of such excess within two years after the patent has issued for the land embraced in such payment, or within two years from the passage of this Act as to such excess payments as have heretofore been made.

A request for information such as filed by the attorney in this case, even assuming that he was at that time authorized to act for and in behalf of any or all of the claimants, can not be considered as "a request for the repayment," within the meaning of the act.

See 19 Comp. Dec. 508; 3 Comp Gen. 811. The applications by the widow May 8, 1922, and the heirs August 29, 1922, were not filed within the time limit.

Upon review the settlement must be and is sustained.

(A-9683)

ADVERTISING, ACCEPTANCE OF OTHER THAN LOWEST BID—CONTRACTS, INCREASED COSTS

Where bids have been submitted for the purchase of flour the acceptance of other than the lowest bid is authorized upon the certification by the administrative officer concerned that the particular grade of flour which is offered by the lowest bidder had been previously used and found unsatisfactory.

Under a contract for the purchase of flour by the United States which provided that delivery was to be made by freight, f. o. b., the additional cost occasioned by the contractor in packing the flour for shipment by parcel post, in accordance with subsequent instructions issued by the United States is, if reasonable and just, allowable.

Comptroller General McCarl to L. L. Cumberland, disbursing officer, Yosemite National Park, June 12, 1925:

I have your letter of May 11, 1925, transmitting, with request for decision as to whether payment thereon is authorized, a voucher in favor of Hooper & Jennings for $202.64 for supplies furnished the Interior Department, National Park Service, under contract dated March 16, 1925. Your doubt is based upon the apparent failure to accept the bid of the lowest responsible bidder.

It appears that the superintendent of the Yosemite National Park advertised for bids on a quantity of food supplies. Four bids were submitted. Hooper & Jennings' bid of $198.60 for 30 sacks of Big Loaf flour was accepted, and a formal contract was entered into; the accepted bid was not the lowest of the bids submitted, being $12.60 more than that of Haas Bros., the lowest bidder. The administrative officer states that—

> Low bid for flour was not accepted for the reason that Mt. Home brand bid on has been found to be unsatisfactory for our requirements.

There being a great difference in the grades of flour and with no practicable means of determining the quality thereof other than by actual use, the certificate of the administrative officer concerned with reference to the quality thereof will be accepted by this office.

It also appears that delivery of the flour was to be made by freight f. o. b. El Portal, Calif. After entering into the formal contract the contractor was instructed to ship by parcel post and claims the difference in cost of packing for parcel post at the rate of 4 cents each for 101 packages, or a total of $4.04. The contractor having

made shipment by parcel post as directed, incurring an additional expense not contemplated by the parties at the time of entering into the contract, is entitled to reimbursement of the reasonable cost.

The voucher is returned herewith and you are advised that payment thereof is authorized, if otherwise correct, upon certification by the purchasing officer that the extra cost claimed is reasonable and just.

(A–9715)

NAVAL RESERVE PAY—ACT OF FEBRUARY 28, 1925, 43 STAT. 1080

This decision involves various questions as to the pay of members of the Naval Reserve as created by the act of February 28, 1925, 43 Stat. 1080. For points involved see decision.

Comptroller General McCarl to the Secretary of the Navy, June 12, 1925:

I have your letter of May 18, 1925, requesting decision upon various questions presented in an attached letter of the Chief of the Bureau of Supplies and Accounts, dated April 9, 1925, arising under the act of February 28, 1925, 43 Stat. 1080, involving payments to be made to members of the Naval Reserve, therein created.

Section 1 of the act of February 28, 1925, provides in part:

That the Naval Reserve Force, established under the Act of August 29, 1916, is hereby abolished, and in lieu thereof there is hereby created and established, as a component part of the United States Navy, a Naval Reserve which shall consist of three classes, namely: The Fleet Naval Reserve, the Merchant Marine Naval Reserve, and the Volunteer Naval Reserve: *Provided*, That all officers and men who on the date of this Act are members of the Fleet Naval Reserve, the Naval Reserve, or the Naval Reserve Flying Corps of the Naval Reserve Force, are hereby transferred to the Fleet Naval Reserve created by this Act, and all officers and men who on the date of this Act are members of the Naval Auxiliary Reserve of the Naval Reserve Force are hereby transferred to the Merchant Marine Naval Reserve created by this Act: *Provided further*, That members of the Naval Reserve Force on the date of the approval of this Act whose status in the Naval Reserve thus created is not otherwise specifically established by this Act are hereby transferred to the Volunteer Naval Reserve * * *.

Section 40 provides:

That this Act shall take effect on July 1, 1925, which date shall be construed as the date of the passage or approval thereof.

The questions, with answers thereto, are set out as follows:

Question I.—Upon the failure of an officer to make application for appointment within three months or prior to being appointed in accordance with section 7—if such application be made—

(1) In what rank would he be considered as serving for the purposes of pay under section 21 provided he held on 1 July, 1925, only a provisional rank acquired without examination?

(2) In what rank would he be considered as serving for purposes of pay under section 21 provided he held on 1 July, 1925, only a provisional rank duly acquired after passing the prescribed examination?

(3) In what rank would he be considered as serving for purposes of pay under section 21, provided he held a confirmed rank and also a higher provisional rank acquired without examination?

(4) In what rank would he be considered as serving for purposes of pay under section 21, provided he held a confirmed rank, and also a higher provisional rank acquired after examination?

Section 1 of the act of February 28, 1925, provides, as to officers and men of the Naval Reserve Force transferred to this new Naval Reserve:

* * * That such transfers of officers and enrolled men shall be for the unexpired period of their current enrollment in the Naval Reserve Force: *And provided further*, That within three months after the date of this Act any officer so transferred pursuant to this section may make application to the Secretary of the Navy for appointment in the Naval Reserve herein created, and such officer shall, if found physically qualified for appointment, be appointed in accordance with section 7 of this Act in the confirmed grade or rank held by him in the Naval Reserve Force with date of precedence in accordance with section 15 of this Act * * *.

Other provisions of the act of February 28, 1925, bearing upon the questions presented are as follows:

SEC. 7. Commissioned and warrant officers appointed or transferred to the Naval Reserve shall be commissioned or warranted to serve during the pleasure of the President, in grades or ranks not above that of lieutenant commander, except that a small percentage of officers, who may be required in higher grades or ranks * * *.

SEC. 21. Officers below the grade or rank of lieutenant commander and enlisted men of the Fleet Naval Reserve attached to a division thereof, organized under regulations prescribed by the Secretary of the Navy, shall receive compensation at the rate of one-thirtieth of the monthly base pay of their grades, ranks, or ratings for attending, under competent orders, each regular drill, or other equivalent instruction or duty, as may be prescribed by the Secretary of the Navy: *Provided*, That no such officer or enlisted man shall receive pay for more than 60 drills or other equivalent instruction or duty in any one fiscal year: *Provided further*, That week-end cruises shall not be regarded as drills or other equivalent instruction or duty.

The act of February 28, 1925, unquestionably contemplates that an officer transferred from the Naval Reserve Force to the new reserve is only to have by virtue of the transfer the rank therein which he legally holds on June 30, 1925. The law for determining the right of an officer of the Naval Reserve Force to appointment to office is found in the act of August 29, 1916, 39 Stat. 587:

When first enrolled members of the Naval Reserve Force, except those in the Fleet Reserve, shall be given a provisional grade, rank or rating in accordance with their qualifications determined by examination. They may thereafter, upon application, be assigned to active service in the Navy for such periods of instruction and training as may enable them to qualify for and be confirmed in such grade, rank or rating.

No member shall be confirmed in his provisional grade, rank or rating until he shall have performed the minimum amount of active service required for the class in which he is enrolled, nor until he has duly qualified by examination for such rank or rating under regulations prescribed by the Secretary of the Navy.

No person shall be appointed or commissioned as an officer in any rank in any class of the Naval Reserve Force, or promoted to a higher rank therein, unless he shall have been examined and recommended for such appointment, commission, or promotion by a board of three naval officers not below the rank of lieutenant commander, nor until he shall have been found physically qualified by a board of medical officers to perform the duties required in time of war, except that former officers and midshipmen of the Navy, who shall have left the service under honorable conditions and who shall have enrolled in the Naval Reserve Force, may be appointed in the grade and rank last

held by them without examination other than the physical examination above prescribed.

An officer can legally hold rank through provisional assignment thereof only in the rank granted upon enrollment, and further assignments of provisional rank are extra legal and without effect to change his status so far as pay is concerned. *Lawless* v. *United States*, 59 Ct. Cls. 224; *Garrison* v. *United States*, 59 Ct. Cls. 919; 4 Comp. Gen. 636.

Answer I.—Questions (1) and (2) are answered that drill pay is to be computed upon the base pay of the rank held provisionally, and (3) and (4) upon the base pay of the confirmed rank held.

Question II.—All men who hold ratings in the Naval Reserve Force corresponding to those of enlisted men of the regular Navy have attained both their confirmed and provisional ratings after examination, as prescribed by law and regulations.

(5) In what rating will such reservists who hold a confirmed and also a higher provisional rating be considered as serving for the purpose of pay under section 21?

The act of August 29, 1916, authorizes provisional rank, grade, or rating only "when first enrolled," and subsequent assignments of provisional ratings give no right to pay.

Answer II.—Question (5) is answered that drill pay is to be computed upon the base pay of the confirmed rating held on June 30, 1925.

Question III.—Section 17 contains a proviso as follows:

"* * * all officers of the Naval Reserve who may be advanced to a higher grade or rank shall be allowed the pay and allowances of the higher grade or rank from the dates stated in their commissions."

(6) Does this latter proviso apply only to those officers who may be advanced while on active duty in time of war or national emergency?

(7) Does the phrase "be allowed the pay and allowances * * * from dates stated in their commissions" include pay for "drills, equivalent instructions or duty, or appropriate duty," as prescribed in section 21?

(8) If this proviso does not apply to all officers at all times, or if the phrase "pay and allowances" does not include the pay prescribed in section 21, then from what date are officers entitled to pay under section 21 upon original appointment or to increased pay upon promotion?

* * * * * * *

(9) Does this proviso refer also to warrant officers; and if so, does the word "commission" include "warrants"?

Section 5 of the act of February 28, 1925, provides:

* * * All appointments and promotions of officers * * * unless otherwise provided in this act, shall be made in accordance with regulations prescribed by the Secretary of the Navy: * * *.

Section 17 provides:

In time of war or national emergency officers on the active list of the Naval Reserve employed on active duty shall be advanced in grade and rank up to and including the rank of lieutenant commander with the officers of the regular Navy with whom or next after whom they take precedence in accordance with this act * * *.

The proviso in question is a part of section 17, and it is quite evident from several sections of the act taken as a whole that the advancements in rank referred to are those made when the reserve,

in whole or in part is called out to serve with the Navy, in time of war or national emergency and when advancements are to be made irrespective of the peace-time needs of a particular division.

Answer III.—Question (6) is answered, yes. Question (7) is answered, no. Question (8) is answered, that officers upon original appointments or upon tender of office through promotion in rank become invested with said office only from the date of acceptance thereof. Question (9) is answered, that as there is no advancement within a warrant grade the appointment of an enlisted man a warrant officer is not an advancement of an officer and is not an advancement in grade or rank.

Question IV.—Section 22 of the act effective 1 July, 1925, provides in substance that certain enlisted men of the Navy may be required or be authorized to obligate themselves to serve four years in the Fleet Naval Reserve upon termination of their enlistments in the regular naval service. This section further states that:

"*Provided*, That upon termination of their enlistment in the regular naval service men who have so obligated themselves shall be assigned to the Fleet Naval Reserve for the four-year period, unless they apply for reenlistment or extension of their enlistment in the regular naval service, * * *: *Provided further*, That the men so assigned to the Fleet Naval Reserve for the four-year period * * * shall be under no obligation to perform training duty or drill during that period, but shall be paid in advance $25 per annum, except when, with their own consent, they become attached to a division of the Fleet Naval Reserve or satisfactorily perform appropriate duties assigned by direction of the Secretary of the Navy, in which case they shall receive the pay, allowances, gratuities, and other emoluments as herein specifically provided for enlisted men of the Fleet Naval Reserve."

(10) Shall these advance payments of $25 be made on the basis of the calendar year, fiscal year, or service year?

* * * * * * *

(11) If these payments are made in advance on any other basis than the fiscal year, will the appropriation current at the time the payment is due and payable be available for payment of the entire amount, although more than one fiscal year is involved?

* * * * * * *

(12) Will such men be permitted to retain all or any part of an advance payment which was received prior to the time they became attached to a division or commence to perform appropriate duties, but be precluded from receiving any additional advance payment as long as they remain attached or perform appropriate duties?

(13) Will such men be entitled to retain all advance payments received and also be entitled to future advanced payments in addition to the pay, allowances, gratuities, and other emoluments provided for enlisted men of the Fleet Naval Reserve?

* * * * * * *

(14) When assigned members of the Fleet Naval Reserve are separated from that organization subsequent to the receipt of a payment in advance and prior to the expiration of the year for which paid, what portion, if any, of the advance payments received will they be permitted to retain?

(15) When such men are separated from the Fleet Naval Reserve subsequent to the date upon which they were entitled to an advance payment but prior to actual disbursement, what portion, if any, of such advance payment shall then be paid?

Section 22 also contains the provision:

Enlisted men of the regular naval service assigned to the Fleet Naval Reserve in accordance with the provisions of this section, * * * may, while so in the Naval Reserve, be permitted to reenlist in the regular naval service, * * *

Section 22 clearly contemplates that immediately upon assignment to the Fleet Naval Reserve the right to the $25 payment accrues. This annual amount is not a payment for any service to be rendered, but is in the nature of a gratuity due and payable annually. It is not payable at the rate of $25 per annum but is to be paid as a lump sum in advance, and each annual payment is an obligation of the appropriation current at date due.

The section unquestionably contemplates, however, a bona fide assignment of an enlisted man to the Fleet Naval Reserve and not a subterfuge to be resorted to in order to receive an extra $25 by an enlisted man who through applying for reenlistment in the regular service within three months of discharge therefrom at expiration of enlistment indicates thereby that his assignment to the Fleet Naval Reserve was not for the purpose of becoming a bona fide member thereof.

While the act provides that an assigned member may at any time within the four-year period of membership in the Fleet Naval Reserve reenlist in the Navy and yet retain his right to the enlistment allowance as though he had reenlisted in the regular service within three months of discharge therefrom this provision clearly contemplated the man whose right to the enlistment allowance would otherwise have been lost through lapse of the three months.

Answer IV.—Question (10) is answered, service year. Question (11) is answered, that the appropriation current with the first day of each service year is available. Question (12) is answered, that payments received shall be retained but no further payments to be made if on the first of the succeeding service year the member be attached to a division or is assigned to the performance of appropriate duties. Question (13), see answer to question 12. Question (14) is answered, that where not attached to a division nor assigned to the performance of appropriate duties a man is entitled to the $25 payment made by reason of assignment to the Naval Reserve but no further $25 payments may be made for any succeeding year if on the first day thereof his status is changed by separation from the organization. Question (15) is answered, that if entitled to payment on the first day of any service year, payment of the full $25 may be made for that year, except that where a man has been paid said amount upon assignment to the Fleet Naval Reserve, he reenlists in the regular service within three months of discharge therefrom, the amount of the advance payment should be withheld from the enlistment allowance, or otherwise refunded. Where the separation from the Naval Reserve is for reason other than reenlistment in the regular Navy, and payment of the $25 has not been made, there is no legal objection, in view of section 6, to providing in

the document evidencing the separation that because of the separation within a short period after assignment to the Naval Reserve the advance payment for the first year shall not be made.

(A–9869)

STATE TAX ON THE SALE OF GASOLINE

The tax imposed on the sale of gasoline by the State of Kansas is a tax payable by the dealer and the United States may not object to the agreed price per gallon on gasoline purchased within the State even though such price includes the State tax. The United States is not, however, liable for the State tax as a dealer or as a purchaser in original containers.

When gasoline purchased in Kansas is used in stationary gas engines, or in tractors used exclusively for agricultural purposes, refunds of amounts equal to the State tax paid as part of the purchase price should be applied for by purchasing agents of the United States within the time limit allowed by the State law, and such refunds as received may be credited to the appropriation from which the purchase price was paid.

Comptroller General McCarl to the Secretary of the Interior, June 12, 1925:

There has been received your request of May 27, 1925, for decision of the question presented by the Commissioner of Indian Affairs with respect to the payment of the State tax of 2 cents per gallon on gasoline purchased in the State of Kansas. The Kansas statute which became effective May 1, 1925, provides in part:

SECTION 1. That the words, terms, and phrases in this act are, for all the purposes thereof, defined as follows: * * * (c) "Dealers" means and includes any person or persons, firm, association, or corporation who receives from any source motor-vehicle fuel in tank cars or other original containers and who unloads or breaks such original containers for the purpose of storing, selling, delivering, or using all or any part of motor-vehicle fuel thus received, but does not include such motor-vehicle fuel as may be received by refineries or plants for the purpose of blending or compounding.

SEC. 2. That a tax of 2 cents per gallon, or fraction thereof, is hereby imposed on the sale or use of all motor-vehicle fuel used in this State for any purpose whatsoever, provided said tax shall be paid but once. Said tax shall be computed upon all motor-vehicle fuel received by each dealer in this State and paid in a manner hereinafter provided * * *.

SEC. 3. That every dealer paying such tax or being liable for the payment thereof shall be entitled to charge and collect the sum of 2¢ per gallon on such motor-vehicle fuel sold by him or them, for any purpose whatsoever, as a part of the selling price thereof, and every such dealer shall post in a conspicuous place at his place of business a placard, not less than 12 inches in length and 7 inches in height, upon which shall be shown in letters and figures not less than 2½ inches in height, the selling price of gasoline per gallon and the amount of the tax charged thereon.

* * * * * * *

SEC. 5. That said tax shall be paid by the dealer to the State oil inspector at the same time that the statement provided for in section 4 hereof is rendered to the oil inspector.

* * * * * * *

SEC. 8. That whenever any sale is made by a dealer of motor-vehicle fuel in the original packages in which the same was imported, such dealer shall deliver to the purchaser thereof an invoice of such motor-vehicle fuel, stating the name and address of the purchaser, the quantity and kind of fuel sold, and whether or not said dealer assumes and agrees to pay the license tax on said fuel above specified, and such dealer shall transmit to the State oil inspector, at the same time he shall render the statement above specified, duplicate copies

of all such invoices issued and delivered by him during the period covered by such statement.

SEC. 9. That it shall be unlawful for any person or persons, firm, or corporation to purchase, receive, or accept any motor-vehicle fuel from any dealer in the original package, as the same was imported into the State, as provided herein, or to pay for the same, or sell or offer the same for sale, unless and until the invoice provided for herein shall have been by said dealer delivered to him at the time of the purchase or receipt of the same motor-vehicle fuel. Any person, firm, or corporation who shall purchase or receive any motor-vehicle fuel from any dealer in this State in the original package in which the same shall have been imported, and upon which fuel the said dealer shall not have assumed to pay the tax, as provided in this act, shall, on the 25th day of each month render to the State oil inspector the same statement required of the dealer hereinbefore specified, and at the same time shall remit and pay to the said State oil inspector a tax of 2¢ per gallon on such motor-vehicle fuel upon which the dealer has not assumed the tax.

* * * * * * *

SEC. 11. That any person or persons, firm or corporation who shall buy or use any motor-vehicle fuel, as defined in this act, for the purpose of operating or propelling stationary gas engines, or tractors used exclusively for agricultural purposes, on which the motor-fuel tax imposed by this act has been paid, shall be reimbursed and repaid the amount of such tax paid by him upon presenting to the board of county commissioners of the county where the said tax was paid on a form prescribed by the State oil inspector, a sworn statement setting forth the total amount of such fuel purchased and paid for and used by such consumer for stationary gas engines or tractors for agricultural purposes, and the purposes for which said motor-vehicle fuel upon which he claims exemption from said tax was used. Upon the presentation of such sworn statement, if said board shall be satisfied that such refund is due, it shall cause to be repaid to such consumer from the taxes collected on motor-vehicle fuels the said taxes on fuels, purchased or used other than for motor vehicles as aforesaid: *Provided*, That such application for a refund of such taxes shall be made on or about the beginning of each quarter of each calendar year: *Provided*, That all claims for refund provided for herein not filed in 60 days from last day of the quarter in which the purchase is made shall be forever barred.

The Kansas statute imposes the tax on the dealer and it is immaterial that it authorizes him to include the tax in the selling price, as it would naturally be reflected in the selling price without such authority. Payment of the agreed price per gallon on all motor-vehicle fuel purchased within the State is therefore authorized irrespective of whether that price includes the State tax. 1 Comp. Gen. 584; 3 *id.* 348, 781.

The term "dealer" as defined in the statute and the provisions of sections 8 and 9 of the statute are broad enough to cover the Government in cases where the Government purchases motor-vehicle fuel in tank cars or original containers. It is not, however, within the power of the State to tax the Federal Government either as a dealer or as a purchaser in original containers. The payment of a tax by the Government direct to the State is therefore not authorized.

Attention is also directed to the provisions of section 11 of the statute providing for the refund of an amount equal to the tax paid as part of the purchase price when the motor-vehicle fuel is used in stationary gas engines or in tractors used exclusively for agricultural purposes. This provision should be brought to the attention of the purchasing agents within the State of Kansas, and they

should be instructed to make application for such refunds within the time allowed by the statute. Any refund so secured, being in the nature of a rebate or reduction in the price paid, may be credited to the appropriation from which the purchase price was paid.

(A–7432)

RENTAL ALLOWANCE—NAVAL OFFICER AND WIFE OCCUPYING QUARTERS ABOARD SHIP

Where the wife of the commanding officer of a Navy station ship, by permission of the commandant of the station, occupies with her husband quarters aboard the ship, such occupancy constitutes an assignment of adequate public quarters for the officer's dependents at his permanent station within the meaning of the rental allowance law and the officer is not entitled to rental allowance during the period of such occupancy.

Decision by Comptroller General McCarl, June 13, 1925:

There is for decision the question whether Lieut. Commander F. J. Lowry, United States Navy, is entitled to refund of $1,177.56 commutation of quarters and rental allowance received for the period May 13, 1922, to September 30, 1923, and subsequently checked against his account.

It appears that the U. S. S. *Pensacola* was ordered to Guam as station ship, arriving there May 13, 1922; that as commanding officer of said ship Lieutenant Commander Lowry was given verbal permission by the commandant of the station for his wife to live on board the vessel while in port. Claimant states that the ship was not altered in any way to provide suitable quarters for his wife and that no space was occupied either by himself or wife other than the quarters assigned to him for his personal use, and that because such space was inadequate he rented quarters on shore for his wife's belongings and a place of permanent abode. The commandant of the station in letter of May 27, 1924, states that at no time had there been public quarters ashore available for assignment to Lieutenant Commander Lowry or for his dependents, and that Mrs. Lowry came from San Francisco in the *Pensacola* when that ship was ordered to Guam as station ship and "has resided on board the ship ever since."

The law authorizes rental allowance to officers with dependents while on sea duty and his dependents are not assigned public quarters. Paragraph 4 of section 2 of the act of May 31, 1924, 43 Stat. 251, provides that:

> No rental allowance shall accrue to an officer, having no dependents, while he is on field or sea duty, nor while an officer with or without dependents is assigned as quarters at his permanent station the number of rooms provided by law for an officer of his rank or a less number of rooms in any particular case wherein, in the judgment of competent superior authority of the service concerned, a less number of rooms would be adequate for the occupancy of the officer and his dependents.

In this case claimant's dependent actually occupied with him quarters assigned him for his personal use and the question is whether such occupancy constitutes an assignment at the officer's permanent station of adequate quarters for his dependent. The law provided that the President should make regulations for carrying into effect the provisions thereof. Executive order of August 13, 1924, pursuant to such provision, defines the terms "assignment," "permanent station," and adequacy of quarters as follows:

I. (e) The term "permanent station," as used in this act, shall be construed to mean the place on shore where an officer is assigned to duty, or the home yard or the home port of a vessel on board which an officer is required to perform duty, under orders in each case which do not in terms provide for the termination thereof; and any station on shore or any receiving ship where an officer in fact occupies with his dependents public quarters assigned to him without charge shall also be deemed during such occupancy to be his permanent station within the meaning of this act.

* * * * * * *

II. * * * (a) The assignment of quarters to an officer shall consist of the designation in accordance with regulations of the department concerned of quarters controlled by the Government for occupancy without charge by the officer and his dependents, if any.

* * * * * * *

III. * * *

(c) No officer shall be paid a rental allowance for any period during which he is assigned as quarters at his permanent station the number of rooms provided by law for an officer of his rank, or a less number of rooms which have been determined in accordance with these regulations to be adequate in the particular case.

Paragraph 3 (b) of article 1819, Navy Regulations, provides that voluntary occupation by an officer and his dependents of quarters assigned shall be conclusive proof that they are adequate.

In no situation is it apparent that the law contemplates that an officer shall be entitled to rental allowance while he and his dependent actually occupy public quarters assigned to him. It is not within the spirit and purpose of the law to furnish an officer and his dependents quarters and allow him rental allowance at the same time. For that reason the regulations quoted above provide that a receiving ship on which an officer in fact occupies with his dependents public quarters assigned to him without charge shall be deemed during such occupancy to be his permanent station. Although the regulations make no such provision relative to a station ship, the condition in this instance is analogous to that of a receiving ship. The fact that instead of cruising about the ship remains at the station makes it feasible for the captain's dependents to live on board as did claimant's wife. Claimant states in support of his claim that the former station ship at Guam, the U. S. S. *Supply*, was provided with suitable quarters for the captain's dependents, but that request for alterations providing suitable quarters for his wife on the U. S. S. *Pensacola* was disapproved by the commander in chief; and further states that if alterations of quarters on the ship had been made for

his wife's use and convenience he would admit that his wife occupied public quarters within the meaning of the law. It thus appears that as a station ship the *Pensacola* was in a status analogous to that of a receiving ship and that within the spirit and intent of the law, during the period that Lieutenant Commander Lowry occupied with his wife quarters thereon assigned to him it should be deemed his permanent station within the meaning of the law governing rental allowance.

The permission granted claimant by the commandant of the station for his wife to live on board the U. S. S. *Pensacola* while in port, and the voluntary occupation of quarters thereon by himself and wife constituted an assignment of adequate public quarters at his permanent station for himself and dependents within the meaning of the law.

Accordingly, payment of commutation of quarters and rental allowance for the period in question was erroneous and claimant is not entitled to refund of the amounts checked against his account by reason of such erroneous payment.

(A–8895)

PURCHASES—NOISELESS TYPEWRITERS

As the Remington Noiseless Typewriter No. 6 is used for and performs substantially the same work as required of standard typewriting machines, it must be considered a standard typewriting machine within the meaning of the act of January 22, 1925, 43 Stat. 766, and may only be purchased during the fiscal year 1926 at the prices specified in said act.

Comptroller General McCarl to the Secretary of the Treasury, June 16, 1925:

I have your letter of March 31, 1925, wherein you request decision relative to the question of purchasing the new model Remington noiseless typewriter during the fiscal year 1926, the question being stated in your letter as follows:

> In response to advertisements issued by the General Supply Committee the Remington Typewriter Company has submitted to the committee a proposal for furnishing the Model 6 Noiseless Remington Typewriter at the schedule of prices given below:
>
> Item 18680–a. Typewriting machine; writes a line 9" long, holds paper 10¾" inches wide, each__ $100.00 net.
> b. Typewriting machine; writes a line 11" long, holds paper 12¾" wide, each__ $103.33 net
> c. Typewriting machine; writes a line 13" long, holds paper 14¾" wide, each__ $106.67 net.
> d. Typewriting machine; writes a line 17" long, holds paper 18¾" wide, each__ $110.00 net.
>
> Your opinion is requested as to whether the provision of the act making appropriations for the Treasury and Post Office Departments for the fiscal year ending June 30, 1926, approved January 22, 1925, which limits the price which may be paid for "standard" typewriting machines bought by the Government service, would prohibit the purchase of Model No. 6 Remington Noiseless typewriter.

The act of January 22, 1925, 43 Stat. 766, provides:

No part of any money appropriated by this or any other act shall be used during the fiscal year 1926 for the purchase of any standard typewriting machines, except bookkeeping and billing machines, at a price in excess of the following for models with carriages which will accommodate paper of the following widths, to wit: Ten inches (correspondence models), $70; twelve inches, $75; fourteen inches, $77.50; sixteen inches, $82.50; eighteen inches, $87.50; twenty inches, $94; twenty-two inches, $95; twenty-four inches, $97.50; twenty-six inches, $103.50; twenty-eight inches, $104; thirty inches, $105; thirty-two inches, $107.50.

In a letter dated March 13, 1925, addressed to the General Supply Committee, the Remington Typewriter Co. stated:

This new machine is not standard in any sense, as this term is universally understood and applied in the typewriter trade and by typewriter users. It is nonstandard in the fundamental principles of its construction, and it also differs radically from all so-called standard typewriters in the kind and character of the service that it renders.

From the practical standpoint the outstanding feature which distinguishes this machine from all other typewriters is described in its name. It is noiseless. From the mechanical standpoint the attainment of this result in combination with the familiar and usual keyboard has involved a method of construction of the entire key lever, type-bar, and printing mechanism which is absolutely and entirely new and revolutionary (in respect to which our own Federal Government has conceded us basic patents). This construction not only bears no resemblance whatever to the operating principle used on all standard typewriters but it is an equally radical departure from the operating principle hitherto employed on the Remington Noiseless machine. The manufacture of the former model of this machine, the No. 5, has now been discontinued, and the new Model No. 6 Remington Noiseless remains to-day the only writing machine of current manufacture which supplies the much desired noiseless feature.

The term "standard typewriting machines" as universally understood applies to machines designed to print against cylinders of a yielding consistency by means of free swinging type bars, which cause impressions by percussion blows, each of these type bars being actuated by a single key. Ever since the invention of the writing machine, standard typewriters have used only this general scheme or mechanism to accomplish the essential results required.

We would emphasize the fact that throughout all typewriter history these have been the decisive tests of a standard typewriter. There are no standards for diameters of printing cylinders, length of printed line, exact arrangement of keyboards, method of returning the carriage and line spacing, ribbon-feeding mechanism, line-indicating, carriage-control mechanism, scales, or even forms of type. Standardization of typewriters consists exclusively of the feature of free swinging type bars each actuated by a single key and resilient printing cylinder.

The No. 6 Remington Noiseless typewriter is entirely nonstandard in these outstanding features. The platen is purposely nonyielding, being of metal, and the type bars do not cause the type to percuss against the cylinder. The principle used is that of pressure printing, which is totally different from the standard percussion blow.

The above quotation points out several features of the new Noiseless Remington typewriter, laying particular stress on the fact that it is noiseless and therefore not a standard typewriting machine within the meaning of the act of January 22, 1925, *supra*. The general schedule of supplies for 1925 lists a noiseless typewriter answering substantially the description given in the above quotation relative to the Remington Noiseless No. 6, and the price on the schedule is $70 for a noiseless machine, correspondence size carriage.

The usual conception of "standard typewriting machines," whether they be noisy or noiseless, or whether the printing is produced by percussion blows or by pressure, upon a yielding or nonyielding metal platen or hard rubber cylinder by free-swinging type bars, or a single type bar system, is generally considered under two broad phases; the mode of operation and the quality and character of the work produced, together with uses for needs commonly met by the typewriter. Under the mode of operation there is for consideration the speed with which the machine can be operated, the facility of operation as compared with the usual universal four-bank keyboard with which modern typewriters are equipped. With regard to the finished work there is taken into consideration the type with which the machine is equipped, the number of characters obtainable from the various shifts, and the quality of the results accomplished. In its uses, it is immaterial so far as standard is concerned, whether the operation is noisy or noiseless—the need supplied is the same; the doing of work for which the typewriter is basically made.

In all of these the Remington Noiseless typewriter No. 6 appears to be substantially that of a standard typewriting machine and there is, therefore, no reason why it should be excluded from this term unless it is so excluded in specific language by law.

Answering your question specifically you are advised that the Remington Noiseless typewriter No. 6 must be considered a standard typewriting machine within the meaning of the act of January 22, 1925, and may only be purchased at prices prescribed in said act.

(A–10196)

COMMUTATION OF QUARTERS, HEAT, AND LIGHT—RENTAL AND SUBSISTENCE ALLOWANCES—DEPENDENT MOTHER OF NAVAL OFFICER

Where an officer of the Navy certified that he had maintained two rooms at a given address as quarters for his mother from October 4, 1921, to June 30, 1923, and it has been subsequently ascertained that his mother did not reside in such quarters but had been an inmate in a State hospital for the insane since 1911, that her expenses were borne by the county and State equally, that the county and State had been reimbursed by the guardian of the mother out of a sum received for the mother as a legacy, such mother is not dependent on her officer son for more than one-half the cost of a reasonable living, or for her chief support, under the provisions of the acts of April 16, 1918, 40 Stat. 530, and June 10, 1922, 42 Stat. 627, and the officer is not entitled to commutation of quarters, heat, and light, or to rental and subsistence allowances, for a dependent mother.

Decision by Comptroller General McCarl, June 18, 1925:

Bernard H. Wolter has requested review of settlement No. Col. 303, dated January 29, 1924, charging him with $951.71, by reason

of payments made to him for commutation of quarters, heat, and light, and rental and subsistence allowances during the period from October 4, 1921, to June 30, 1923, totaling $1,315.19, less $363.48 checked against his pay, as a result of certificates made by him that his mother was dependent upon him for more than one-half of the cost of a reasonable living and for her chief support, in accordance with the acts of April 16, 1918, 40 Stat. 530, and June 10, 1922, 42 Stat. 627.

The obtaining of payments for commutation of quarters, heat, and light under the provisions of the act of April 16, 1918, was authorized prior to April 6, 1922, under decision of the Comptroller of the Treasury, on the faith and credit of claimant's certificate attached to each pay account showing that his mother, Mrs. Nora Wolter, was dependent upon him for support, and that during the period for which heat and light were charged he actually maintained a place of abode for her, as quarters, at 1436 Grant Avenue, Bethlehem, Pa. In accordance with the practice of this office subsequent to April 6, 1922, made also applicable to the payments of rental and subsistence allowances under the act of June 10, 1922, claimant was requested to furnish in support of such payments the affidavit of his mother.

On October 3, 1922, he stated he was unable to furnish an affidavit from his mother, as she was temporarily insane and could not, therefore, legally make a sworn statement. In lieu thereof he submitted the affidavits of two disinterested persons which stated generally that Mrs. Nora Wolter was the widow of the late Rev. M. Wolter, and was dependent upon her son, Ensign B. H. Wolter, for support. On May 3, 1923, claimant submitted information that he had one brother, age 23, who was attending school at Carnegie Tech, Pittsburgh, under the Federal Vocational Training Department, and one sister, age 25, who was a school-teacher in Bethlehem, Pa., who did not contribute to their mother's support. He further stated that his mother's average living expenses were $50 per month, that she had no real or personal property and no income whatever except the amount he contributed monthly toward her support. On January 6, 1923, he averred that he contributed regularly toward his mother's support the sum of $50 per month, and he thereafter stated that during the period from July 1, 1923, to August 6, 1923, he contributed the sum of $80.

It was thereafter developed that claimant's mother did not live in the two rooms alleged by him to have been maintained for her at 1436 Grant Avenue, Bethlehem, Pa., but that she was a patient at the Homeopathic State Hospital for the Insane at Allentown, Pa., having been admitted to that institution October 13, 1911, and

has been cared for thereat continuously to the present time. It was then urged by claimant that besides maintaining the two rooms for her at his legal residence, "to which she could have gone if her condition warranted it at the time," he paid all her expenses at the hospital, consisting of hospital bill, clothing, necessary miscellaneous expenses, as eyeglasses, toilet articles, etc., "which in an institution of this kind is very high."

The superintendent of the hospital advised this office March 6 1923, that Mrs. Wolter was maintained in the hospital on the dual system, the Commonwealth of Pennsylvania being charged $3 per week and Northampton County a like amount, and in connection with other alleged expenses at the hospital the superintendent further advised by letter of July 10, 1923, as follows:

In reply to your inquiry of the 5th instant, we are advising that $6.00 per week covers the entire cost of maintenance of Mrs. Wolter, there being no extra charges for medical services or anything else.

Some clothing has been furnished by the patient's sister, Miss C. Ocker, 41 N. 7th Avenue, Bethlehem, Pa.

It further appears that the premises at 1436 Grant Avenue, where two rooms are alleged to have been maintained for Mrs. Wolter, were owned by Miss C. Ocker, claimant's aunt, and said by her to have been occupied by herself and niece during the period in question. The financial arrangements under which the two rooms were maintained for claimant's mother were requested, but the amount of rental paid by claimant has not been stated. Miss Ocker's address, as furnished by the superintendent of the hospital July 10, 1923, was 41 North Seventh Avenue, not 1436 Grant Avenue.

It appears that arrangements had been made whereby the county share of Mrs. Wolter's maintenance at the hospital was paid by the poor directors of Northampton County, and that such directors were in turn reimbursed by Paul De Schweinitz, secretary of missions of the Moravian Church, Bethlehem, Pa. Relative to this matter, he stated, May 24, 1923, as follows:

I simply advance the money for her bills which are sent to me, from our general mission treasury, and then I look to him [Lieut. B. H. Wolter] to reimburse the missionary treasury as best he can.

The attorney general for the Commonwealth of Pennsylvania, bureau of maintenance and collections, advised this office July 19, 1923, in part, as follows:

* * * In reply we wish to advise you that Mrs. Nora Wolter, a patient at the Homeopathic State Hospital for the Insane at Allentown, Pennsylvania, since 1913, has never been a reimbursing one, so far as the Commonwealth of Pennsylvania is concerned. During all of this time said Commonwealth has expended in the neighborhood of $1.600 for the maintenance of this patient, and if the son, Lieut. Bernhard H. Wolter, U. S. N., has ever done anything in the way of maintaining his mother during this period of time it has only been by probably reimbursing the poor directors of Northampton County, who pay half of the general maintenance cost of the patient.

He further advised that the Bethlehem Trust Co., of Bethlehem, Pa., had been appointed guardian of Nora Clementine Wolter, mother of claimant, for the purpose of receiving a legacy of about $5,000 in the nature of a bequest contained in the will of a deceased relative in England.

The Bethlehem Trust Co. advised this office April 20, 1925, that it was appointed guardian for Mrs. Wolter on November 26, 1917, and on December 21, 1922, it received a legacy for her in the amount of $5,955.36, and that under date of March 3, 1924, under order of court, it was instructed to pay to the Commonwealth of Pennsylvania the sum of $1,504.14 to reimburse the State for the support and maintenance of Mrs. Wolter at the State hospital for the insane during the period from July 24, 1913, to September 1, 1923.

Since December, 1922, the county share for the support and maintenance of claimant's mother at the hospital has been paid by her guardian, the Bethlehem Trust Co.

On June 20, 1923, after it had been determined that claimant's mother was not occupying quarters as purported by the certificates attached to his pay vouchers, claimant requested that if his claim be disallowed he be permitted to refund the amount of erroneous payments in quarterly payments of $50. The claim was thereafter disallowed for the reason that he did not contribute more than one-half of a reasonable living within the meaning of the acts cited, in view of the fact that the State of Pennsylvania had borne one-half of the expenses of maintenance at the hospital. Again on October 1, 1923, claimant stated as follows:

> * * * I am unable to reimburse the United States in a lump sum, and respectfully request that I be permitted to reimburse monthly or quarterly at the rate of $25.00 per month. In my letter to your office on June 20th, 1923, I requested to be permitted to make quarterly payments if claim was disallowed. This plan of reimbursement is the best I can do, as I haven't the required lump sum, and after paying my expenses the best I can do is $25.00 per month.

The privilege of liquidating his indebtedness due the United States by monthly installments of $25 each was accorded claimant October 18, 1923. There is no record of any such payments having been made. He, however, on March 4, 1924, requested that the matter again be reviewed on the ground that he was "making definite arrangements to pay" the State share of the expenses of caring for his mother, which he expected to have paid in a short time, and again on April 9, 1924, he stated that he would advise this office when such expenses have been paid, and this notwithstanding the facts divulged by the guardian, as indicated, that the State share of these expenses had already been paid and that the county share of such expenses had likewise been paid by him since December, 1922, which included the period from July 1 to August 6, 1923, during

which period claimant alleged he necessarily contributed $80 for his mother's support.

Claimant's resignation from the Navy was accepted, effective August 6, 1923, and from information on file in this office he is now employed as clerk in the city treasurer's office at Norfolk, Va.

The settlement is sustained and collection will be proceeded with.

(A-9223)

CIVILIAN RETIREMENT DEDUCTIONS—EMPLOYEES OF THE DISTRICT OF COLUMBIA FURNISHED QUARTERS AND SUBSISTENCE

The 2½ per cent civil retirement deductions from the salary of employees of the District of Columbia who are subject to classification are required to be made on the basis of the total rate of compensation fixed by the administrative office in the grade in which the position has been allocated, including cash salary paid, plus the monetary value of quarters and subsistence, as determined by the Personnel Classification Board under section 3 of the classification act of March 4, 1923, 42 Stat. 1489. Such 2½ per cent deductions are chargeable to the appropriations for payment of salaries to the employees rather than the appropriations for furnishing quarters and subsistence.

Comptroller General McCarl to J. R. Lusby, disbursing clerk, District of Columbia, June 19, 1925:

In the audit of your accounts for the fiscal year 1925 there is for consideration whether the 2½ per cent civil retirement deductions from the salary of employees under the District of Columbia subject to classification should be made on the basis of the cash salary paid to the employees who are also provided with quarters and subsistence in kind, or whether the deductions should be made on the basis of the rate fixed for the positions held by the employees under the classification act in the grade to which the positions have been allocated, including not only the cash salary paid, but also the monetary value of quarters and subsistence furnished in kind fixed by the Personnel Classification Board.

As an illustration, particular reference is made to the pay rolls for the period February 1 to 15, 1925, for the Gallinger Municipal Hospital, Workhouse and Reformatory, Industrial Home for Colored Children, and Home for Aged and Infirm. These employees are subject to classification and their positions have been allocated to various grades and the salaries of employees fixed at the rates of pay in the grades. Most of the employees are paid a portion of the total rate for their positions in cash, and the difference between the amount of cash received and the rate fixed under the classification act for their positions is represented by the commutation or monetary value of the quarters and subsistence furnished them in kind. The pay rolls

show the proper grade to which allocated, the amount of the salary paid in cash, and the commutation value of quarters and subsistence. This value is given as $240 per annum for subsistence, $180 per annum for house, and $60 per annum for quarters (bed in dormitory). The retirement deductions have been computed only on the basis of the actual cash payment made to the employees, excluding the value fixed for subsistence and quarters. It is understood the same rule has been followed since July 1, 1924, the effective date of classification.

Section 8 of the act of May 22, 1920, 41 Stat. 618, provides that the retirement deduction shall equal 2½ per cent of the employee's "basic salary, pay, or compensation." Section 2 of the act, 41 Stat. 615, construes this term by excluding from the operation of the act "all bonuses, allowances, overtime pay, or salary, pay, or compensation given in addition to the base pay of the positions as fixed by law or regulation." The rates fixed in the classification act for the grade in which the position has been allocated, whether the minimum or one of the higher rates in the grade, constitute the "base pay of the positions as fixed by law." Section 3 of the classification act of March 4, 1923, 42 Stat. 1489, provides in part "the board shall make necessary adjustments in compensation for positions carrying maintenance." It has been ascertained that the board has taken such action with regard to employees under the District of Columbia and that the commutation or monetary value of subsistence, house and quarters above stated, was determined by the Personnel Classification Board after agreement with the District authorities.

This provision in the classification act does not mean that the allocation of the position shall be affected, necessitating placing same in a lower grade when maintenance is provided in kind, but it means that the commutation or monetary value of maintenance must be determined by the Personnel Classification Board and that amount of cash deducted from the rate fixed by the administrative office in the grade to which compensation has been allocated. Substitution of maintenance in kind for cash salary does not change the "basic salary, pay, or compensation" within the meaning of the retirement act, which remains the rate fixed by the administrative office in the grade to which the position has been allocated. See generally, 3 Comp. Gen. 654.

There will be transferred from the appropriations for salaries for the various services involved for the fiscal year 1925, to the civil retirement fund, an additional amount equal to 2½ per cent of the aggregate sums represented by the difference between the cash salaries paid the employees and the rates of compensation fixed by the administrative offices in the grades to which the positions have been allocated, and corresponding deductions will be made from the sal-

aries of the employees on the next pay day subsequent to the date of this decision. The employees will not be required to pay interest on the amount to be so deducted. 2 Comp. Gen. 506. Transfer from salary appropriations to the civil retirement fund at the beginning of the fiscal year 1926, will be made accordingly. 26 Comp. Dec. 948. It will be noted that although the cost of furnishing quarters and subsistence in kind is chargeable to a different appropriation than the cash salary of the employees, there is to be no deduction or transfer to the retirement fund from the appropriations provided for quarters and subsistence, but the full amount of the retirement deductions is to be transferred from the appropriations for salaries. The reason for this is that the entire amount of re-retirement deductions is to be transferred from the appropriations is equivalent to cash received by the employees and the total amount thereof is necessary to be transferred from the salary appropriations which are the only appropriations from which cash is paid to the employees.

(A-9632)

MILEAGE—TRAVEL WITH TROOPS

Where an officer of the Marine Corps, under orders to travel in connection with a troop movement, is, by subsequent orders, permitted to proceed by other transportation than that used by the main body, he is nevertheless traveling with troops and may not be paid mileage under section 12 of the act of June 10, 1922, 42 Stat. 631.

Decision by Comptroller General McCarl, June 19, 1925:

First Lieut. Rees Skinner, United States Marine Corps, applied September 22, 1924, for review of settlement No. 236945-N, dated February 11, 1924, wherein was disallowed his claim for mileage from Mare Island, Calif., to San Diego, Calif., under orders dated July 26, 1923.

On July 18, 1923, the Major General Commandant, United States Marine Corps, addressed the following order to the commanding general Department of the Pacific, United States Marine Corps, San Francisco, Calif.:

1. The Secretary of the Navy * * * having directed the transfer of the recruit depot, Mare Island, Calif.. and the activities connected therewith, you will issue the necessary orders to effect this transfer which includes the sea-going school, as soon as naval tranportation is available.

The commanding general transmitted this order to the commanding officer marine barracks, Mare Island, Calif., who on July 25, 1923, issued Post Transfer Order No. 130:

1. Effective 26 July, 1923, the following-named men will be transferred to the marine barracks, San Diego, Cal., via U. S. S. *Sirius* now lying at this navy yard.

* * * * * * *

2. 1st Lieut. Gus L. Gloeckner, 1st Lieut, Rees Skinner, and Mar. Gun. Llewelyn Jenkins will be transferred to the marine barracks, San Diego, Cal., with the above detail. 1st Lieut. Gloeckner will be in command.

On July 26, 1923, the following order was addressed to claimant by the commanding officer, marine barracks, Mare Island:

1. On July 31, 1923, you will stand detached from this post and all duties assigned to you and will proceed to the marine barracks, San Diego, California, via the U. S. S. *Gold Star*.
2. Upon the arrival of the U. S. S. *Gold Star* at San Diego, California, you will report to the commanding general 5th Brigade, U. S. Marines, for such duties as may be assigned to you.

On July 27, 1923, the commanding general addressed the following orders to claimant, revoking the above orders:

1. The orders to you contained in references (b) are hereby revoked.
2. On July 31, 1923, you will stand detached from your present station and duties, and will proceed to the marine barracks, San Diego, California, via the U. S. S. *Gold Star*. Upon the arrival of the U. S. S. *Gold Star* at San Diego, California, you will report to the commanding general 5th Brigade, U. S. Marines, for such duties as may be assigned to you.
3. In accordance with your verbal request of this date, you are hereby authorized to proceed to your new station via automobile, and you are further authorized to submit claim for reimbursement in an amount not to exceed that which it would have cost the Government had you carried out the orders contained in paragraph two of these orders.
4. You are also authorized to delay in reporting at San Diego, California, until August 5, 1923.

On August 23, 1923, in reply to inquiry the commanding general, headquarters Department of the Pacific, announced:

1. Replying to reference (a), you are informed that the orders issued to First Lieutenant Rees Skinner * * * named therein, were in connection with the movement of the recruit depot detachment, from Mare Island, California, to the marine barracks, San Diego, California.

His orders further show that upon reporting to headquarters Fifth Brigade, San Diego, August 4, 1923, he was directed to "further report to the commanding officer recruit depot for assignment to duty."

Section 12 of the act of June 10, 1922, 42 Stat. 631, provides in part:

That officers of any of the services mentioned in the title of this Act, when traveling under competent orders without troops, shall receive a mileage allowance * * *.

As presented in this case, it does not follow that travel is "without troops" simply because the main body may have been transported by one means (the U. S. S. *Sirius*) and claimant ordered to travel by another (the U. S. S. *Gold Star*). Travel with troops, contemplates travel in connection with a troop movement and section 12 authorizes mileage only when an officer traveling does not do so in that connection. The claimant's travel was ordered because of the transfer of the recruiting depot to which he was attached, with over 200 enlisted men from Mare Island to San Diego is announced by the commanding general headquarters Department of the Pacific,

and his orders show he was assigned to the recruit depot upon his arrival at San Diego. The facts indicate beyond question of a doubt that the sole and only reason for the travel of claimant was in connection with, and as a part of, the removal of recruit depot from the navy yard, Mare Island, to San Diego, and the subsequent orders issued to claimant do not create a right to mileage as for travel without troops.

Had claimant proceeded to San Diego via the U. S. S. *Gold Star* he would not thereby have acquired a right to mileage. The disallowance of his claim is accordingly affirmed.

(A–9673)

CONTRACTS, TERMINATION—DISBURSING OFFICERS, RELIEF UNDER THE ACT OF FEBRUARY 11, 1925, 43 STAT. 860

Where a contract provided for the execution of a final release in full before final payment could be made there is no authority for the acceptance of a qualified release. The disbursing officer concerned should not make payment upon such qualified release, but should forward the papers to the General Accounting Office for direct settlement.

The granting of relief to a disbursing officer under the act of February 11, 1925, 43 Stat. 860, for payments made to a contractor on a qualified instead of a final release, does not authorize the removal of the stoppages against the contractor unless and until the reserved claim is finally barred by the running of the statute of limitations, or is closed by a final adjudication when the reserved claim is asserted in court.

Decision by Comptroller General McCarl, June 22, 1925:

George G. Seibels, captain, Supply Corps, United States Navy, requested December 6, 1924, review of settlement No. M–6787–N, dated April 18, 1924, wherein was disallowed credit for final payment of $1,338.40 made to the W. G. Cornell Co. under contract No. 3129–C, dated July 26, 1918, and of $1,709.60 made to the Penn Bridge Co. under contract No. 2666, dated January 5, 1918, without a final release as required by paragraph 29 of the general provisions of the respective contracts, as follows:

* * * Upon the completion of the contract the balance due on account thereof will be covered by similar vouchers, subject to any credits in favor of the Government: *Provided*, That the contractor shall first execute and deliver a final release to the Government, in such form and containing such provisions as shall be approved by the Navy Department, of claims against the Government arising under or by virtue of the contract.

When the work under the contracts was completed, the respective contractors attached to their final vouchers releases from all claims except certain ones arising under or by virtue of their respective contracts and the vouchers were paid by Paymaster Seibels. It is now contended that disallowance of credit therefor in his accounts was improper because the United States received the material for which

the payments were made; that such qualified release had been accepted by the accounting officers and that the contract provision—

> does not specify an unqualified release but only a "final release in such form and containing such provision as shall be approved by the Navy Department." Certain amounts were withheld by the Government as liquidated damages in each case. The propriety of withholding such amounts is a matter of controversy between the representatives of the Government and the contractors, and is therefore a proper subject for consideration by the General Accounting Office. There is, however, no controversy as to the correctness of payments which have been made.
>
> While a final unqualified release would have the effect, no doubt, of placing the burden of proof on a contractor should he claim any additional amount, it certainly would not increase the value to the Government of the material and services which it had received and for which a contractor was properly paid.
>
> Should any or each of these contractors maintain that further payments are due, it will be within the power of the General Accounting Office to determine from the facts of record whether or not a further allowance shall be made.
>
> Notwithstanding the above, the acceptance of a qualified release by the Navy Department was such form of release as was approved by that department for the cases in question, and, in view of the matters at issue, such form of release was equitable, since the substantial facts in the case were and are a matter of record and the question of further payment is largely one of law, and which may properly be left to the General Accounting Office and the courts.

The contract specifically calls for a "final" release. The stipulation that it shall be "in such form and containing such provisions as shall be approved by the Navy Department" means, at the most, approval of form and provisions which will express a "final" release and not form and provisions which basically express otherwise than a "final" release. It may also be said that if other than a "final" release is authorized, then there was no need for stipulating for a release. In a finding by the Court of Claims, decision of May 11, 1925, *Pawling* v. *United States*, the custom of accepting a qualified release was referred to as not authorized by any statutory authority. See 3 Comp. Gen. 901 to the same effect.

In my decision of May 23, 1924, A–617, to the Secretary of the Navy with reference to a similar payment, it was said:

> It is obvious that under such a condition the proper procedure was to not make the final payment through a disbursing officer, as the questions involved could not be properly determined by such disbursing officer, and hence the payment of the full amount of the contract should not have been made until the liability for the additional sum claimed by the contractor was settled. The matter should therefore have been presented to this office for settlement of the claims of the contractor to the final payment under the contract with such recommendation thereon as the Navy Department might deem proper.
>
> The matter is of a class which you have by your letter of May 12, 1924, undertaken to adopt a procedure which will result in the presentation to this office for settlement of final payments under contract wherever there is a doubt as to the amount finally payable. The present matter being one in which a qualified release was taken, I believe that with the correction of the practice so that such matters will not hereafter be for payment by disbursing officers, the payment as made need not be further questioned in the accounts of Commander Irwin, and credit therefor will be allowed accordingly.

In the present case, the qualified releases accompanying the vouchers on which the payments in question were made, the contractors undertook to reserve to themselves the right to prosecute certain

claims as to which the action of the department was not acceptable. The claimed rights so excepted from the operations of the releases, it appears, arose, if at all, more than six years ago, and upon inquiry it does not appear that any claims have been prosecuted on account thereof. The failure of the contractors to present and prosecute in judicial proceedings the claims so excepted within the statutory period of limitation may be taken as an abandonment thereof. Accordingly, in this and other like cases the failure to obtain the required final release before the payments in question were made has been cured by operation of time and the laches of the claimant contractors, and the charges against the disbursing officers need no longer be maintained.

However, the crediting of the payments in the accounts of the disbursing officers shall not be taken as relieving the contractors, although stoppages against them may be removed. Generally, the legal effect of a payment on a qualified release when a final release is required is that acceptance thereof by the person of whom the final release is required concludes the transaction in the manner stipulated as though a final release were given without exception or reservation. "The law judges of things which must necessarily be done, as if actually done"; therefore, a release and payment thereon required to be final will be deemed to be final in the consideration and settlement of claims which should have been presented to and settled by this office before final payment.

Upon the assurances contained in the letter of the Secretary of the Navy dated May 12, 1924, and so long as vouchers covering final payments under contracts wherever there is doubt as to the amount finally payable, continue to be forwarded here for direct settlement, and upon such conditions, credit heretofore denied disbursing officers for failure to obtain "final" releases will now be allowed; but in such cases, if six years have not elapsed since the claimed right, excepted from the operations of the "qualified" release, accrued, or, if the excepted claims are being prosecuted in any court, the stoppages against the contractors will be maintained and counter-claims reported in accordance with the existing procedure, until the matters are finally closed or barred.

Credit for the payments in the present case will be allowed pursuant to the provisions of the act of February 11, 1925, 43 Stat. 860.

(A-9767)

CHECKS—INSANE PAYEES

Where a Veterans' Bureau check for disability compensation was made payable to a mentally incompetent beneficiary instead of being made payable to the committee (his mother) appointed to look after his affairs, and it is shown that the beneficiary resided at the same address of the committee, the presumption is that the beneficiary received, cashed, and derived the benefit of the proceeds of the check with the knowledge and acquiesence of the committee, and a claim by the beneficiary after regaining his sanity for the amount of such check may not be allowed by the accounting officers.

Decision by Comptroller General McCarl, June 22, 1925:

There is before this office for consideration the claim of Robert Henry Stevens for $816, being the amount of check No. 33033, issued July 25, 1922, by J. C. Roberts, special disbursing agent, United States Veterans' Bureau, in favor of Robert Henry Stevens, in payment of disability compensation.

The basis of the claim appears to be that the check in question was issued in favor of the claimant at a time when he was mentally incompetent and a committee had been appointed to look after him and his affairs. Information has been received from the United States Veterans' Bureau that the records of that bureau show that Robert Henry Stevens was adjudged mentally incompetent by a Virginia court in April, 1921; that his mother, Mollie O. Stevens, was appointed as his committee; and that she was discharged in February, 1923, at which time the court found Robert Henry Stevens to be sane. It has also been reported that during the period of the committeeship disability compensation checks on behalf of Robert Henry Stevens were issued by William H. Holmes, disbursing clerk of the bureau, in favor of the committee, but that on July 25, 1922, the above-described check was issued by J. C. Roberts, special disbursing agent, in favor of Robert Henry Stevens instead of Mollie O. Stevens, his committee. Said check was sent to Lunenburg, Va., which, at that time was the address of Stevens's mother with whom he was residing. From the official records and the facts disclosed as the result of investigations there would appear to be no room for reasonable doubt that the claimant received, cashed, and derived the benefit of the proceeds of the check with the knowledge and acquiescence of the committee.

The appropriation involved having once been charged with the amount, it can not lawfully be again charged with the same item; neither does the technical situation which appears give rise to any legal claim which may be allowed by the accounting officers.

Accordingly the claim must be and is denied.

(A-9420)

STAR-ROUTE PURCHASES—POSTMASTERS ACTING AS DISBURSING OFFICERS

The authority in the act of May 18, 1916, 39 Stat. 161, for the Postmaster General to disregard existing laws as to the employment of personal services, or the procurement of conveyances, materials, or supplies, when in his judgment the bids received for star routes are exorbitant or unreasonable, applies only to furnishing service on star routes, and does not apply to any and all expenditures from the star-route appropriation.

The postmaster of the Washington, D. C., post office may not be designated by the Postmaster General to disburse funds from an appropriation under the control of the Fourth Assistant Postmaster General for star routes, to pay for repairs to an automobile used in inspecting star routes.

Comptroller General McCarl to the postmaster, Washington, D. C., June 23, 1925:

There has been received your letter of May 28, 1925, again submitting the voucher in favor of the Commercial Auto & Supply Co. (Inc.), in the amount of $372.65 for repairs to an automobile, payment of which you were advised by decision of May 19, 1925, was not authorized. You now submit a statement from the Fourth Assistant Postmaster General regarding this expenditure and request further consideration in the light of that statement.

The Fourth Assistant Postmaster General states that the repairs were made by direction of his bureau under the provisions of the act of May 18, 1916, 39 Stat. 161, which are as follows:

SEC. 7. That whenever in the judgment of the Postmaster General the bids received for any star route are exorbitant or unreasonable, or whenever he has reason to believe that a combination of bidders has been entered into to fix the rate for star-route service, the Postmaster General be, and he is hereby, authorized, out of the appropriation for inland transportation by star routes, to employ and use such means or methods to provide the desired service as he may deem expedient, without reference to existing law or laws respecting the employment of personal service or the procurement of conveyances, materials, or supplies.

It is not apparent what relation the above-quoted provision has to the voucher now for consideration. Said provision does not excuse compliance with section 3709, Revised Statutes, in all cases of payments from the appropriation for inland transportation of mails but is limited to payments necessary to the furnishing of star-route service when the bids received are, in the judgment of the Postmaster General, exorbitant or unreasonable, or he has reason to believe that a combination of bidders has been entered into to fix the rates. There is no showing that the repairs here in question were necessary to the furnishing of service on a star route for which the bids received were exorbitant or unreasonable, or in connection with which there was a combination of bidders. On the contrary, it is stated in effect that the automobile was being used by an official of the Post Office Department in conducting an inspection of the Government-operated star route between Annapolis and Solomons, Md.,

at the time of the accident; from which it may be inferred that the need for the repairs was to enable the continued use of the automobile in making similar inspections and not to furnish the star-route service. The act of May 18, 1916, *supra*, has no application to this procurement.

Section 3709, Revised Statutes, requires that all purchases and contracts for supplies or services in any of the departments of the Government shall be advertised in advance when the public exigency does not require the immediate delivery of the articles or performance of the service. This is applicable to the Post Office Department and nothing is submitted to indicate that the requirement has been complied with in the present case. However, for reasons stated in my decisions of August 4, 1924, and April 10, 1925, A–1240, to the Postmaster General, the failure to comply with said requirement in this particular instance would not alone preclude the proposed payment.

The submission of this voucher by you payable from the appropriation for inland transportation on star routes, act of April 4, 1924, 43 Stat. 89, which appropriation is under the control of the Fourth Assistant Postmaster General, presents the question of your right of authority as postmaster of the Washington City post office to act as disbursing officer in such cases. The Revised Statutes contain the following provisions with reference to payments on account of the Postal Service:

> SEC. 3674. Payments of money out of the Treasury on account of the postal service shall be in pursuance of appropriations made by law, by warrants of the Postmaster-General * * *.
>
> SEC. 3860. The Postmaster-General may allow to the postmaster at New York City and to the postmasters at offices of the first and second classes, out of the surplus revenues of their respective offices * * * a reasonable sum for the necessary cost of rent, fuel, lights, furniture, stationary, printing, clerks, and necessary incidentals to be adjusted on a satisfactory exhibit of the facts * * *.
>
> SEC. 3861. The salary of a postmaster, and such other expenses of the postal service authorized by law as may be incurred by him, and for which appropriations have been made, may be deducted out of the receipts of his office, under the direction of the Postmaster-General.

The act of July 5, 1884, 23 Stat. 156, provides:

> * * * the Postmaster-General is authorized to designate postmasters at money-order post-offices as disbursing officers for the payment of the salaries of officers and employees of the postal service, and for such other payments as postmasters are now authorized to make from postal revenues.

The Postmaster General is also authorized to designate postmasters as disbursing officers for the payment of "mail messengers and others engaged under their supervision in transporting the mails." See act of June 3, 1924, 43 Stat. 356.

Postmasters are not primarily disbursing officers, and whenever it has been the will of the Congress that they act as disbursing officers with respect to a particular class of payments special legislation to

that effect has been enacted. The general provision of law for payments from postal revenues is by warrant after final audit. See section 4055, Revised Statutes, and decision of June 6, 1922, to the Postmaster General.

The expenditure here in question does not belong to any of the classes for the payment of which the Postmaster General is authorized by law to designate a postmaster to act as disbursing officer. Therefore, the payment of the voucher by you is not authorized.

The voucher and supporting papers will be retained in this office for audit in like manner as are other accounts or claims payable through the General Accounting Office from postal revenues.

(A-9856)

MILEAGE—NAVAL OFFICER PERFORMING TRAVEL PARTLY BY GOVERNMENT-OWNED VESSEL

Under the act of February 11, 1925, 43 Stat. 864, an officer of the Navy, performing official travel by a Government-owned vessel for which no transportation fare is charged, is entitled only to reimbursement of actual and necessary expenses incurred, but where official travel is only partly performed by a Government-owned vessel mileage is payable under section 12 of the act of June 10, 1922, 42 Stat. 631, when both termini of the complete travel are within the continental limits of the United States in North America, for travel performed to the port of embarkation, and from the port of debarkation to the terminal point of the journey enjoined, distance to be computed by the shortest usually traveled route.

Comptroller General McCarl to the Secretary of the Navy, June 24, 1925:

I have your letter of May 25, 1925, submitting a proposed change in Section D of "Instructions for carrying into effect the joint service pay bill, act of June 10, 1922," with request for an expression of views as to whether the proposed change, in so far as it involves disbursements, is in conformity with law.

The proposed change is based on the provision of law as found in the act of February 11, 1925, 43 Stat. 864, relative to nonpayment of mileage when traveling under orders by certain Government-owned vessels, and is as follows:

Strike out subparagraph (i) at the top of page D4 and substitute the following:

"An officer traveling by Government conveyance on land within the limits of the United States in North America, under travel orders (except repeated travel), is entitled to the regular mileage of 8 cents, less the same deduction as if the travel had been performed on a transportation request; that is, 3 cents per mile must be deducted for the distance as per Army Distance Table. Officers performing travel by Government-owned vessels for which no transportation fare is charged shall only be entitled to reimbursement of actual and necessary expenses incurred. (Act of February 11, 1925.) On and after February 11, 1925, in cases where officers travel under orders partly by a Government-owned vessel and partly by rail they will be entitled to mileage for land travel only. For example, an officer who receives orders involving travel from Washington, D. C., to San Diego, Calif., and is ordered to travel from New York, N. Y., to San Francisco, Calif., by Government-owned vessel

is entitled to mileage from Washington, D. C., to New York, N. Y., and from San Francisco, Calif., to San Diego, Calif., and actual expenses from New York, N. Y., to San Francisco, Calif. Mileage is not payable for travel by air. (Comp. Gen. Ad 7199, 3 October, 1922.)"

The act of February 11, 1925, 43 Stat. 864, provides:

* * * officers performing travel by Government-owned vessels for which no transportation fare is charged, shall only be entitled to reimbursement of actual and necessary expenses incurred * * *.

When both termini of the complete travel enjoined by the orders are within the continental limits of the United States in North America mileage is payable for travel to the port of embarkation and from the port of debarkation to the terminal point, the distances for land travel to be computed by the shortest usually traveled route.

The proposed change appears properly to cover the subject so far as it relates to the 1925 law, and there appears no reason why the same may not be issued.

(A-9862)

ST. ELIZABETHS HOSPITAL—INVESTMENT OF PERSONAL FUNDS OF PATIENTS

A patient of St. Elizabeths Hospital, for whom no guardian or committee has been appointed, may not be permitted to withdraw his personal funds on deposit in the Treasury to his credit for the purpose of private investment, and there is no authority to invest such personal funds on deposit to the credit of the patient in Government interest-bearing securities, or otherwise, so as to earn interest for the benefit of the patient while he remains in the institution.

Comptroller General McCarl to the Secretary of the Interior, June 25, 1925:

I have your request of May 23, 1925, for decision whether Sergt. Powell Patterson, a patient of St. Elizabeths Hospital, may be permitted, as requested by him in letter dated May 9, 1925, to withdraw for private investment personal funds deposited in the Treasury to his credit through the disbursing officer of the institution, no committee or guardian having been appointed for the patient, or if that be not authorized, whether the amount of personal funds on deposit to the credit of said patient may be invested in Government interest-bearing securities or otherwise so as to earn interest for the benefit of the patient while he remains in the institution.

Section 4839, Revised Statutes, as amended by the act of February 2, 1909, 35 Stat. 592, after authorizing the appointment of a disbursing agent of St. Elizabeths Hospital, provides as follows:

* * * The said disbursing agent, under the direction of the superintendent, shall have the custody of and pay out all moneys appropriated by Congress for the Government Hospital for the Insane, or otherwise received for the purposes of the hospital, and all moneys received by the superintendent in behalf of the hospital or its patients, and keep an accurate account or accounts thereof. The said disbursing agent shall deposit in the Treasury of the United States, under the direction of the superintendent, all funds now in the hands of the

superintendent or which may hereafter be intrusted to him by or for the use of patients, which shall be kept in a separate account; and the said disbursing agent is authorized to draw therefrom, under the direction of the said superintendent, from time to time, under such regulations as the Secretary of the Interior may prescribe, for the use of such patients, but not to exceed for any one patient the amount intrusted to the superintendent on account of such patient. * * *.

Persons confined in St. Elizabeths Hospital for treatment of insanity are presumably mentally incompetent to handle their financial affairs. Notwithstanding such persons may be only temporarily confined or their condition such as to justify only partial restriction, they may not be permitted while remaining patients of the institution to withdraw their personal funds deposited in the Treasury through the disbursing officer of the institution.

Accordingly, the request of Sergeant Patterson may not be complied with.

As to the further question whether the funds of the patient may be invested in Government interest-bearing securities or otherwise so as to earn interest, there is much to persuade that such a procedure should be permitted, but it must be borne in mind that while Government securities are the ideal investment yet they are not always purchasable at par but usually above par, and thus may affect the interest return. But however that may be, the specific direction of the statute is that the moneys be deposited in the Treasury, and there being no provision therein either for investment or that the funds shall bear interest while so deposited, there is no authority to place them at interest. It seems that in exceptional cases minor amounts are likely to be involved, so that the question of interest is not pecuniarily material. If, however, it is thought administratively there should be an interest return, the question is one for the consideration of Congress.

(A–10143)

PUBLIC BUILDINGS, REPAIRS AND ALTERATIONS—ATLANTA PENITENTIARY

The appropriation "United States penitentiary, Atlanta, Ga., working capital," is not available for the cost of certain alterations in the existing plant for the manufacture of cotton fabrics at the Atlanta Penitentiary so as to provide additional floor space to enable the manufacture of other classes of cotton fabrics not now manufactured at the plant.

Comptroller General McCarl to the Attorney General, June 26, 1925:

I have your letter of June 15, 1925, requesting decision whether the appropriation "United States penitentiary, Atlanta, Ga., working capital," is available for cost of certain alterations in the existing plant for the manufacture of cotton fabrics at the Atlanta Peni-

tentiary to permit the manufacture of denims, drills, nainsook, and sheeting for sale to the Government in accordance with Bureau of the Budget Circular No. 154, dated April 10, 1925. You describe the proposed alterations as follows:

* * * It is proposed to tear out a part of the wall on the south side of the building and add a lean-to about 14 feet wide in its interior. This alteration will give an additional floor space of approximately 3,412 square feet. The work will be performed by prison labor, and the building materials purchased under contract. It is estimated the following materials, at an aggregate cost of $5,770, will be needed:

330 tons sand	$353
900 bbls. cement	2,385
60,000 bricks	750
490 tons gravel	715
Lumber for forms	1,567
Total	5,770

Sections 5 and 7 of the act of July 10, 1918, 40 Stat. 897, authorizing the establishment of the factory or mill for the manufacture of cotton fabrics, provide as follows:

SEC. 5. That there is created a fund, to be known as the working capital, which shall be available for the carrying on the industrial enterprise authorized herein or which may be authorized hereafter by law to be carried on in said penitentiary. The working capital shall consist of the sum of $150,000, which sum is authorized to be appropriated. The receipts from the sale of the products or by-products of the said industries and the sale of condemned machinery or equipment shall be credited to the working capital fund and be available for appropriation by Congress, annually, for the purposes set forth in this Act.

SEC. 7. That said working capital shall be disbursed under the direction of the Attorney General and shall be available for the purchase, repair, or replacement of machinery or equipment, for the purchase of raw materials or parts, for the employment of necessary civilian officers and employees at the penitentiary and in Washington, for the repair and maintenance of buildings and equipment, and for all other necessary expenses in carrying out the provisions of this Act.

The act of November 4, 1918, 40 Stat. 1035, appropriated the $150,000 for working capital as authorized to be appropriated in the previous statute in the following terms:

* * * working capital, $150,000 * * * *Provided*, That the said working capital fund and the receipts credited thereto may be used as a revolving fund during the fiscal year 1919.

Each fiscal year since the establishment of the plant the working capital and receipts have been reappropriated as a revolving fund in similar terms. For the fiscal year 1925 see act of May 28, 1924, 43 Stat. 223, and for the fiscal year 1926 see act of February 27, 1925, 43 Stat. 1032. The amounts thus reappropriated are available only for the same purposes as the original working capital or revolving fund. The provisions of the act establishing the plant, creating the working capital, did not authorize the use of the revolving fund for construction of buildings, but "for repair and maintenance of buildings and equipment, and for all other necessary expenses in carrying out the provisions of this act." The word "repair" as used in appro-

priation acts has been defined to mean "to make over, to restore to a good or sound state, as repairing the roof, repairing windows, or repairing the outside steps, etc." 20 Comp. Dec. 73. The word "maintenance," as used in appropriation acts, has been construed to refer to service items such as contingencies, laundry and towel service, rubbish, ashes, garbage, etc. 3 Comp. Gen. 881. The phrase "all other necessary expenses" refers to current or running expenses of a miscellaneous character arising immediately out of and directly related to the work performed at the plant. It is not broad enough to include the cost of constructing additions to a building, nor definite enough to comply with the requirements of sections 3663, 3678, and 3733 of the Revised Statutes. The appropriation in question has never been itemized in any of the annual budgets submitted to Congress, but has been submitted to Congress for appropriation as one lump sum. There is no language in this appropriation for working capital, or in any other appropriation under the Department of Justice, which may reasonably be construed as specifically authorizing expenditures for cost of additions to the buildings at the Atlanta Penitentiary. Reference is made to decision of June 30, 1922, A. D. 6838, addressed to the Attorney General, holding that this same appropriation for working capital for the fiscal year 1922 was not available for construction of warehouses in which to store the products of the cotton-duck mill. See also generally the decision of this office dated July 10, 1924, A–1876, holding that the appropriation "For repairs and necessary alterations to buildings" occupied by the Bureau of Standards was not available for the construction of an extension to the laboratory building, citing 1 Comp. Dec. 33, 200; 3 *id.* 134, 207; 7 *id.* 684, 773; 11 *id.* 119; 2 Comp. Gen. 301.

Aside from the question of availability of appropriations for the proposed expenditure, there appears in the annual appropriation acts for the Department of Justice for the fiscal years 1925 and 1926, cited above, the following prohibition:

> Appropriations in this Act under the Department of Justice shall not be used for beginning the construction of any new or additional building, other than those specifically provided for herein, at any Federal penitentiary.

The words "additional building," given their ordinary meaning, refer to building or buildings in addition to structures already in existence, either attached thereto or separate. The intent of Congress is quite obvious that the prohibition is directed against any building construction whatever at Federal penitentiaries other than that for which specific provision has been made. The proposed additions to the buildings to provide additional floor space of approximately 3,412 square feet would be within this appropriation-use prohibition. The revolving fund is annually reappropriated and is thus fairly within appropriation restrictions. It would apparently

be evasive of this appropriation restriction to interpret the revolving fund as available for building, the fund not providing therefor by its terms.

In your submission you emphasize particularly the need for additional floor space and the desirability thereof from an economic standpoint which will result from the purchase by the Government of products manufactured as well as to furnish the prisoners an opportunity to earn wages for the benefit of their dependents, under authority of the controlling statute. I have given these matters thoughtful consideration and have no desire to appear as interfering with the furtherance of such purposes, but the need, necessity, or desirability for the expenditure does not authorize the use of the appropriation for purposes not fairly within its terms as provided by Congress, nor overcome the specific prohibition of law.

The question submitted is answered in the negative.

(A–10163)

TRAVELING EXPENSES OF OFFICIALS OF THE DEPARTMENT OF JUSTICE

The decision of June 4, 1925, 4 Comp. Gen. 1013, to the effect that the Solicitor General and other officials of the Department of Justice, when sent by the Attorney General to attend to any interest of the United States, are entitled to reimbursement of actual expenses not to exceed $6 per day, but they are not entitled to a per diem in lieu thereof, does not apply to special assistants to the Attorney General whose official headquarters are at places other than Washington, D. C. Payments of a per diem in lieu of subsistence not exceeding $4 for travel performed prior to June 15, 1925, to the officers within the purview of the decision of June 4, 1925, if made in accordance with the travel orders and regulations in force at that time, will not be disturbed. 4 Comp. Gen. 1013, modified.

Comptroller General McCarl to the Attorney General, June 26, 1925:

I have your letter of June 17, 1925, referring to decision of June 4, 1925, 4 Comp. Gen. 1013, to the effect that a per diem in lieu of subsistence is not authorized in cases in which section 370, Revised Statutes, as amended by the act of March 4, 1923, 42 Stat. 1503, provides for reimbursement of actual expenses incurred for subsistence, not to exceed $6 per day, and requesting decision whether said ruling "applies to special assistants to the Attorney General whose official headquarters are at places other than Washington, D. C." You also request that the decision of June 4, 1925, be made effective July 1, 1925, for the reason that "a large number of expense accounts for the month of May have been received and are now in process of audit in which per diems in lieu of subsistence have been charged under the regulations which have heretofore been in force."

In reply you are advised that section 370, Revised Statutes, as amended, specifically includes "a special assistant to the Attorney General" along with "any other officer of the Department of Justice"; but considering the fact that the allowance therein authorized is limited to cases in which the officer "is sent by the Attorney General to any State, district, Territory, or country to attend to any interest of the United States," and the stipulation for the allowance prescribed only "while absent from the seat of government," it would seem to be clear that the provision was not intended to apply to special assistants to the Attorney General having official headquarters or designated post of duty other than at Washington, D. C., when ordered to perform travel in connection with their regular duties. The question submitted is answered accordingly.

With reference to the request that the decision of June 4, 1925, be made effective July 1, 1925, it is assumed that immediately upon receipt of said decision notice of the effect thereof was communicated to the travelers affected thereby, and expense accounts thereafter rendered should be made to conform therewith, accordingly I have to advise that said decision will not be applied to require the disallowance of credit for payments of a per diem of not to exceed $4 in lieu of subsistence in cases in which the travel was performed prior to June 15, 1925, if the payment of the per diem was in accordance with the travel orders and the regulations in force at the time.

(A–8046)

TRANSPORTATION OF DEPENDENTS OF A NAVAL OFFICER

Where an officer of the Navy, ordered to make a permanent change of station, is granted permission to report to another station to enable him to travel by other means at his own expense and such permission does not include his dependents, his right to transportation for them at Government expense is not affected. 3 Comp. Gen. 358 modified.

Comptroller General McCarl to Lieut. S. B. Brewer, United States Navy, June 27, 1925:

There has been received your letter of January 12, 1925, requesting review of settlement No. Col. 054786, dated December 9, 1924, charging you with $150.29 for transportation furnished your wife for travel performed by her from Philadelphia, Pa., to Seattle, Wash., by reason of orders of June 22, 1921, detaching you from duty on board the U. S. S. *Blakeley* and assigning you to duty on the U. S. S. *New Mexico*.

The charge raised was based on decision of December 10, 1923, 3 Comp. Gen. 358, holding that under the orders in question, which stipulated that all travel performed in connection with such change of duty must be without expense to the Government, there was no authority of law to furnish your wife transportation as provided in the act of May 18, 1920, 41 Stat. 604.

The orders in question detached you from duty on board the U. S. S. *Blakeley* and authorized you to report to the commanding officer U. S. S. *New Mexico* for duty on board that vessel, and stipulated that "All travel performed in connection with the above must be without expense to the Government." The original orders, dated May 24, 1921, for change of duty from the U. S. S. *Blakeley* to the U. S. S. *New Mexico* directed you to perform the travel involved on board the U. S. S. *Tennessee;* you state said orders were not received by you until several days after the departure of the *Tennessee* for the Pacific coast. The orders of May 24, 1921, were revoked by orders of June 3, 1921, continuing you on the U. S. S. *Blakeley.*

You state that after the reporting of your relief you were informed you would be ordered to the *New Mexico* via the U. S. S. *Stubling*, sailing in September, 1921; that rather than wait so long for transportation you volunteered to pay your own way across the continent, but that you made no such agreement regarding transportation of your dependents, and that you did not accept the orders (which stipulated that if you did not desire to bear the expense of travel to return the orders for cancellation) until you were assured that transportation would be issued for your dependents; also that the reason for so ordering you to pay your own expenses was that the appropriation available for transportation of officers was almost exhausted, but that there were sufficient funds in the appropriation for transportation of dependents. You further state that it was neither the intention on your part nor on the part of the department that you should defray the transportation of your dependents. Such statements are supported by the Secretary of the Navy in letter of July 22, 1924, in which he stated that at the time your orders were written there was a shortage in the allotment for payment of mileage to officers, but ample funds for payment of travel of officers' dependents, and that in view of that fact there was no intention, in issuing said orders, to deprive you of transportation for your dependents and household effects.

From the foregoing it appears that the change of station requiring travel was ordered by the department and that the permission to report to the commanding officer of the *New Mexico* rather than an

order to so report and travel by naval vessel had for its purpose to conserve the appropriation for mileage. In these circumstances the decision of December 10, 1923, 3 Comp. Gen. 358, is modified and the charge of $150.29 raised against you in the settlement will be removed.

(A-10057)

TRANSPORTATION OF HOUSEHOLD EFFECTS OF EMPLOYEES OF THE RECLAMATION SERVICE, GEOLOGICAL SURVEY, AND BUREAU OF MINES

In the absence of specific legislative authority therefor, the cost of packing, crating, hauling, and transportation of household effects of employees of the Reclamation Service, Geological Survey, and Bureau of Mines, Department of the Interior, upon change of station, may not be paid from appropriated funds. Payments made for expenses incurred in connection with transportation of household effects incident to a change of station which occurred prior to March 28, 1925, will be allowed up to and including June 30, 1925. 4 Comp. Gen. 818; *id.* 941, modified.

Comptroller General McCarl to the Secretary of the Interior, June 27, 1925:

I have your letter of June 10, 1925, referring to the decisions of this office dated March 28, 1925, 4 Comp. Gen. 818, and May 13, 1925, 4 Comp. Gen. 941, and requesting decision whether—

* * * where permanent change of station occurred prior to March 28, 1925, and the employees accepted change of station with the understanding that shipment of household goods would be made at Government expense, in accordance with regulations in effect at the time of permanent transfer, and the employee holds authority to ship at Government expense, issued previous to your decision of March 28, 1925, shipment of household goods can now be made at the expense of the Government.

Decision of March 28, 1925, 4 Comp. Gen. 818, 820, with reference to transportation of household goods of employees of the Reclamation Service, Geological Survey, and Bureau of Mines upon change of station at the expense of the Government, held as follows:

Credit will not be allowed for payments made from Government funds to employees of the three services mentioned as reimbursement of expenses incurred for packing, crating, hauling, or transportation of household effects incident to permanent change of station occurring subsequent to December 6, 1924. But in view of the long-continued practice and the apparent ground for the assumption that the decisions holding such allowances unauthorized applied only to employees whose compensation was fixed by law or regulation, such payments incident to permanent change of station occurring on or prior to December 6, 1924, if otherwise regular, will not be disturbed. See decision of March 12, 1925, 4 Comp. Gen. 755.

Decision of May 13, 1925, 4 Comp. Gen. 941, held as follows:

Decision of March 28, 1925, is hereby amended, changing the effective date for the discontinuance of the practice of shipping household goods of employees upon change of station from December 6, 1924, to March 28, 1925.

The question now presented is answered in the affirmative. However, as the transportation of household goods at Government expense was not authorized unless incident to the change of station,

and therefore within a reasonable time subsequent to the change of station, no expense in connection with transportation of household goods incident to change of station which occurred prior to March 28, 1925, will be allowed unless incurred prior to July 1, 1925.

(A–9291)

TRAVELING EXPENSES—OFFICER OF THE COAST GUARD SUBPŒNAED TO APPEAR AS A WITNESS

An officer of the Coast Guard subpœnaed to appear before a United States district court to testify to facts officially ascertained by him is entitled to mileage under the act of June 10, 1922, 42 Stat. 631, for travel performed in going to and returning from the court, rather than to reimbursement of actual and necessary traveling expenses under section 850, Revised Statutes.

Comptroller General McCarl to the Secretary of the Treasury, June 29, 1925:

There has been received your letter of April 16, 1925, requesting review of settlement No. C–18417–T, dated July 31, 1924, disallowing credit for an item of $24.96 in the account of Special Disbursing Agent William H. Webb, United States Coast Guard, for mileage paid to H. S. Browne, boatswain, for travel from Key West to Miami, April 27–29, 1924, in answer to a subpœna issued out of the United States district court at Miami. You also request a specific ruling on the following points:

1. When a member of the Coast Guard performs travel incident to the prosecution of cases arising as a result of the operations of the service, is such travel to be regarded as coming within the provisions of section 850, Revised Statutes?
2. If the foregoing question is answered in the affirmative, will a commissioned or warrant officer be subject to the general limitation of $5 per diem allowed civil employees of the Government or to the $7 per diem provided for officers of certain services by the act of June 10, 1922?
3. Likewise, in the case of enlisted men, whose allowances for quarters and subsistence when in a travel status are fixed by executive order, will the expense allowed under section 850, Revised Statutes, be limited by such fixed allowances, or by the general limitation of $5 per diem?
4. From what appropriation is such travel expense to be paid?

Section 850, Revised Statutes, provides as follows:

When any clerk or other officer of the United States is sent away from his place of business as a witness for the Government, his necessary expenses, stated in items and sworn to, in going, returning, and attendance on the court, shall be audited and paid; but no mileage, or other compensation in addition to his salary, shall in any case be allowed.

An opinion of the Attorney General, April 15, 1878, 15 Op. Atty. Gen. 486, stated that "Expenses necessarily incurred by an officer of the Army as a witness for the Government in judicial proceedings before the civil authorities are allowable under section 850, Revised

Statutes, and payable from the judiciary fund." And that opinion was reaffirmed in 16 Op. Atty. Gen. 113 and 147. See also 4 Comp. Dec. 146; 17 *id.* 584; 19 *id.* 752.

The provisions of section 850, Revised Statutes, apply with equal force to officers of the Coast Guard performing travel as witnesses for the Government before Federal courts, and a witness before a United States grand jury must be regarded as a witness for the Government before a court.

The appropriation for fees of witnesses, act of May 28, 1924, 43 Stat. 221, is specifically made available "for payment of the actual expenses of witnesses, as provided by section 850, Revised Statutes."

Section 11 of the act of June 10, 1922, provides in part as follows:

* * * To each enlisted man not furnished quarters or rations in kind there shall be granted, under such regulations as the President may prescribe, an allowance for quarters and subsistence, the value of which shall depend on the conditions under which the duty of the man is being performed, and shall not exceed $4 per day * * *.

Section 12 provides in part:

That officers of any of the services mentioned in the title of this Act, when traveling under competent orders without troops, shall receive a mileage allowance at the rate of 8 cents per mile, * * * Unless otherwise expressly provided by law, no officer of the services mentioned in the title of this Act shall be allowed or paid any sum in excess of expenses actually incurred for subsistence while traveling on duty away from his designated post of duty, nor any sum for such expenses actually incurred in excess of $7 per day * * *.

The provisions of the said act of June 10, 1922, are not in conflict with and do not supersede the provisions of section 850, Revised Statutes. Therefore, the question for consideration is whether the duty imposed falls within the scope of the earlier or later act.

When the duty imposed comes clearly within the provisions of section 850, Revised Statutes, the travel involved is not such as contemplated in the act of June 10, 1922. See 22 Comp. Dec. 484; 23 *id.* 207.

In the instant case Mr. Browne was one of the crew of a Coast Guard vessel subpœnaed to appear as a witness for the Government before the grand jury at Miami, April 28, 1924, and in answer thereto he left Key West, Fla., on April 27 for Miami, returning to Key West April 29, 1924, and rendered his account for said travel to Special Disbursing Officer William H. Webb upon a mileage basis as provided by section 12 of the act of June 10, 1922, 42 Stat. 631, and it was so paid by the disbursing officer, but this office disallowed the item in his accounts for the reason that the expenses thus incurred should have been paid from a judiciary appropriation on an actual expense basis, under the provisions of section 850, Revised

Statutes, instead of under the appropriation from which his traveling expenses are usually paid when traveling for his department.

In a decision of this office addressed to the Attorney General under date of February 7, 1924, it was held that while the prohibition act does not in terms impose upon the Coast Guard officers the duty of investigating and aiding in the prosecution of violations of said act, the very nature of their official duties seems to require of them to take some part in investigations and prosecution of unlawful importation of liquors into the United States. Said decision also announced the general rule to the effect that where officers or employees attend a court in connection with the investigation or prosecution of a case for the purpose of aiding the prosecution or testifying to facts which they have officially investigated their expenses so incurred are chargeable to the appropriation under which they are officially operating and not to the judiciary appropriation. Citing 7 Comp. Dec. 293; 27 *id.* 199, 1039; 2 Comp. Gen. 629, 801.

As the travel performed in the case here under consideration was for the purpose of testifying to facts officially investigated, credit for the payment will be allowed.

With reference to the specific questions hereinbefore stated, they may be answered as follows:

No. 1. Answered in the negative generally.

Nos. 2 and 3. As question No. 1 is answered in the negative, specific answers to these questions would not seem necessary. It may be stated, however, that if it is a part of the official duty of the person performing the travel to aid in the prosecution of the case or if the travel is for the purpose of testifying to facts which he has officially ascertained or investigated reimbursement of expenses incurred or authorized allowances in lieu thereof should be paid under the limitations of departmental regulations from the appropriation under which their ordinary traveling expenses are paid. But in cases in which the expenses are properly payable under the provisions of section 850, Revised Statutes, and accordingly chargeable under the Department of Justice appropriation, the payments would be on the same basis as in the case of civilian employees attending the court.

No. 4. This question is answered by the answers to the three other questions.

(A-9948)

BURIAL EXPENSES—TRANSFERRED MEMBERS OF FLEET MARINE CORPS RESERVE

As transferred members of the Fleet Marine Corps Reserve are not enlisted men of the Regular Marine Corps their funeral expenses are not payable from the appropriation made by the act of May 28, 1924, 43 Stat. 203, for the payment of funeral expenses of officers and enlisted men of the Marine Corps.

Comptroller General McCarl to Maj. Charles R. Sanderson, United States Marine Corps, June 29, 1925:

There has been received your letter of June 1, 1925, submitting a voucher in favor of William H. Chew, funeral director, 1928 Federal Street, Philadelphia, Pa., in amount $150, for expenses incurred in the burial of the late Gunnery Sergt. John McGurn, Fleet Marine Corps Reserve, who died at his home, Philadelphia, Pa., February 3, 1925. You request decision whether payment of the voucher is authorized.

It appears that McGurn was transferred to the United States Fleet Marine Corps Reserve, class 1 (d), with over 20 years' service September 16, 1919, and was immediately transferred to an inactive status, in which he remained up to and including the date of his death.

You invite attention to the Navy appropriation act of May 28, 1924, 43 Stat. 203, under the heading "General expenses, Marine Corps," reading as follows:

* * * funeral expenses of officers and enlisted men and accepted applicants for enlistment and retired officers on active duty and retired enlisted men of the Marine Corps, including the transportation of their bodies, arms, and wearing apparel from the place of demise to the homes of the deceased in the United States * * *.

The provisions of the act of August 29, 1916, 39 Stat. 589, 590, relative to transferred members of the Fleet Naval Reserve, and made applicable by the act to transferred members of the Fleet Marine Corps Reserve, provide:

In addition to the enrollments in the Fleet Naval Reserve above provided, the Secretary of the Navy is authorized to transfer to the Fleet Naval Reserve at any time within his discretion any enlisted man of the naval service with twenty or more years' naval service, and any enlisted man, at the expiration of a term of enlistment who may be then entitled to an honorable discharge, after sixteen years' naval service: *Provided*, That such transfers shall only be made upon voluntary application and in the rating in which then serving, and the men so transferred shall be continued in the Fleet Naval Reserve until discharged by competent authority.

Members of the Fleet Naval Reserve who have, when transferred to the Fleet Naval Reserve, completed naval service of sixteen or twenty or more years shall be paid a retainer at the rate of one-third and one-half, respectively, of the base pay they were receiving at the close of their last naval service plus all permanent additions thereto * * *.

It has been held that enlisted men of the Navy who, upon their voluntary application, have been transferred to the Fleet Naval Reserve in accordance with the act of August 29, 1916, cease for all purposes to be enlisted men of the Navy and become thereafter for all purposes fleet naval reservists. 2 Comp. Gen. 762.

The act of May 28, 1924, making appropriation for the payment of funeral expenses of enlisted men of the Marine Corps has reference to enlisted men of the Regular Marine Corps, and has no application to transferred members of the Fleet Marine Corps Reserve.

The appropriation not including transferred members of the Fleet Marine Corps Reserve you are not authorized to pay the voucher.

(A-9701)

PROPERTY, PRIVATE—DAMAGED BY AIRCRAFT

A claim covering damages for loss of a horse resulting from operation of an Army balloon, when not in excess of $250, may be allowed, under the act of June 7, 1924, 43 Stat. 492, where it is shown that the horse of the claimant became frightened while the balloon was passing over the claimant's farm, ran into a barbed-wire fence, and was so injured that it was necessary for it to be killed. 3 Comp. Gen. 234 distinguished.

Comptroller General McCarl to Capt. Carl Halla, disbursing officer, United States Army, June 30, 1925:

There has been received your letter of May 11, 1925, requesting decision whether voucher submitted in favor of Clyde De Voe for $121, covering damages for loss of one horse, may properly be paid.

It appears that a dirigible balloon from Wilbur Wright Field, Dayton, Ohio, owned by the Government and piloted by First Lieut. Ira R. Koenig, Air Service officer, on December 2, 1924, passed over the farm of claimant and that one of his horses in the pasture became frightened and ran into a barbed-wire fence and was seriously injured and that by reason of the injury was later killed. The pilot of the balloon testified that possibly he flew over the southwest corner of claimant's farm at an altitude of 500 or 600 feet. Another witness, apparently residing on the farm, testified that the balloon was at an elevation of between 50 and 100 feet above the farm. No landing was made on or near the farm. The claim is not one involving negligence for consideration under the provisions of the act of December 28, 1922, 42 Stat. 1066.

A board of officers of the Army convened to investigate the claim found that claimant's horse was injured as a result of being frightened by a Government dirigible balloon flying over claimant's farm, and that claimant suffered damages by reason thereof in the sum of

$121, and the claim was approved by the Chief of the Air Service and the Assistant Secretary of War, and recommended for payment under the provision made in the act of June 7, 1924, 43 Stat. 492, in terms as follows:

> * * * not more than $4,000 may be expended for settlement of claims (not exceeding $250 each) for damages to persons and private property resulting from the operation of aircraft at home and abroad when each claim is substantiated by a survey report of a board of officers appointed by the commanding officer of the nearest aviation post and approved by the Chief of Air Service and the Secretary of War * * *.

The payment of the voucher submitted and herewith returned is authorized accordingly.

The facts in this case are essentially different from the facts involved in the case decided in 3 Comp. Gen. 234.

(A–9897)

CLASSIFICATION OF CIVILIAN EMPLOYEES—UNIT OF APPROPRIATION

The total amount of funds appropriated for personal services in the District of Columbia under the heading "Office of Treasurer of the United States," by the act of April 4, 1924, 43 Stat. 70, and the act of January 22, 1925, 43 Stat. 770, constitutes one "bureau office, or other appropriation unit" within the meaning of the average provision restricting payments of compensation for personal services in the District of Columbia, subject to the classification act of 1923.

Comptroller General McCarl to the Secretary of the Treasury, June 30, 1925:

I have your letter of May 26, 1925, requesting decision whether the two appropriation items provided under the heading "Office of Treasurer of the United States" constitute one "bureau, office, or other appropriation unit" within the meaning of the average provision restricting payments of compensation for personal services in the District of Columbia, subject to the classification act. The act of April 4, 1924, 43 Stat. 70, appropriating for the Treasury and Post Office Departments for the fiscal year 1925, provides as follows:

> OFFICE OF TREASURER OF THE UNITED STATES
>
> Salaries: For Treasurer of the United States, $8,000; for personal services in the District of Columbia in accordance with the "Classification Act of 1923," $1,084,000; in all, $1,092,000.
>
> For personal services in the District of Columbia, in accordance with "The Classification Act of 1923," in redeeming Federal reserve and national currency, $450,000, to be reimbursed by the Federal reserve and national banks.

See also the same appropriation for the fiscal year 1926, act of January 22, 1925, 43 Stat. 770.

The decisions of this office have held, in effect, that ordinarily the respective bureaus in a department are the units within the meaning of the average provision in the absence of a specific showing that the bureau is operating under two or more appropriations providing for dissimilar or unrelated activities. 4 Comp. Gen. 167; *id.* 497; *id.* 678; *id.* 703; *id.* 741; *id.* 817; *id.* 851. The two items in question appear to have been provided for the same or a similar purpose having relation to the work of the office of the Treasurer of the United States, and nothing has been submitted to the contrary. The fact that the funds provided under the second item are derived by reimbursement from Federal reserve and national banks is not controlling since it does not appear that the employees paid from said funds are engaged on work essentially different from and unrelated to the work of the other employees in the Treasurer's office.

You are advised, therefore, that the total amount of funds appropriated for personal services in the District of Columbia under the heading "Office of Treasurer of the United States" constitutes one "bureau, office, or other appropriation unit" within the meaning of the average provision.

It has been ascertained that heretofore the two items have been considered as two separate appropriation units. Necessary adjustments in the compensation of employees will not be required to be made effective on the basis of one appropriation unit for any period prior to July 1, 1925.

(A-9915)

TRAVELING EXPENSES—USE OF OWN AUTOMOBILE

Alcohol purchased for use in the radiator or cooling system of an automobile during cold weather to prevent freezing of the water therein may only be reimbursed when the automobile is used exclusively on official travel. Reimbursement may not be allowed when the automobile is used at the official station of the employee or is available otherwise for personal use in addition to the official business trips.

Decision by Comptroller General McCarl, June 30, 1925:

In connection with the settlement of the accounts of S. B. Qvale, Federal prohibition director, there is for consideration whether reimbursement is authorized of amount expended by an officer or employee of the Government for alcohol for use in the cooling system of his own automobile when used on official business.

The use of alcohol in the radiator or cooling system of an automobile in use during cold weather is to prevent the freezing of the

water in the cooling system which would cause overheating of the engine and otherwise interfere with the proper operation of the automobile. A greater quantity is required when the automobile is in constant use than when allowed to stand idle much of the time because the heat from the operation of the engine causes a greater amount to evaporate than when the car is idle and the engine cold. It is also customary among car owners when the car is not to be used for any extended period in cold weather to drain off the water rather than purchase alcohol or other antifreezing mixture to keep it from freezing. It is apparent, therefore, that the use of alcohol under certain circumstances may be a necessary operating expense. It is not, however, susceptible of a definite computation on a mileage basis as in the case of gasoline and oil and the benefit to the Government is to a large extent speculative. Reimbursement for the purchase of alcohol can be allowed therefore only when it is clearly established that the expenditure therefor was necessitated solely by the official use, as for instance, in cases where the privately-owned automobile is used exclusively on official travel or where the purchase is rendered necessary during an extended trip on official business which could not continue without its purchase. Reimbursement can not be allowed when the automobile is used at the official station of the employee or is available otherwise for personal use in addition to the official business trips. Vouchers claiming such reimbursement should be accompanied by a full statement of the conditions under which the car is used and credit for such payments will not be allowed in the absence of a clear showing that the expenditure was necessitated solely by use on Government business.

(A-10187)

CLASSIFICATION OF CIVILIAN EMPLOYEES—MAXIMUM RATE OF COMPENSATION FOR NATIONAL PROHIBITION OFFICERS IN THE FIELD

Under the provisions of the act of December 6, 1924, 43 Stat. 704, providing appropriations to enable adjustment of the rates of compensation in certain field services for the fiscal year 1925, including the National Prohibition Unit of the Internal Revenue Service, to correspond to the rates prescribed by the classification act of 1923 for positions in the District of Columbia, and extended during the fiscal year 1926 by the act of January 22, 1925, 43 Stat. 764, $7,500 per annum, the maximum rate of compensation prescribed by the classification act is the maximum rate of compensation which may be fixed administratively for a national prohibition director or other field officer of that service in a grade to which the field position held by the officer has been properly allocated.

Comptroller General McCarl to the Secretary of the Treasury, June 30, 1925:

I have your letter of June 16, 1925, as follows:

> Your opinion is requested as to whether the Treasury Department has the authority, under existing laws, to fix the compensation of a prohibition director, or other prohibition officials of high responsibility in the field service, at a sum in excess of $7,500 per annum.

The appropriation act of December 6, 1924, 43 Stat. 704, appropriated funds under specific headings to enable the heads of the several departments and establishments of the Government to adjust compensation of civilian employees in the field service for which appropriations were therein provided to correspond to the rates established by the classification act for positions in the departmental service in the District of Columbia. There was included in this appropriation act the item "* * * and for enforcement of the narcotic and national prohibition acts, $712,000 * * *." This authority covered the fiscal year 1925, 4 Comp. Gen. 582; *id.* 599, and requires that the duties and responsibilities of a position will determine the class to which such position belongs and the grade to which it shall be allocated. After determining the corresponding grade under the classification act to which a given field service position should be allocated, the salary of the person holding such position should then be fixed in accordance with the rules laid down in the classification act. 4 Comp. Gen. 625, 626; *id.* 755, 756. The last cited decision also held that no rate of compensation for such a field position so allocated could be fixed administratively in excess of the maximum rate prescribed by the classification act for positions in the District of Columbia, viz: $7,500 per annum. This restriction, of course, does not apply to field positions, the compensation of which is specifically fixed by other statutes at a rate in excess of $7,500 per annum.

The act of January 22, 1925, 43 Stat. 764, appropriating for the Treasury and Post Office Departments for the fiscal year 1926, provided as follows:

> Those civilian positions in the field services under the several executive departments and independent establishments, the compensation of which was fixed or limited by law but adjusted for the fiscal year 1925 under the authority and appropriations contained in the Act entitled "An Act making additional appropriations for the fiscal year ending June 30, 1925, to enable the heads of the several executive departments and independent establishments to adjust the rates of compensation of civilian employees in certain of the field services," approved December 6, 1924, may be paid under the applicable appropriations for the fiscal year 1926 at rates not in excess of those permitted for them under the provisions of such Act of December 6, 1924.

This provision is expressly made applicable to the several executive departments and establishments mentioned in the act of December

6, 1924, and has the effect of extending the authority contained in the act of December 6, 1924, through the fiscal year 1926. Likewise, the construction of the act of December 6, 1924, made by the decisions of this office, *supra*, will be effective during the life of the statute; that is, until June 30, 1926.

As there appears no specific authority of law to fix rates of compensation of field officers in the National Prohibition Unit at a rate in excess of $7,500 per annum, the question submitted must be and is answered in the negative.

APPENDIX

SATURDAY HALF HOLIDAYS

[Circular No. 19]

JUNE 2, 1924.

(Relating to office procedure and not of general information.)

DIRECTIONS FOR SECURING REFUNDS OF AMOUNTS DUE THE UNITED STATES ON ACCOUNT OF STATE TAXES INCLUDED IN THE PRICES PAID FOR GASOLINE BY OFFICERS OF THE UNITED STATES

[Circular No. 20]

APRIL 22, 1925.

The attached compilation of State laws * governing the sale and use of gasoline or other liquid motor fuels has been prepared for the purpose of indicating the conditions under which the United States is exempt from the payment of tax thereon and for the purpose of assisting in obtaining refunds of amounts paid to which the United States is entitled.

The laws which have been included in this compilation show how to obtain exemption certificates and blank applications for refunds of taxes paid and specify the procedure to be followed when they are used. The time within which claims must be filed in order to receive the refunds due is specifically indicated therein and should be given special consideration.

In the examination of vouchers making payments for gasoline purchased in States having laws authorizing the refundment of tax paid on gasoline used for certain purposes, it has been found that there is seldom any indication that a claim for refund has been made on behalf of the United States within the time prescribed by law for filing such claims for refund. It would seem, therefore, that measures should be instituted that will result in the prompt presentation of claims for refund of tax paid on gasoline purchased by the United States for uses which entitle the consumer to a refund.

While the duty of instituting such claims might be performed by various agents of the Government, it is a duty which seems to more properly come within the province of administrative officers who purchase gasoline, and such officers will be expected to obtain the exemptions and refundments to which the United States is entitled.

The following suggestions are offered for their guidance:

1. Procure blank forms of exemption certificates and blank forms of application for refundment of tax paid.
2. Require dealers to furnish (*a*) such original bills or invoices, as are prescribed by the State law, to support claim for refundment, and in addition (*b*) such as may be necessary to support vouchers in payment for gasoline.
3. Use exemption certificates if their use is provided for by the law applicable.
4. Institute, within the prescribed time, claims for refundment.

Moneys recovered through claims made for refundment of tax paid on gasoline will be credited to the appropriation from which the tax was paid.

J. R. MCCARL,
Comptroller General of the United States.

*See State statutes for individual laws.

ALLOWANCE AND REPORTING OF CLAIMS CHARGEABLE TO EXHAUSTED AND LAPSED APPROPRIATIONS AND APPROVAL OF REQUISITIONS FOR DISBURSING FUNDS

[Circular No. 21]

JUNE 25, 1925.

1. In the settlement of claims against the United States the balances found due claimants will be certified as payable from the appropriations chargeable therewith whether or not appropriated funds are available, exhausted, or lapsed, except claims arising under a definite or specific appropriation the purpose and amount of which determines the merits of the claims. See paragraph 3.

2. All claims allowed by the General Accounting Office shall be duly entered of record for payment from the first available funds; and where the amount is due pursuant to statutory authority to do the thing for which the allowance is made or where the appropriation has lapsed and a sufficient amount has been covered to and remains in surplus from the particular appropriation, such claims will be reported to the Congress under the provisions of the act of July 7, 1884, 23 Stat. 254.

3. Where payment of the amount allowed is dependent solely upon an appropriation the total of which appears to have been exhausted or is otherwise insufficient, whether lapsed or not, after entry thereof on the books and payment can not be made from repayments to the appropriation charged (see par. 2), such claim settlements will be reported at the proper time to the head of the department or independent establishment concerned for action in seeking deficiency appropriation for payment thereof in the amounts certified and a copy of the letter transmitting the report will be furnished the Director of the Bureau of the Budget. Such claims are not to be reported to the Congress under the act of July 7, 1884, *supra.*

4. When reporting to the Congress the claim settlements chargeable to balances of appropriations carried to surplus, it is desirable that one appropriation, segregated as to each department or independent establishment, be made covering all such claim settlements reported, to serve all accounting requirements, the detailed charges to each appropriation involved appearing on the books of the Government. When submitting the amounts of claim settlements for a deficiency appropriation it is also desirable that appropriation therefor be made in a similar manner.

5. Hereafter all claims properly presented to the General Accounting Office shall be settled by allowance or disallowance in accordance with the law and facts, and the practice of returning claim papers, without settlement, to administrative offices for securing deficiency appropriations because of insufficiency or nonavailability of funds is hereby discontinued.

6. Requisitions for disbursing funds will be approved, disapproved or returned by the chief of the bookkeeping division in the name of the Comptroller General of the United States and approved requisitions will be entered on the books of the General Accounting Office against the appropriations chargeable therewith.

7. The purpose of the procedure herein prescribed is to insure compliance with the intent of the Congress respecting claims payable from balances of appropriations carried to surplus and the incurring of expenditures in excess of the amounts appropriated as expressed in the acts of July 7, 1884, and February 27, 1906.

8. This circular will be effective July 1, 1925, and supersedes Circular No. 18 of 1924, which is hereby rescinded.

J. R. MCCARL,
Comptroller General of the United States.

CHANGES IN OFFICE PERSONNEL

[Bulletin No. 5]

JANUARY 3, 1925.

(Relating to office procedure and not of general information.)

CONDUCT OF EMPLOYEES

[Bulletin No. 6]

FEBRUARY 4, 1925.

(Relating to office procedure and not of general information.)

EMPLOYEES ENGAGED IN OUTSIDE EMPLOYMENT

[Bulletin No. 7]

JUNE 10, 1925.

(Relating to office procedure and not of general information.)

CLAIMS OF THE UNITED STATES

[General Regulations No. 37]

JULY 7, 1924.

The collection unit of the General Accounting Office, now connected with the bookkeeping section, will, on July 15, 1924, become a unit of the claims division, and all mail and matters pertaining thereto should be forwarded to the claims division, General Accounting Office, Walker-Johnson Building, 1734 New York Avenue NW., Washington, D. C.

J. R. MCCARL,
Comptroller General of the United States.

RETURN OF OFFICIAL DOCUMENTS TO ADMINISTRATIVE OFFICERS AND OTHERS

[General Regulations No. 38]

NOVEMBER 15, 1924.

1. All warrants, checks, money orders, vouchers, and other official documents and papers pertaining to or forming a part of any claim or account settled or in the process of settlement by the General Accounting Office shall be deemed a part of the accounts required by law to be preserved and may not be removed from the custody of the Comptroller General or his representatives except upon the written authority of the Comptroller General given in particular cases or under the following conditions:

2. Whenever copies of documents will serve the required purpose and it is practicable to furnish same the originals thereof will not be removed from the General Accounting Office. If the desired document is of a formal nature and is the only record thereof in existence and the expense of copying will not exceed $0.50, a copy will be furnished in lieu of the original. If the documents desired are informal and copies can be made at a total cost not exceeding $0.25, such copies will be furnished in lieu of the originals. Copies of originals will not be made in any case where duplicates or copies are otherwise available. Copies will not be furnished except to serve a public need or when necessary to the private interests of the official or individual immediately concerned as party to the official transaction represented thereby; nor will copies or information be furnished except in accordance with General Regulations No. 24 and Bulletin No. 4 of the General Accounting Office. In every case in which copies or original documents are desired the necessity therefor must fully appear, from which will be determined whether the request merits favorable consideration.

3. Under no circumstances shall any warrant, check, money order, voucher, postal savings certificate, or similar document in the actual or constructive custody or possession of the General Accounting Office or of any official having temporary possession thereof by authority of the Comptroller General be loaned or released to any official, individual, or corporation party thereto as maker, drawer, payee, endorser, assignee, or the like; nor shall any such document be marked or otherwise mutilated, or be presented as evidence in any manner by reason of which it may become a part of the official records of any department or court, or its value as evidence affected or destroyed.

4. Where the original or a copy of any warrant, check, money order, savings certificate, or other negotiable or quasi-negotiable instrument of the United States on file in the General Accounting Office is desired to correct irregularities in the payment or negotiation thereof, full and complete information with reference thereto together with the claims, etc., showing handwriting, signatures, and other matters in question, must accompany the request for the original or copy, and promptly upon receipt thereof any question as to the necessity therefor and whether an original or copy should be furnished will be determined in the General Accounting Office and action taken accordingly.

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5. Whenever sufficient facts appear to permit a proper determination of the accountability of the responsible person credit will be denied or a charge raised immediately on account thereof, and the copy or original will be transmitted with return of accompanying papers and the proper official advised of the action taken with reference thereto; but if further information is desired before such action can be taken, request should be made therefor and the record held open until same is received and final action is taken in the General Accounting Office.

6. Where the amount involved may not be charged in the official accounts of the responsible officer or a charge raised against the responsible individual a memorandum account of all documents returned will be maintained and upon failure to return same to the General Accounting Office with appropriate advices and detail of facts, within a reasonable time, the face value thereof will be charged in the general account of the establishment concerned in the same manner as though the amount had been erroneously paid from the general fund without accounting or appropriation therefor. In any case in which credit is denied or a charge raised care will be exercised in crediting the account upon the taking of final action fully relieving the United States of any cost not chargeable to public funds.

7. In any case in which the record fully discloses the irregularity and final action can be taken thereon as to all matters and there is no question involving the signature, handwriting or other peculiar characteristic of the document, final action will be immediately taken and those concerned fully advised, and there will not be considered in connection therewith any demand for originals or copies of documents, the advices of the General Accounting Office and its certification in the account being prima facie and binding upon those concerned. Where the person benefiting by the irregularity refuses to make whole those held accountable therefor unless the original document is presented, those held accountable must be left to such recourse as may be available to them, as in no case may original documents be returned to parties to its making or negotiation for the purpose of reclamation or collection of its face value. See Treasury Department regulations regarding reclamation on checks and warrants.

8. Certified copies of the records of the General Accounting Office will be furnished as authorized by law when the necessity therefor appears, such copies being competent evidence equally with the originals. Whenever any important document is released or loaned to a proper official, or is to be presented for examination before a court of competent jurisdiction outside of the District of Columbia, a certified or true copy thereof will be taken and filed in lieu of the original, according to its importance. In any case in which copies only will be furnished and it is known that copies will be required for presentation and filing as evidence, such copies will be made and certified regardless of the expense and the originals retained, unless the question involves one of handwriting, etc.

9. Expert knowledge employed generally by the General Accounting Office will be available to the several divisions thereof. Special or private services of an expert will not be employed by the General Accounting Office in any case in which competent official service is available. The determination of any matter, including questions involving forgeries and the like, requiring expert knowledge available in the General Accounting Office, will have the same force and effect as any other matter determined in the General Accounting Office.

10. Subject to other provisions hereof original documents will be presented in custody of an employee of the General Accounting Office for examination or loaned to proper officials only when it is impracticable because of the expense or other reasons to furnish or use copies in lieu thereof, upon written receipt therefor, for the return of which they will be held accountable. Where it is not desirable to loan required documents an employee will be detailed in custody thereof, with instructions to permit proper examination of the documents and retain same in like condition as when received. It will be deemed practicable to use copies of documents in lieu of originals in all cases except where the cost is excessive or there is involved a question as to the signature or handwriting appearing thereon, or other peculiar characteristic of the document the nature of which can not be fully shown by means of existing methods of copying. Where the record is voluminous or the expense of copying would otherwise be out of proportion to the value of the document, if in excess of the amounts stated above, desired official papers or records may be loaned to the proper official upon his written receipt therefor, fully describing the papers and record, any paper or document that should be retained to be separated from the file and copies thereof furnished in lieu of the originals.

11. As to any request for the return of original documents or the furnishing of copies thereof for further administrative action involving a payment made

or to be made, there will be for consideration and determination in the General Accounting Office any question affecting the payment made or in contemplation, and in any case where the action is final the records of the General Accounting Office will stand closed and appropriate reply made to the request for documents or copies thereof.

12. Whenever any question arises as to any document by virtue of which there is probability of the document being material to the determination of the matter involved and the document is of a class authorized to be destroyed, such document shall be promptly transferred to and thereafter retained in a permanent file available for use indefinitely or until further need therefor shall have passed.

J. R. McCARL,
Comptroller General of the United States.

REGULATIONS GOVERNING THE ACCOUNTING FOR EXPENDITURE OF APPROPRIATED FUNDS FOR THE TEMPORARY GOVERNMENT OF THE WEST INDIAN ISLANDS

[General Regulations No. 39]

JANUARY 28, 1925.

1. Funds appropriated by the United States for the expenses of the Virgin Islands will not be considered as continuing appropriations available until expended unless the act making the appropriation shall specifically so prescribe.

2. Funds appropriated for the expenses of the islands will upon proper requisition from the governor and as required for expenditure be placed to his credit on the books of the Treasurer of the United States. The governor shall render monthly accounts for such funds to the General Accounting Office. He shall be credited with payments to the assistant government secretary for use in settlement of expenses incident to the occupation of the Virgin Islands and to the execution of the provisions of the act approved March 3, 1917. Refundments, funds not required for expenditure, and interest on funds in the possession of the assistant government secretary received by the governor shall be deposited to the credit of the Treasurer of the United States under the proper appropriation or revenue account.

3. The assistant government secretary shall deposit the payments made to him by the governor in one or both colonial treasuries under the United States Budget account, and shall make payments therefrom of all expenses certified by the governor to be necessary expenses incident to the occupation of the Virgin Islands and to the execution of the provisions of the act approved March 3, 1917, including the deficits of the colonial treasuries, and the treasury of the St. Thomas Harbor Board. All vouchers covering payments from the United States Budget account shall be approved by the governor in the following form: "Certified as necessary expenses incident to the occupation of the Virgin Islands and to the execution of the provisions of the act providing a temporary government for the West Indian Islands acquired by the United States from Denmark, and for other purposes approved, March 3, 1917."

4. The assistant government secretary, as fiscal agent, shall render to the General Accounting Office monthly special deposit accounts which will show:

(*a*) Funds transferred to him by the governor. Refundments and miscellaneous collections.

(*b*) (1) Disbursements on account of expenses of central administration, St. Thomas and St. John.

(2) Disbursements on account of expenses of central administration, St. Croix.

(3) Disbursements in payment of the cost of construction of public works approved by the President.

(4) Payments to meet deficits in colonial treasury, St. Thomas and St. John.

(5) Payments to meet deficits in colonial treasury, St. Croix.

(6) Payments to meet deficits in treasury harbor of St. Thomas.

The total of the receipts entered on the account will be supported by a schedule showing the date of receipt, name of remitter, character of the collection and the amount.

Payments to the local treasuries will be supported by detailed financial statements showing the amounts budgeted under each revenue and expenditure account for the entire fiscal year and in parallel columns the receipts and expenditures for the current month and the accumulated receipts and expenditures for the preceding months of the fiscal year and by summary statements showing

for the current month and the preceding fiscal period the total of local receipts, funds contributed by the United States, expenditures and cash balance available, United States currency values.

Disbursements to pay expenses of central administration and the cost of construction of public works approved by the President shall be supported by original pay rolls and vouchers listed on schedules. Memorandum pay rolls and vouchers will be retained by the assistant government secretary together with checks issued in payment thereof. Totals only of all schedules of receipts and collections and of financial statements will be converted into dollars and cents, the rate at which converted to be given in each case.

The correctness of all financial statements and schedules shall be certified by the assistant government secretary, and the government secretary or the head of the department having cognizance shall certify on each pay roll that the persons named thereon were legally appointed and have performed services required by law and regulations during the period stated except as otherwise noted.

The account current shall be approved by the Governor of the Virgin Islands.

5. Any balance in the hands of the assistant government secretary at the close of the fiscal year not necessary to meet deficits in revenues in the local treasuries or not required to pay the expenses of the central administrations for the year for which the funds were appropriated or to pay the cost of construction of approved public works projects budgeted as hereinbefore provided shall be returned to the governor to be taken up by him in his accounts and deposited in the Treasury of the United States.

6. Copies of all budgets and additional money bills shall be furnished the General Accounting Office when approved by the governor.

7. These regulations will be effective on and after July 1, 1925, except that for the six months' period ended December 31, 1924, and for the quarters ending March 31 and June 30, 1925, the assistant government secretary shall render accounts of his receipts and expenditures from appropriations, each account to consist of an account current and schedules of receipts and disbursements and be supported by financial statements of revenues and expenditures of local funds and by such vouchers as may be readily available.

J. R. McCarl,
Comptroller General of the United States.

The White House,
Approved January 28, 1925.
(Signed) Calvin Coolidge, *President.*

ACCOUNTING REQUIRED FOR MONEYS RECEIVED BY OFFICERS AND EMPLOYEES OF THE UNITED STATES TO ELIMINATE DEPOSITS IN THE TREASURY "WITHOUT PERSONAL CREDIT"

[General Regulations No. 40]

February 20, 1925.

It is a general practice of many officers and employees of the United States to deposit with the Treasurer of the United States "without personal credit" moneys collected or received on account of miscellaneous revenues, trust or special funds and refundments of appropriated moneys; and this practice is followed to a limited extent by private individuals in settlement of claims or debts due the United States. Deposits to the credit of certain funds are also made of moneys received under specific authority of law and from which disbursements are later made, but for the receipt and disposition of which no formal accounting is made by the officer receiving the same.

The interests of the Government require that an accounting procedure be established which will fix responsibility for the receipt and proper disposition of such moneys and furnish an accurate and complete record of the transactions.

It is therefore directed that effective April 1, 1925, the following procedure be observed:

All such moneys shall be scheduled by the receiving officer or employee and promptly forwarded to a disbursing or finance officer of the branch of the service concerned, who will take up each item in a regular or special deposit account, scheduling the same so as to permit a ready identification and when covered into the Treasury personal credit therefor will be given.

J. R. McCarl,
Comptroller General of the United States.

STANDARD ACCOUNTS CURRENT

[General Regulations No. 41]

MARCH 7, 1925.

1. The following standard forms of account current for use of disbursing and collecting officers, clerks, agents, and other officers of whatever title, disbursing and collecting moneys on account of the United States in rendering their accounts to the General Accounting Office, are hereby prescribed and published for general use throughout the Government service effective with the accounts for the fiscal year beginning July 1, 1925, in lieu of all others which have heretofore been approved for like purposes by the Comptroller of the Treasury or the Comptroller General of the United States:

Form 1019, size 16 by 10½ inches.
Form 1020, size 14 by 8½ inches.
Form 1021, size 8 by 10½ inches.
Form 1022, size 16 by 10½ inches.

2. Provision has been made on Forms 1019 and 1020 for showing opposite each appropriation, fund, or account title, the balance due from last account and receipts on the one hand, and payments and balance due the United States at close of period on the other, each of which should equal the same total, to be placed in the "Total" column between the two sides of the account.

3. The total only of each accounting item indicated by the columnar headings on Forms 1019 and 1020 will be placed opposite the proper appropriation or other title as the "Analysis of account totals" on the reverse side of the account current provides space for scheduling accountable warrants, Treasury deposits and transfers of funds. Separate detailed schedules of collections and disbursements must be furnished as heretofore, only the totals thereof being included in the "Analysis of account totals." When more than one sheet is required the headings will be filled in with the notation "First sheet," "Second sheet," etc., placed on the forms just above the words "Account current" appearing thereon. The totals of the accounting items, the officer's certificate and the information and certificates called for on the reverse side of the account current will be shown on the final sheet.

4. Forms 1021 and 1022 have been arranged to show the accounting items on the left side with the appropriations, funds, or accounts in vertical columns to the right. Balance due from last accounts and receipts are shown in the upper half of both forms and payments and balance due United States at close of period in the lower half. Form 1022 also provides a "Total" column for the accumulation of line totals. If Form 1022 with eight account columns is not sufficient, a second sheet will be used and the notations "First sheet" and "Second sheet" placed on the respective sheets just above the words "Account current" appearing thereon; the headings will be filled in and the accounting items and data completed on both sheets but the line totals will be shown on the second sheet as will also the officer's certificate, cash account, analysis of balance due the United States, and administrative officer's certificate of examination and approval; where more than eight columns are regularly required Form 1019 must be used.

5. It is contemplated that Form 1021 with two vertical account columns will be used by officers, agents, and others disbursing from one or two funds or appropriations, by collecting officers and agents and for special deposit accounts.

6. Disbursing and collecting officers, agents, and others in preparing their accounts will observe the following arrangement of accounting items and appropriation and fund accounts: (*a*) On Forms 1019 and 1020, account titles will be listed in the following order: Appropriations, trust funds, miscellaneous receipts and special deposits when their inclusion is authorized. The total balance due the United States for each of these groups, where more than one item is involved, will be entered in the "Balance due the United States" column, on a separate line following the last entry of each group. (*b*) On form 1022, account titles will appear in the box headings of the columns in the same order as specified above, and on both Forms 1021 and 1022 the accounting items will be entered as follows: Receipts—balance due from last account, accountable warrants, transfers from officers, collections, adjustments; payments—disbursements, deposits, transfers to officers, adjustments, and balance due United States. (*c*) Where a service is authorized by the General Accounting Office to submit accounts by subheads of appropriations, such subheads must be grouped together and the totals for the appropriation entered on the line immediately following. Account current Form No. 1019 only may be used for this purpose.

7. All forms have been designed primarily for flat filing or for binding in loose-leaf binding devices, but there has been provided on the reverse side a suitable brief or space for such notations as may be needed where the vertical filing system is used; also for notations of inclosures which should always be carefully made to enable the administrative office and the General Accounting Office to ascertain immediately upon receipt of the accounts whether the papers specified have been forwarded. Such notations should be concise but specify clearly the kind and number of papers, for example: Account current, schedule of collections (2 sheets, 6 receipts), schedule of disbursements (10 sheets), etc.

8. Where the administrative examination of an account is divided among two or more administrative units, separate accounts current may be prepared to be forwarded to the respective units for examination and approval and the totals of those accounts consolidated on another sheet. This consolidated account, together with the detailed accounts, will be rendered to the General Accounting Office after final administrative examination and approval.

9. Upon receipt of these regulations and sample forms each department and independent establishment will determine the particular form which will be used by each of its various services. Within 60 days from date hereof each department and independent establishment will furnish to the General Accounting Office a list of the services under its jurisdiction, specifying for each one the particular account current form which will be used and will attach to the list a copy of the form in current use.

10. Standard Forms 1019, 1020, 1021, and 1022 are not intended to supersede those now in use in the Postal Service nor Form 79 used in accounting for internal revenue collections. Departments and independent establishments for whose peculiar needs special forms of accounts current have heretofore been provided and are still considered essential, will likewise submit within 60 days a statement of facts in regard thereto, together with a copy of the account current form now used, for appropriate action by the Comptroller General.

11. Coincident with notice to the General Accounting Office as required in the first part of paragraph 9, requisition will be made upon the Public Printer for a supply of each of the standard account current forms which it is estimated will be required for the period of 12 months, at the same time authorizing him to destroy or otherwise dispose of old plates and type matter pertaining to account current forms now in use. In so doing it is understood and agreed by said departments and establishments that they thereby consent to the plan of combining all the requisitions submitted and printing one edition for each of the four forms to be placed in stock at the Government Printing Office, subject to their order, and that they authorize the Public Printer to prorate the cost of printing and render bill against each department and establishment for its proportionate share on the basis of the number and style of blanks ordered by it. This procedure will be repeated at the beginning of each 12-month period or oftener as may be required by the Public Printer. The Public Printer will deliver the blanks as needed upon supply requisitions therefor, and will keep an accurate account with each department and establishment, showing the quantities ordered by and delivered to each and the balance due. The certification by the Public Printer, or by his authority, that the blanks covered by a bill have been printed and placed in stock subject to order of a department or establishment concerned, or partly placed in stock and partly delivered to said department or establishment, as the case may be, may be accepted as evidence of delivery within the meaning of section 3648 of the Revised Statutes, and if otherwise correct authorize payment of the bill as provided by law.

12. Hereafter requisitions for the printing of forms of accounts current other than the standard forms will not be honored by the Public Printer, except as may hereafter be specially authorized by the Comptroller General, but this shall not be construed to prevent the department or independent establishment from ordering printed on the forms used by them the name of the department or establishment, bureau thereof, the class of account and the titles of appropriations, funds, and accounts in the spaces provided therefor.

J. R. McCarl,
Comptroller General of the United States.

	Total	Cash on hand	Disbursements
		Total	

We, the undersigned, have verified the cash on hand stated above by actual count and certify the amount to be correct.

(Signature) _____ (Title) _____

(Date) _____, 192 (Signature) _____ (Title) _____

Examined and approved, except as noted below or in letter of exceptions, and referred to the General Accounting Office:

_____

_____

_____

_____

_____

(Signature) _____

(Title) _____

(Date) _____, 192

ANALYSIS OF BALANCE DUE UNITED STATES

		Less outstanding checks	Net balance
On deposit with Treasurer of U.S.	$	$	$
On deposit with	$	$	$
Deferred credits—Salary payments			$
In hands of authorized agents			$
(Give names of agents; if necessary, make separate schedule)			
In transit to authorized agents			$
(Give names of agents; if necessary, make separate schedule)			
Cash in office safe			$
Otherwise kept (manner and authority for so keeping)			$
		Total	$

NOTE.—When part of the balance is in foreign currency, the amount of the foreign currency must be stated.

Treasury deposits:

Cert. No. ___ Date _____

Transfer of funds to—

(Name) (Date)

Balance due United States

Total

STANDARD FORM No. 1019
Approved by Comptroller General U. S., Nov. 20, 1924

ACCOUNT CURRENT

_____ Department
_____ Bureau
_____ Station
_____ Account (Class of)

Account Current of_____ Title_____ Symbol_____

From_____, 192 , to_____, 192 , both dates inclusive, under official bond dated _____, 192

Appropriation, fund and account titles	Balance due United States from last account	Receipts				Total	Payments				Balance due United States
		Accountable warrants	Collections	Adjustments			Disbursements	Treasury deposits	Adjustments		
Total											
For General Accounting Office:											

I certify that the above is a full, true, and correct account of all moneys coming into my possession on account of the United States during the period stated, under my official bond above mentioned, except amounts reported in the following accounts rendered under the said bond: _____

(To be used when disbursing officer renders more than one account under same bond)

The balance of $_____ is held as stated on the reverse hereof. (Place)_____ (Date)_____

_____ (Signature) _____ (Title) _____

STANDARD FORM No. 1020
Approved by Comptroller General U. S.
Nov. 20, 1924

ACCOUNT CURRENT

_____ Department
_____ Bureau
_____ Station
_____ Account (Class of)

Account Current of _____ Title _____ Symbol _____

From _____, 192 , to _____, 192 , both dates inclusive, under official bond dated _____, 192

Appropriation, fund and account titles	Balance due United States from last account	Receipts: Accountable warrants	Receipts: Collections	Receipts:	Total	Payments: Disbursements	Payments: Treasury deposits	Payments:	Balance due United States
Total									
For General Accounting Office									

ANALYSIS OF BALANCE DUE UNITED STATES

		Less outstanding checks	Net balance
On deposit with Treasurer of U. S.	$_____	$_____	$_____
On deposit with_____	$_____	$_____	$_____
Deferred credits—Salary payments			$_____
In hands of authorized agents, per schedule			$_____
In transit to authorized agents, per schedule			$_____
Cash in office safe			$_____
Otherwise kept (give manner and authority)			$_____
Total			$_____

(NOTE.—Where part of the balance is in foreign currency, the amount of the foreign currency must be stated.)

I certify that the above is a full, true, and correct account of all moneys coming into my possession on account of the United States during the period stated, under my official bond above mentioned, except amounts reported in the following accounts rendered under said bond: _____

_____

The balance of $_____ is held as shown in analysis hereon.

(Place) _____ (Signature) _____

(Date) _____, 192 (Title) _____

(Reverse of Standard Form 1020)

Department.....

Bureau.....

ACCOUNT CURRENT

OF

.....
(Name)

.....
(Title)

.....
(Station)

From....., 192

To....., 192

INCLOSURES

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Examined and approved, except as noted below or in letter of exceptions, and referred to the General Accounting Office:

.....

.....

.....

.....
(Signature)

.....
(Title)

(Date)....., 192

Cash account

Date	Receipts	Amount	Date	Payments	Amount
	Cash on hand last account				
				Cash on hand	
	Total			Total	

We, the undersigned, have verified the cash on hand stated above by actual count, and certify the amount to be correct.

..... (Signature) ..... (Title)

..... (Signature) ..... (Title)

(Date)....., 192

Analysis of account totals

Item	Amount
RECEIPTS	
Balance due U. S. last account	
Accountable warrants:	
No..... Date.....	
Collections	
Transfer of funds from—	
(Name) (Date)	
Total	
PAYMENTS	
Disbursements:	
Treasury deposits:	
Cert. No. ..... Date.....	
Transfer of funds to—	
(Name) (Date)	
Balance due United States:	
Total	

STANDARD FORM No. 1021
Approved by Comptroller General U. S.
Nov. 20, 1924

ACCOUNT CURRENT

---------- Department
---------- Bureau
---------- Station
---------- Account
(Class of)

Account Current of---------- Title----------
From----------, 192 , to----------, 192 , both dates inclusive.
Under official bond dated----------, 192 Symbol----------

RECEIPTS					For General Accounting Office	
Balance due United States from last account						
Total						
PAYMENTS						
Disbursements as shown by schedules and vouchers attached						
Balance due United States						
Total						

I certify that the above is a full, true, and correct account of all moneys coming into my possesson on account of the United States during the period stated, under my official bond above mentioned, except amounts reported in the following accounts rendered under said bond: ----------

The balance of $----------is held as stated on the reverse side hereof.

(Place)---------- (Signature)----------

(Date)----------, 192 (Title)----------

[Reverse of Standard Form 1021]

Department ----------
Bureau ----------

ACCOUNT CURRENT
OF
---------- (Name)
---------- (Title)

From ----------, 192
---------- (Station)

To ----------, 192

INCLOSURES

EXAMINED AND APPROVED, EXCEPT AS NOTED BELOW OR IN LETTER OF EXCEPTIONS, AND REFERRED TO THE GENERAL ACCOUNTING OFFICE:

---------- (Date), 192

---------- (Title)

---------- (Signature)

CASH ACCOUNT

Date	Receipts	Amount		Date	Payments	Amount	
----	Cash on hand last account	----	----	----	----	----	----
----	----	----	----	----	----	----	----
----	----	----	----	----	----	----	----
----	----	----	----	----	----	----	----
----	----	----	----	----	----	----	----
----	----	----	----	----	----	----	----
----	----	----	----	----	----	----	----
----	----	----	----	----	----	----	----
----	----	----	----	----	----	----	----
----	----	----	----	----	----	----	----
----	----	----	----	----	----	----	----
----	----	----	----	----	Cash on hand	----	----
	TOTAL	----	----		TOTAL	----	----

We, the undersigned, have verified the cash on hand stated above by actual count and certify the amount to be correct.

(Signature) ---------- (Title) ----------

(Date) ----------, 192 (Signature) ---------- (Title) ----------

ANALYSIS OF BALANCE DUE UNITED STATES

		Less outstanding checks	Net balance
On deposit with Treasurer of U. S. ----	$----	$----	$----
On deposit with ----	$----	$----	$----
Deferred credits—Salary payments ----			$----
In hands of authorized agents ---- (Give names of agents; if necessary, make separate schedule)			$----
In transit to authorized agents ---- (Give names of agents; if necessary, make separate schedule)			$----
Cash in office safe ----			$----
Otherwise kept (manner and authority for so keeping) ----			$----
Total ----			$----

(NOTE.—Where part of the balance is in foreign currency, the amount of the foreign currency must be stated)

STANDARD FORM No. 1022
Approved by Comptroller General U. S.
Nov. 20, 1924

ACCOUNT CURRENT

_____ Department
_____ Bureau
_____ Station
_____ Account (Class of)

Account Current of _____ Title _____ Symbol _____

From _____, 192 , to _____, 192 , both dates inclusive, under official bond dated _____, 192

RECEIPTS								Total	For General Accounting Office
Balance due United States from last account									
Accountable warrant, No. ____ Date ____									
Total									
PAYMENTS									
Disbursements as shown by schedules and vouchers attached									
Treasury deposits, Cert. No. ____ Date ____									
Balance due United States									
Total									

I CERTIFY that the above is a full, true, and correct account of all moneys coming into my possession on account of the United States during the period stated, under my official bond above mentioned, except amounts reported in the following accounts rendered under the said bond: _____ The balance of $_____ is held as stated on the reverse.

(To be used when disbursing officer renders more than one account under same bond)

hereof. (Place) _____ (Date) _____ (Signature) _____ (Title) _____

Department.....
Bureau.....

ACCOUNT CURRENT
OF
.....
(Name)
.....
(Title)
.....
(Station)
From....., 192
To....., 192

INCLOSURES
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Examined and approved, except as noted below or in letter of exceptions, and referred to the General Accounting Office:

.....
.....
.....
.....
(Signature).....
(Title).....
(Date)....., 192

Cash account

Date	Receipts	Amount	Date	Payments	Amount
.....	Cash on hand, last account.....	.....	.....	.....	.....
			.....	Cash on hand.....	.....
	Total.....	.....		Total.....	.....

We, the undersigned, have verified the cash on hand stated above by actual count, and certify the amount to be correct.

(Signature)..... (Title).....

(Date)....., 192 (Signature)..... (Title).....

ANALYSIS OF BALANCE DUE UNITED STATES

		Less outstanding checks	Net balance
On deposit with Treasurer of U. S.....	$.....	$.....	$.....
On deposit with.....	$.....	$.....	$.....
Deferred credits—Salary payments.....			$.....
In hands of authorized agents.....			$.....
(Give names of agents; if necessary, make separate schedule)			
In transit to authorized agents.....			$.....
(Give names of agents; if necessary, make separate schedule)			
Cash in office safe.....			$.....
Otherwise kept (manner and authority for so keeping).....			$.....
		Total.....	$.....

(NOTE.—When part of the balance is in foreign currency, the amount of the foreign currency must be stated)

CLAIMS OF ESTATES OF DECEDENTS

[General Regulations No. 42]

APRIL 6, 1925.

Vouchered claims of representatives of estates of deceased employees and others, received in the General Accounting Office, will hereafter be promptly settled in the same manner as other claims and notice thereof furnished the administrative establishment, and the practice of determining the sufficiency of the evidence and returning such vouchered claims for payment and submission in the current accounts of fiscal officers and audit in connection therewith, is discontinued, except in those cases where payment may not properly be accomplished through the Treasury Department upon certification by the General Accounting Office.

J. R. MCCARL,
Comptroller General of the United States.

STANDARD FORMS

[General Regulations No. 43]

MAY 22, 1925.

1. The following standard forms of schedule of disbursements and schedule of collections for use of disbursing officers, clerks, agents, and other officers of whatever title disbursing and collecting moneys on account of the United States in rendering their accounts to the General Accounting Office and of a requisition for disbursing funds are hereby prescribed and published for general use throughout the Government service, effective October 1, 1925, in lieu of all others which have heretofore been approved for like purposes by the Comptroller of the Treasury or the Comptroller General of the United States, except as otherwise provided herein:

Form 1024. Schedule of disbursements, 14 by 8½ inches, 7 distribution columns.
Form 1025. Schedule of disbursements, 8½ by 14 inches, 1 distribution column.
Form 1026. Schedule of collections, 8½ by 14 inches.
Form 1027. Requisition for disbursing funds, 8 by 10½ inches.

SCHEDULE OF DISBURSEMENTS

2. Form 1024 provides for columnar distribution of disbursements by appropriations. Form 1025 contemplates the use of a separate sheet for each appropriation or the scheduling of payments as made and their summarization by appropriations on the final sheet of the schedule.

3. Both forms provide in the heading space for entering number of sheet, the name of department or independent establishment, bureau or office, service or group, disbursing officer, his title or rank and symbol number, the period covered, and there are provided columns for voucher number, name of payee, check number, total amount paid, amount paid in cash, and appropriation. On the line for service or group should be entered the name of the bureau or division for whose account the disbursements are made or the designation or group title of a number or series of appropriations. Form 1025 provides also for indicating in the heading the title of appropriation if only one is involved or a disbursing fund.

4. The number of the check drawn in payment of each voucher is to be shown on the schedule, so that the submission of the list of checks drawn or carbon copies of checks as required by General Regulations No. 31 may eventually be eliminated.

5. In case of Form 1024, the total amount of each voucher or pay roll will be shown in the column provided and must agree with the sum of the corresponding entries in the appropriation distribution columns. The column headed "Paid in cash" in both forms is for the convenience of those officers making cash payments in the daily balancing of their cash transactions.

6. Form 1025 is designed for use of those disbursing officers who disburse for numerous bureaus or offices, from one fund or appropriation, or whose transactions are voluminous. In scheduling disbursements on this form, a separate sheet may be used for each appropriation where the volume of transactions

warrants it; otherwise appropriations chargeable should be indicated in the column provided as vouchers are entered, and the amount disbursed in each case shown in the "Total amount paid" column. Both forms are particularly adapted for machine use and when prepared by carbon process may be utilized as a subsidiary of the cash book. As far as possible all schedules should be so prepared as to be of maximum service as a primary or secondary office record and a supporting document to the officer's account current.

7. Vouchers must be numbered consecutively, as passed for payment, and not by appropriations, and the serial numbering must continue throughout the fiscal year.

8. The brief on the reverse of the schedule must be completed, but where more than one sheet is used, only that on the final sheet need be filled out. Schedules forwarded to a bureau or an office for administrative approval will bear the approving officer's indorsement on the final sheet of the schedule pertaining to his bureau or office.

9. The last sheet of a schedule submitted in support of a claim for credit on account current must show the total amount chargeable to each appropriation listed thereon. Where each sheet of a schedule is totaled, a summary of sheet totals must be made on the final sheet.

SCHEDULE OF COLLECTIONS

10. Form 1026, the standard form of schedule of collections, follows the general style of heading of the schedule of disbursements, while the columnar arrangement is designed to accumulate the data necessary to identify fully the varied collections received, and also provides for indicating the appropriation, revenue account or fund to be credited.

11. Where collections are to be credited to more than two appropriations or funds, a summary should be made on the final sheet of the schedule showing the amount to be credited to each.

REQUISITION FOR DISBURSING FUNDS

12. Form 1027, the standard form of requisition for disbursing funds, follows closely the form which is referred to in Treasury Department Circular No. 36, July 9, 1912.

13. The request for issuance of a warrant for disbursing funds must be recommended by the head of the administrative bureau or division of a department or independent establishment having knowledge of the status of the disbursing officer's accounts and signed by the head or an assistant head of the department or independent establishment.

14. Before signing any requisition the approving official should satisfy himself that the necessary inquiry has been made relative to the condition of the disbursing officer's accounts in order to avoid placing to his credit funds in excess of his usual and current needs. If there has been delinquency in the rendition of his accounts, a waiver of such delinquency must accompany the requisition.

15. Upon receipt of these regulations each department and independent establishment is requested to make requisition at once upon the Public Printer for a supply of any of the standard forms herein prescribed which it is estimated will be required for the period of nine months from October 1, 1925, at the same time authorizing him to destroy or otherwise dispose of old plates and type matter pertaining to such forms now in use. In so doing it is understood and agreed by said departments and establishments that they thereby consent to the plan of combining all the requisitions submitted and printing one edition for each of the forms, to be placed in stock at the Government Printing Office, subject to their order, and that they authorize the Public Printer to prorate the cost of printing and render bill against each department and establishment for its proportionate share on the basis of the number and kind of blanks ordered by it. This procedure will be followed at the beginning of each fiscal year or oftener as may be required by the Public Printer. The Public Printer will deliver the blanks as needed upon supply requisitions therefor, and will keep an accurate account with each department and establishment, showing the quantities ordered by and delivered to each and the balance due. The certification by the Public Printer, or by his authority, that the blanks covered by a bill have been printed and placed in stock subject to order of a department or establishment concerned, or partly placed in stock and partly delivered to said department or establishment, as the case may be, may be accepted as evidence of delivery

within the meaning of section 3648 of the Revised Statutes, and if otherwise correct authorize payment of the bill as provided by law.

16. The provisions of these regulations do not apply to forms of schedules of disbursements and of collections, by whatever title known, which have heretofore been approved by this office to meet the peculiar requirements of a department or establishment, or branch thereof. But it is intended that said schedule forms shall supersede *all other forms* of like character, and no similar form will be specially approved in future unless it can be shown that one of the standard forms will not meet the reasonable needs of the service.

17. Hereafter requisitions for the printing of forms of schedules of disbursements and of collections and requisitions for disbursing funds, by whatever title known, will not be honored by the Public Printer except as hereinbefore excepted or as specially authorized by the Comptroller General of the United States, but this shall not be construed to prevent a department or establishment from ordering printed on the face of the standard forms to be used by it the name of said department or establishment, bureau thereof, service or group, titles of officials, and on the schedule forms the titles of appropriations, nor on the reverse side of the form of schedule of disbursements to be used by the Bureau of Internal Revenue, Treasury Department, the affidavit required by section 3145, Revised Statues, as amended by 20 Stat. 330.

18. Authority is granted to consume the printed supply of the schedules and requisitions for disbursing funds on hand before using the standard forms herein prescribed: *Provided*, That the Public Printer shall be notified, in connection with making requisition for the standard form, of the quantity of each form on hand and the length of time which it is estimated they will last.

LURTIN R. GINN.
Acting Comptroller General of the United States.

[Reverse of Standard Form 1024]

(Department or establishment)

(Bureau or office)

SCHEDULE OF DISBURSEMENTS

Amount, $____ No. of sheets__

ACCOUNTS OF

(Name)

(Title)

(Station)

From ____, 192 , to ___, 192

Examined and approved, except as noted:

(Signature)

(Title)

(Date), 192

STANDARD FORM NO. 1024
Form approved by Comptroller General U. S. May 22, 1925

SCHEDULE OF DISBURSEMENTS

Sheet No. _____

(Department or establishment) (Bureau or office) (Service or group)

Made by _____ (Name) (Title or rank) At _____ (Station) Period _____ (Month or quarter), 192 Symbol No. _____

Voucher number	Paid to—	Check number	Total amount paid	Paid in cash	Appropriations						
	Total										

STANDARD FORM NO. 1025
Form approved by Comptroller General U. S.
May 22, 1925

SCHEDULE OF DISBURSEMENTS

Sheet No. ____

(Department or establishment) (Bureau or office) (Service or group)

Made by _____ (Name) _____ (Title or rank) At _____ (Station)

Period _____ (Month of—or quarter ended), 192 Symbol No. _____

From the appropriation _____ (Or as indicated below)

Voucher number	Paid to—	Appropriations	Check number	Total amount paid	Paid in cash
			Total		

[Reverse of Standard Form 1025]

(Department or establishment)

(Bureau or office)

SCHEDULE OF DISBURSEMENTS

Amount, $____ No. of sheets____

ACCOUNTS OF

(Name)

(Title)

(Station)

From ____, 192 , to ____, 192

Examined and approved, except as noted:

(Signature)

(Title)

(Date) ____, 192

STANDARD FORM No. 1026
Form approved by Comptroller General U. S.
May 22, 1925

SCHEDULE OF COLLECTIONS Sheet No. _____

_____ _____ _____
(Department or establishment) (Bureau or office) (Service or group)

Received by _____ At _____
(Name) (Title) (Station)

Period _____, 192 Symbol No. _____
(Month of—or quarter ended)

Date	Reference or receipt number	Remitter	Purpose	Amount	Fund to be credited
			Total		

[Reverse of Standard Form 1026]

(Department or establishment)

(Bureau or office)

SCHEDULE OF COLLECTIONS

Amount, $___ No. of sheets___

ACCOUNTS OF

(Name)

(Title)

(Station)

From ____, 192 , to ____, 192
(Period)

STANDARD FORM NO. 1027
Form approved by Comptroller General U. S., May 22, 1925

REQUISITION FOR DISBURSING FUNDS

No. _____

_____ _____
(Department or establishment) (Bureau or office)

_____, 192

(Reserved for "PAID" Stamp)

To the Secretary of the Treasury:

Please cause warrant to issue, chargeable to the undermentioned appropriations, and to the officer named herein, as follows:

$_____
(Amount of this requisition)

_____
(Name) (Title)

_____
(Address)

Treasurer of the United States, $_____ D. O. Symbol No____

_____ $_____
(Depositary, if other than Treasurer U. S.) (Amount)

_____ $_____
(Date of his bond) (Amount)

The records or information in this office indicates that the amount requested does not exceed the ordinary requirements of the officer named.

The officer's last report shows a balance on hand of _____ $_____

The last account due from this officer _____ rendered within the statutory time and there is _____ existing delinquency under Section 12 of the Act of July 31, 1894 (28 Stat., 209), or acts amendatory thereof.

Issue recommended:

_____ _____
*Title*_____ *Title*_____

General Accounting Office, _____
This requisition is DISAPPROVED because_____
_____
J. R. McCARL,
Comptroller General of the United States.
By _____
_____, 192

General Accounting Office, _____
This requisition is APPROVED for $_____
J. R. McCARL,
Comptroller General of the United States.
By _____
_____, 192

Appropriations	Amount

If necessary, the list of appropriations may be continued on back of the requisition.

[Reverse of Standard Form 1027]

Appropriations	Amount

PRESCRIBING SYMBOLS FOR APPROPRIATIONS AND THEIR USE BY ADMINISTRATIVE AND OTHER OFFICERS

[General Regulations No. 44]

JUNE 1, 1925.

In the Digest of Appropriations for 1926, issued by the Treasury Department, there will be shown for each appropriation title a number representing the symbol of that particular appropriation and these symbols will be used on all official papers, as hereinafter provided, in connection with the appropriation titles. The appropriation symbols grouped by departments, and by numerical sequence are as follows:

Agriculture	3–001 to 3–549
Commerce	6–001 to 6–699
District of Columbia	DC–001 to DC–650
Interior, proper	4–001 to 4–699
Interior, Indian	4–700 to 5–999
Justice	1–700 to 1–999
Labor	6–700 to 6–999
Legislative, executive and independent offices	0–001 to 0–999
Navy	7–001 to 7–999
Panama Canal	9X001 to 9X099
Post Office	9–100 to 9–349
State	1–001 to 1–699
Treasury	2–001 to 2–999
War	8–001 to 8–899
War, rivers and harbors projects	8X900.01 to 8X999.99

0–001 to 0–999	Legislative, executive and independent offices.
1–001 to 1–699	State.
1–700 to 1–999	Justice.
2–001 to 2–999	Treasury.
3–001 to 3–549	Agriculture.
4–001 to 4–699	Interior, proper.
4–700 to 5–999	Interior, Indian.
6–001 to 6–699	Commerce.
6–700 to 6–999	Labor.
7–001 to 7–999	Navy.
8–001 to 8–899	War.
8X900.01 to 8X999.99	War, rivers and harbors projects.
9X001 to 9X099	Panama Canal.
9–100 to 9–349	Post Office.
DC–001 to DC–650	District of Columbia.

In the system adopted the symbol consists of a whole number of five digits, the fifth from the right representing the department, the fourth the fiscal year, and the other three the appropriation or an appropriation group, the specific appropriations of which are represented by decimal numbers. Appropriations without year and special funds are indicated by the symbol "X" while funds representing contributions for specific purposes which are subject to refundment and moneys held in trust are designated by the symbol "T."

When a part of an appropriation is transferred from one department to another under authority of law, the symbol originally assigned will be used and in addition the symbol number of the receiving department will be prefixed thereto.

It was found impracticable to assign a distinctive symbol for each department, so that in a few instances the same symbol is shared by several departments, and in one case—the Department of the Interior—two symbol numbers are assigned. To the Departments of Commerce and Labor is assigned the symbol "6"; the Departments of State and Justice "1"; the Post Office Department and the Panama Canal "9," while the District of Columbia is indicated by the letters "DC" in lieu of a number. Appropriations for the legislative, executive, and independent offices bear the departmental symbol "0," and as these offices have been classified according to purpose for which established, the symbols assigned indicate the class as well as the appropriation. These classes and symbol groups are as follows:

Legislative and executive offices	001–399
Independent administrative establishments	400–499
Independent regulatory and industrial research establishments	500–699

Establishments for advancement of fine arts and scientific and historical knowledge 700–799
Establishments for promotion of public welfare and relief 800–899
World War establishments 900–999

The appropriations for the construction of public buildings under the supervision of the Supervising Architect of the Treasury Department are arranged alphabetically by States, the State symbols running from 801 to 854 and the specific project represented by two figures following the decimal—.01 to .49 for courthouses, customhouses and other buildings, and .50 to .99 for post offices. River and harbor projects are numbered in a similar manner by geographical units from 901 to 964 in the following order: Atlantic coast, beginning with the State of Maine; Gulf coast; Mississippi Valley; Pacific coast to Alaska; and the Mississippi River. Symbols for harbor improvements run from .01 to .49 and for river improvements .50 to .99.

Appropriations and funds of the Indian Service have been grouped in the following order—bureau expenses, funds appropriated for support of schools, etc., arranged by States, trust funds by tribes, miscellaneous appropriations and special funds, and, lastly, reimbursable appropriations arranged by States. As previously indicated, the first three digits from the right of the whole number may represent a State or a tribe, the specific appropriation being shown by the decimal number.

Administrative offices will use the symbols in addition to the titles of appropriations on all requisitions for funds, on all requests for adjustments of appropriations and supporting schedules thereto, and also when designating moneys to be covered into the United States Treasury. So far as practicable they will also appear on warrants issued by the Treasury Department.

Disbursing officers will use symbols and titles of appropriations on all schedules of disbursements and collections and on accounts current forwarded to the General Accounting Office, also on letters transmitting funds to be covered into the Treasury of the United States; but it will be discretionary with the administrative office whether or not the symbols shall also appear on vouchers paid by the disbursing officer or submitted to the General Accounting Office for direct settlement.

Administrative offices whose officers disburse from continuing appropriations, many of which may not appear in the Digest of Appropriations, should obtain the symbol list from the General Accounting Office containing such appropriations under their jurisdiction, so that the accounts may be uniform with respect to the titles of all appropriations appearing thereon.

All departments and establishments should use the symbols in their appropriation accounting, and in the installation or approval of appropriation accounting systems by the General Accounting Office this will be required.

The present system of accounting numbers used in the accounts of the Postal Service will continue in effect, but in future reprints of Postal Service pay rolls and schedules the appropriation symbols herein prescribed will be substituted for those now appearing thereon.

J. R. McCarl,
Comptroller General of the United States.

ESTABLISHING A BOOKKEEPING DIVISION

[General Regulations No. 45]

June 25, 1925.

1. There is hereby established a bookkeeping division comprising the bookkeeping section and other related activities recently assigned or transferred thereto, and the chief of the division will be entitled the chief of bookkeepers.

2. This order shall become effective July 1, 1925, and all orders inconsistent herewith are modified accordingly.

J. R. McCarl,
Comptroller General of the United States.

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