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JUL 13 2001

The Honorable Richard B. Cheney
President of the Senate
Washington, D.C. 20510

Dear Mr. President:

The Department of Defense proposes the enclosed legislation relating to our civilian personnel, property disposal or transfer, and contractor claims. These proposals are part of the departmental legislative program for the First Session of the 107th Congress and we urge their enactment. The purpose of each proposal is stated in its accompanying sectional analysis.

We propose an objective standard to govern the payment of pay differentials to federal employees exposed to asbestos; military leave for Federal employees who are Reserves or National Guardsmen for funeral honors duty; the elimination of the requirement that Civil Service compensatory time be based on irregular or occasional overtime; removal of the five-year vesting requirement for portability eligibility for those employees moving between nonappropriated fund and appropriated fund positions; Civil Service or Federal Employees' Retirement credit for nonappropriated fund service; and authority to pay for employee credentials or certification during downsizing, competitive sourcing, or privatization in order to facilitate the transition to the private sector. We also propose clarification that employees in the Federal government, who are detailed from other governmental entities or nonprofit organizations, are subject to the Government in Ethics Act.

We also propose the transfer to state agencies of training equipment and materials used in the emergency response assistance programs and clarifying language that when an installation is closed, all proceeds, to include those designated for infrastructure maintenance and environmental restoration, may be paid to the appropriate military department. We further propose that payment of interest on contractor claims be made from the date of claim or the date the contractor suffered the loss, whichever is later, and that interest not run on claims over \$100,000, if not certified.

The Office of Management and Budget advises that there is no objection, from the standpoint of the Administration's program, to the presentation of these initiatives for your consideration and the consideration of the Congress.

Sincerely,

Daniel J. Dell'Orto
Acting

Enclosures
As Stated





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JUL 13 2001

GENERAL COUNSEL

The Honorable J. Dennis Hastert
Speaker of the House of Representatives
Washington, D.C. 20515

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**SEC. ____ . COMMON OCCUPATIONAL AND HEALTH STANDARDS FOR
DIFFERENTIAL PAYMENTS AS A CONSEQUENCE TO EXPOSURE TO
ASBESTOS.**

1 (a) PREVAILING RATE SYSTEMS.—Section 5343(c)(4) of title 5, United States Code, is
2 amended by inserting before the semicolon at the end the following: “(for any hardship or hazard
3 related to asbestos, such differentials shall be determined by applying occupational safety and
4 health standards consistent with the permissible exposure limit (PEL) promulgated by the
5 Secretary of Labor under the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 et
6 seq))”.

7 (b) GENERAL SCHEDULE PAY RATES.—Section 5545(d) of such title 5 is amended by
8 inserting before the period at the end of the first sentence the following: “(for any hardship or
9 hazard related to asbestos, such differentials shall be determined by applying occupational safety
10 and health standards consistent with the permissible exposure limit (PEL) promulgated by the
11 Secretary of Labor under the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 et
12 seq.)”.

13 (c) APPLICABILITY.—Subject to any vested constitutional property rights, any
14 administrative or judicial determination after the date of enactment of this Act concerning
15 backpay for a differential, established under sections 5343(c)(4) or 5545(d) of such title 5, related
16 to asbestos shall be based on occupational safety and health standards described in subsections
17 (a) and (b).

Sectional Analysis

This proposal would amend sections 5343(c)(4) and 5545(d) of title 5, United States Code to create an objective standard to govern the payment of pay differentials to federal employees exposed to asbestos. Section 5343(c)(4) requires that a differential for duty involving “unusually severe working conditions or unusually severe hazards” be included in determining the wages to be paid a Federal employee under a prevailing wage system. Similarly, section 5545(d) requires that a differential be paid to a Federal employee paid under general schedule pay rates during any period the employee is “subjected to physical hardship or hazard not usually involved in carrying out the duties” of the employee.

Currently for asbestos there are different standards regarding pay differentials for general schedule and wage system employees. The hazardous pay differential covering general schedule employees for asbestos is paid when exposure exceeds the Occupational Safety and Health Act (OSHA) permissible exposure limit. Environmental differential pay covering wage system employees is paid when asbestos concentrations “may expose employees to potential illness or injury” The environmental differential pay standard is open to interpretation and allows local arbitrators to determine subjectively the amount of asbestos exposure warranting the payment of the differential. This lack of an objective standard has resulted in questionable arbitration awards (totaling millions of dollars) in cases where air sampling results showed airborne asbestos concentrations to be well below the OSHA standard

This proposal would provide an objective asbestos standard for both wage system and general schedule employees. Differentials would be based on occupational safety and health standards consistent with those promulgated by the Secretary of Labor under the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 et seq.). This would ensure consistency and fairness in agency responses to environmental differential pay and hazardous pay differential claims by providing an objective, scientifically-based standard that could be relied upon by all parties.

SEC. ____ . USE OF MILITARY LEAVE.

1 Section 6323(a) of title 5, United State Code, is amended by inserting “funeral honors
2 duty (as described in section 12503 of title 10 and section 115 of title 32),” following “(as
3 defined in section 101 of title 37),”.

Sectional Analysis

This amendment would add funeral honors duty as an authorized duty for which federal employees may take military leave from their civilian employment. With the projected increase in the number of funerals of veterans at which the military will be requested to provide honors, it is important to use all available personnel resources to meet this mission. The use of Reserve Component members to support this mission is essential and the department must ensure that these members are provided all available options in order to perform this military mission.

**SEC. ____ . REMOVAL OF REQUIREMENT THAT CIVIL SERVICE
COMPENSATORY TIME BE BASED ON IRREGULAR OR
OCCASIONAL OVERTIME.**

- 1 Section 5543 of title 5, United States Code, is amended—
2 (1) in paragraph (a)(1), by striking “irregular or occasional,”;
3 (2) in paragraph (a)(2) by striking “irregular or occasional,”; and
4 (3) in subsection (b) by striking “irregular or occasional.”.

Sectional Analysis

This amendment would amend section 5543 of title 5, United States Code, to eliminate an inconsistency in the treatment of employees by removing the limitation that overtime must be irregular or occasional in order for compensatory time off to be granted in its stead. Compensatory time for employees on flexible schedules is authorized by 5 U.S.C. 6123(a)(1), regardless of the nature of the overtime. This amendment would allow similar treatment for employees on scheduled tours of duty. The use of compensatory time off, rather than payment of overtime, could result in significant savings to the agency.

**SEC. ____ . RETIREMENT PORTABILITY ELECTIONS FOR EMPLOYEES MOVING
BETWEEN DEPARTMENT OF DEFENSE AND COAST GUARD
NONAPPROPRIATED FUND POSITIONS AND APPROPRIATED FUND
POSITIONS.**

1 (a) CIVIL SERVICE RETIREMENT SYSTEM.—Section 8347(q) of title 5, United States Code,
2 is amended—

3 (1) in paragraph (1)(B), by striking “has 5 or more years of civilian service
4 creditable under” and inserting “is employed subject to”; and

5 (2) in paragraph (2)(B), by striking “vested”.

6 (b) FEDERAL EMPLOYEES’ RETIREMENT SYSTEM.—Section 8461(n) of such title 5 is
7 amended—

8 (1) in paragraph (1)(B), by striking “has 5 or more years of civilian service
9 creditable under” and inserting “is employed subject to”; and

10 (2) in paragraph (2)(B), by striking “vested”.

Sectional Analysis

When Congress enacted the legislation for portability between nonappropriated and appropriated fund positions, it was a fundamental principal to keep employees "whole" as they moved between the systems. In recent years it has become apparent that some employees move regularly between nonappropriated and appropriated fund employment, spending 2-3 years in each, and don't remain in either system long enough to become vested in a retirement program. Their movement under portability does not leave them "whole" when it comes to retirement.

This proposal would amend sections 8347(q) and 8461(n) of title 5, United States Code. Section 8347 concerns the Civil Service Retirement System and Section 8461 concerns the Federal Employees Retirement System. Currently, those sections require that employees be vested (have five or more years of service) in order to elect to continue participation in their retirement plan when they move between nonappropriated and appropriated fund employment systems. This proposal would remove that requirement, permitting employees who move, after the date of enactment, with less than five years of service to elect to continue in the Civil Service Retirement System, Federal Employees Retirement System, or Nonappropriated Fund retirement system, as applicable.

**SEC. ____ . CIVIL SERVICE RETIREMENT SYSTEM AND FEDERAL EMPLOYEES’
RETIREMENT SYSTEM CREDIT FOR NONAPPROPRIATED FUND
SERVICE.**

1 (a) CIVIL SERVICE RETIREMENT SYSTEM.—Section 8332 of title 5, United States Code, is
2 amended by adding at the end the following new subsection (o):

3 “(o)(1) Subject to paragraph (4), an employee or Member may at the time of retirement
4 elect to be allowed credit under section 8336 for service rendered as an employee of a
5 nonappropriated fund instrumentality of the Department of Defense or the Coast Guard described
6 in section 2105(c), that is not otherwise creditable under this subchapter.

7 “(2) Service described in paragraph (1) shall not be deemed creditable for any other
8 purpose under this chapter.

9 “(3) No deposit shall be required for service described in paragraph (1).

10 “(4) When service described in paragraph (1) is used under section 8336, the annuity
11 otherwise payable under this chapter shall be reduced by an amount, computed under regulations
12 promulgated by the Office, such that the present value of the benefits provided is actuarially
13 equivalent to the present value of the annuity which would otherwise be provided without credit
14 for the service described in paragraph (1), and assuming the employee or Member separated from
15 service on the same date.”.

16 (b) FEDERAL EMPLOYEES’ RETIREMENT SYSTEM.—Section 8411 of such title is amended
17 by adding at the end the following new subsection (k):

18 “(k)(1) Subject to paragraph (4), an employee or Member may at the time of retirement
19 elect to be allowed credit under sections 8412 and 8414 for service rendered as an employee of a

1 nonappropriated fund instrumentality of the Department of Defense or the Coast Guard described
2 in section 2105(c).

3 “(2) Service described in paragraph (1) shall not be deemed creditable for any other
4 purpose under this chapter.

5 “(3) No deposit shall be required for service described in paragraph (1).

6 “(4) When service described in paragraph (1) is used under section 8412 or 8414, the
7 annuity otherwise payable under this chapter shall be reduced by an amount, computed under
8 regulations promulgated by the Office, such that the present value of the benefits provided is
9 actuarially equivalent to the present value of the annuity which would otherwise be provided
10 without credit for the service described in paragraph (1), and assuming the employee or member
11 separated from service on the same date.”.

12 (c) APPLICABILITY.—The amendments made by this section shall apply only to
13 individuals who separate from service covered under chapters 83 or 84 of such title on and after
14 the date of enactment.

15 (d) CREDIBILITY OF SERVICE.—An individual receiving credit under this section shall not
16 be granted credit for such service under any retirement system for employees of a
17 nonappropriated fund instrumentality.

Sectional Analysis

This proposal would amend title 5, United States Code, with regard to the Civil Service Retirement System (section 8332) and the Federal Employees Retirement System (section 8411). In so doing the proposal would provide employees the opportunity to receive either Civil Service Retirement System or Federal Employees Retirement System retirement credit for prior Nonappropriated Fund service. Employees who choose to receive this credit would have their Civil Service Retirement System or Federal Employees Retirement System annuity reduced commensurate with the cost of funding the present value of the added Nonappropriated Fund

service. Employees would receive credit for the Nonappropriated Fund service irrespective of the date of the move, break in service between the move from Nonappropriated Fund to Appropriated Fund position, or participation or vested status in the Nonappropriated Fund retirement plan.

Congress previously provided authority for Nonappropriated Fund credit for employees in the Federal Employees Retirement System. There was reluctance to attempt to provide the same benefit for employees covered by Civil Service Retirement System since it was assumed to be a "closed" system. The Office of Personnel Management coordinated on the development of this proposal and indicated that the closed nature of the Civil Service Retirement System would not be a problem.

There would be no additional cost to the Department.

SEC. ____ . PAYMENT FOR PROFESSIONAL EMPLOYEE CREDENTIALS

1 (a) PAYMENT FOR CREDENTIALS.— Chapter 57 of title 5, United States Code, is
2 amended by adding at the end the following new section:

3 **“§5757. Expenses for credentials**

4 “(a) An agency may use appropriated or other available funds to pay for—

5 “(1) employee credentials, including professional accreditation, State-
6 imposed and professional licenses, and professional certification; and

7 “(2) examinations to obtain these credentials.

8 “(b) No authority under subsection (a) may be exercised on behalf of any
9 employee occupying or seeking to qualify for appointment to any position which is
10 excepted from the competitive service because of its confidential, policy-determining,
11 policy-making, or policy-advocating character.”.

12 (b) CLERICAL AMENDMENT.— The table of sections at the beginning of such
13 chapter 57 is amended by adding at the end of the following new item:

14 “5757. Expenses for credentials.”.

Sectional Analysis

This proposal would add a new section 5757 to chapter 57 of title 5, United States Code, to allow agencies to pay the cost of employees’ licenses, certificates, and other professional credentials, as well as the cost of examinations to obtain these credentials.

When employees are displaced during downsizing, competitive sourcing or privatization, agencies make every effort to place them in non-Federal jobs. In some cases, employees cannot be placed without the appropriate certificate or license. This proposal would authorize payment for the examinations and other expenses involved in obtaining those certificates or licenses. This is consistent with the Federal government's policy to facilitate the transition of employees who are separated through no fault of their

own, and provides assurance to the remaining workforce that their employers will make every effort to find jobs for displaced workers.

This proposal also would apply to employees remaining with the agency. However, it would not apply to employees occupying or seeking to qualify for appointment to any position which is excepted from the competitive service because of its confidential, policy-determining, policy making, or policy advocating character. This authority would provide agencies with another useful tool in meeting their recruiting and retention needs.

This proposal is permissive in nature and would not obligate agencies to adopt its provisions.

**SEC. ____ . CLARIFICATION THAT CERTAIN EMPLOYEES APPOINTED OR
DETAILED TO THE FEDERAL GOVERNMENT FROM OTHER
GOVERNMENTAL ENTITIES OR NONPROFIT ORGANIZATIONS ARE
SUBJECT TO THE GOVERNMENT IN ETHICS ACT.**

1 Section 3374(c)(2) of title 5, United States Code, is amended by inserting “the Ethics in
2 Government Act of 1978 (5 U.S.C. App.), section 1043 of the Internal Revenue Code of 1986
3 (26 U.S.C. 1043), section 27(p)(8) of the Office of Federal Procurement Policy Act (41 U.S.C.
4 423),” after “chapter 73 of this title,”.

Sectional Analysis

Subchapter VI, Chapter 33, of title 5, United States Code, permits employees to be assigned, by appointment or detail, from states and local governments, including, by regulations established by the Office of Personnel Management, from nonprofit organizations that have as one of their principal functions “the offering of professional advisory, research, education, or development services, or related services to governments or universities concerned with public management.” Under section 3374 these individuals are considered to be “employees.”

This provision would amend section 3374 to clarify that such individuals are employees of the agency whether they are assigned by appointment or by detail, and, as such, are covered by the Ethics in Government Act of 1978 and section 1043 of title 26 (the Internal Revenue Code). The provision also clarifies that such individuals are covered by the procurement integrity requirements of section 423 of title 41 U.S.C.

**SEC. ____ . AVAILABILITY OF PROCEEDS FROM SALES OF DEPARTMENT OF
DEFENSE PROPERTY WHEN THE INSTALLATION WHERE THE
PROPERTY SOLD IS CLOSED.**

1 Section 204(h)(2)(A) of the Federal Property and Administrative Services Act of 1949
2 (40 U.S.C. 485(h)(2)(A)) is amended by inserting before the period "or by the military
3 department that had jurisdiction over the property if the installation is closed".

Sectional Analysis

Currently, section 204(h) of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 485(h)) provides that the 50 percent of sales proceeds of Department of Defense property which is designated for certain purposes at the installation where the property sold is located will be available to the military department if the installation is closed. This proposal would authorize the military departments to reuse 100% of the sale proceeds on infrastructure maintenance and environmental restoration, areas where the military has large annual deficiencies.

Section 204(h) provides for the distribution of sales proceeds from the sale of surplus Department of Defense properties (other than property at a military installation designated for closure or realignment). Paragraph (2) of section 204(h) provides for 50 percent of sale proceeds to be available for facility maintenance and repair or environmental restoration at the military installation where the property is located and 50 percent to be available for facility maintenance and repair and for environmental restoration by the military department that had jurisdiction over the property before it was disposed of or transferred. The statute is unclear as to the availability of the first 50 percent when the entire installation is sold and there is no military installation left upon which to use the sales proceeds. This revision would authorize the military department that had jurisdiction over the property to use all of the proceeds for the purposes provided if the installation where the property sold is closed. The General Services Administration has reviewed the proposal and has no objection.

**SEC. ____ . CONTRACT DISPUTES ACT AMENDMENT RELATING TO PAYMENT
OF INTEREST ON CONTRACTOR CLAIMS.**

1 (a) SPECIFICITY OF DATE FOR INTEREST.—Section 12 of the Contract Disputes Act of
2 1978 (41 U.S.C. 611) is amended to read as follows:

3 "The Government shall pay interest on a contractor's claim on the amount found to be due
4 and unpaid from (a) the date the contracting officer receives the claim pursuant to sections 6(a)
5 and 6(c)(1) of this Act or (b) the date the contractor paid its incurred costs, whichever is later,
6 until date of payment. The contractor shall specify how much of the claimed amount has been
7 expended as of the claim certification date. The interest provided for in this section shall be paid
8 at the rate established by the Secretary of the Treasury pursuant to Public Law 92-41 (85 Stat 97)
9 for the Renegotiation Board."

10 (b) IMPLEMENTATION.—The Federal Acquisition Regulatory Council shall issue
11 amendments to the Federal Acquisition Regulation not later than 180 days after the date of
12 enactment of this Act.

Sectional Analysis

This section would amend section 12 of the Contract Disputes Act of 1978 by striking out the first sentence, which provides that interest on amounts found due contractors on claims shall be paid to the contractor from the date the contracting officer receives the claim pursuant to section 6(a) of this Act from the contractor until payment thereof. Section 6(a) requires contractor claims against the Government to be in writing and submitted to the contracting officer for a decision. This section replaces the first sentence with language requiring the Government to pay interest on contractor claims from the date the contracting officer receives a claim pursuant to sections 6(a) and 6(c)(1) of this Act or the date the contractor paid its incurred costs, whichever is later, until date of payment. The amendment requires contractors to specify how much of the claimed amount has been expended as of the claim certification date.

Section 6(c)(1) requires contractors to certify claims in excess of \$100,000. By adding reference to section 6(c)(1), the amended language clarifies that interest will not run on a claim

over \$100,000 that is not certified. This clarification is in consonance with the decision reached in Fidelity Construction Company v. United States, 700 F.2d 1379 (Fed. Cir. 1983), cert. denied, 464 U.S. 826 (1983).

Some claims include estimated costs for work to be completed in the future. Since the Contract Disputes Act awards interest from the date the contracting officer receives the written claim, interest is currently computed without regard to when the contractor incurred the costs even though substantial costs can be incurred subsequent to receipt of the written claim by the contracting officer. It is contrary to sound business practice and inequitable to the Government to pay contractors interest on costs not yet incurred.

In Servidone Construction Corp. v. United States, 931 F.2d 860 (Fed. Cir. 1991), and J.S. Alberici Construction Co. Inc. & Martin K. Eby Construction Co. Inc. (Joint Venture), ENG BCA No. 6179-R, 97-1 BCA paragraph 28,919, aff'd, 153 F.3d 1381 (Fed. Cir. 1998), the contractors were awarded interest on the amounts found due on their claims from the time the claims were received by the contracting officers until payment by the Government. In both cases, the amounts found due included claimed costs not yet incurred at the time the contracting officers received the claims. This Bill would require that costs actually be incurred before interest begins to accrue. The result is a more customary situation where interest is paid based on the use of money.

The amended language precludes contractors from receiving windfall payments of interest on claimed costs not yet incurred. Clearly, taxpayer dollars should not be wasted paying contractors unearned interest on their claims.

**SEC. ____ . TRANSFER OF EQUIPMENT AND MATERIALS USED IN
EMERGENCY RESPONSE ASSISTANCE PROGRAM.**

1 Section 1412(e)(4) of the Defense Against Weapons of Mass Destruction Act of
2 1996 (title XIV of Public Law 104-201; 110 Stat. 2718; 50 U.S.C. 2312(e)(4)) is
3 amended by adding at the end the following sentence:

4 “Equipment and related materials loaned by the Department of Defense under this
5 section to State and local agencies may be transferred to such agencies without cost
6 notwithstanding section 1412(f) of this title or any other provision of law concerning the
7 disposition of Federal property.”.

Sectional Analysis

The Department has made training equipment loans to 105 cities: 68 cities received a full complement of equipment that is valued at \$300,000 per city and 37 cities received approximately \$20,000 in equipment per city. Total estimated value of the equipment purchased and loaned to these cities is \$21.1M. This equipment was purchased by DoD on behalf of the cities with monies granted under the Domestic Preparedness Program. The equipment is permanently retained and maintained by the cities. It is on loan, as opposed to owned by the cities, due to the prohibition of transferring DoD property directly to nonfederal government agencies. This gives rise to several issues. The Department of Defense is required to inventory all equipment on its property books on an annual basis. This will require DoD to send personnel on temporary duty (TDY) to 105 cities on an annual basis to execute annual inventory. The requirement for annual inventories will also cause a financial and labor hardship on the cities that must account for this equipment to DoD standards. In addition, DoD maintains a certain level of liability for the equipment, as long as it remains on the DoD property books. This one-time transfer of this equipment will eliminate the financial cost, labor difficulties, and liabilities that DoD incurs so long as the equipment remains DoD property.