U.S. Department of Agriculture
Washington, D.C. 20250

DEPARTMENTAL REGULATION	Number: 2200-003
SUBJECT: Shutdown of Department Operations in the Event that Current Obligating Authorities no Longer Exist	DATE: May 4, 1984
	OPI: Office of Budget and Program Analysis

1 PURPOSE

This regulation prescribes policies and procedures to be followed in the event that appropriate bills or resolutions have expired and Congress has failed to pass an appropriation or a Continuing Resolution providing obligational authority to permit the orderly continuation of programs.

2 SPECIAL INSTRUCTIONS/CANCELLATION

Secretary's Memorandum Number 2026, dated September 30, 1980 is replaced by this regulation.

3 POLICY

In the event that any agency's current obligating authority no longer exists, Federal officers may only incur obligations necessary for the orderly closedown of their agency.

All actions taken will be in accordance with:

a The Attorney General's Opinion, dated January 16, 1981, Appendix A;

b Office of Management and Budget Bulletin Number 80-14, dated August 28, 1980, and Supplement No. 1, dated August 20, 1982, Appendix B; and

c The office of Personnel Management Memorandum dated September 10, 1980, Appendix C.

4 RESPONSIBILITIES

The head of each agency and staff office will develop and maintain a plan for the orderly closedown of their organization. The plans will be specifically tailored to the requirements necessary for each agency or staff office.

The plans will include the following provisions:

a All employees will be directed to report to their supervisors to receive assignments of duties necessary for an orderly closedown.

b All employees in travel status will be directed to return to duty station, unless continued travel is essential for accomplishing the orderly closedown of the organization.

c Closedown activities will include preparing all records for transfer to the appropriate records holding area, issuing notices of cancellation of ongoing program activities, inventorying and preparing all personal property and real property and facilities for appropriate disposition.

d All records, personal property, and real property and facilities will be maintained and protected until appropriate disposition is accomplished.

e When the head of an agency or staff office determines an employee is no longer needed to perform activities to accomplish the orderly closedown, such employee must be notified and placed on furlough or other personnel action taken as appropriate for the circumstance.

f Notice of closedown actions, copies of agency and staff office plans, and recurring implementation status reports will be provided to the Secretary.

g Agency and staff office heads should include other provisions they deem necessary to accomplish the orderly closedown in accordance with the provisions of the Attorney General's opinion and the OMB bulletin.

Other instructions and specific guidance may be issued as circumstances require at each occurrence of a potential closedown situation.

The Office of Budget and Program Analysis and Office of Personnel should coordinate the efforts of agencies and Departmental staff offices to assist the Secretary in Departmental planning and implementation for an orderly closedown of any activity or organization of the Department when such action is required.

END

APPENDIX A

OFFICE OF THE ATTORNEY GENERAL

Washington, DC 20530

The President

The White House

Washington, DC 20500

My Dear Mr. President:

You have asked my opinion concerning the scope of currently existing legal and constitutional authorities for the continuance of government functions during a temporary lapse in appropriations, such as the Government sustained on October 1, 1990. As you know, some initial determination concerning the extent of these authorities has to be made in the waning hours of the last fiscal year in order to avoid extreme administrative confusion that might have risen from Congress' failure timely to enact 11 of 13 anticipated regular appropriations bills, 1/ or a continuing resolution to cover the hiatus between regular appropriations. The resulting guidance, which I approved, appeared in a memorandum that the Director of the Office of Management and Budget circulated to the heads of all departments and agencies on September 30, 1980. Your request, in effect, is for a close and more precise analysis of the issues raised by the September 30 memorandum.

Before proceeding with my analysis, I think it useful to place this opinion in the context of my April 25, 1980 opinion to you concerning the applicability of the Anti-deficiency Act, 31 U.S.C. S 665, upon lapse in appropriations. That opinion set forth two essential conclusions. First, if, after the expiration of an agency's appropriations, Congress has enacted no appropriation for the immediately subsequent period, the agency may make no contracts and obligate no further funds except as authorized by law. Second, because no statute generally permits federal agencies to incur obligations without appropriations for the pay of employees, agencies are not, in general, authorized by law to employ the services of their employees upon a lapse in appropriations. My interpretation of the Antideficiency Act in this regard is based on its plain language, its history, and its manifest purposes.

1/ Prior to October 1, 1980, Congress has passed regular appropriations for fiscal year 1981 only for energy and water development, Pub. L. 96-367, 94 Stat. 1331 (Oct. 1, 1980).

The events prompting your request for my earlier opinion included the prospect that the then-existing temporary appropriations measure for the Federal Trade Commission would expire in April, 1980 without extension, and that the FTC might consequently be left without appropriations for a significant period. 2/ The FTC did not then suggest that it possesses obligational authorities that are free from a one-year time limitation. Neither did it suggest, based on its interpretation of the law at that time, that the FTC performs emergency functions involving the safety of human life or the protection of property other than protecting government property within the administrative control of the FTC itself. Consequently, the legal questions that the April 25, 1980 opinion addressed were limited. Upon determining that the blanket prohibition expressed in S 665(a) against unauthorized obligations in advance of appropriations is to be applied as written, the opinion added only that the Antideficiency Act does permit agencies that are ceasing their functions to fulfill certain legal obligations connected with the orderly termination of agency operations. 3/ The opinion did not consider the more complex legal questions posed by a general congressional failure to enact timely appropriations, or the proper course of action to be followed when no prolonged lapse in appropriations in such a situation is anticipated.

The following analysis is directed to those issues. Under the terms of the Antideficiency Act, the authorities upon which the Government may rely for the continuance of functions despite a lapse in appropriations implicates two fundamental questions. Because the proscription of S 665(a) excepts obligations in advance of appropriations that are "authorized by law," it is first necessary to consider which functions this exception comprises. Further, given that S 665(b) expressly permits the Government to employ the personal service of its employees in "cases of emergency involving the safety of human life or the protection of property," it is necessary to determine how this category is to be construed. I shall address these questions in turn, bearing in mind that the most useful advice concerning them must be cast chiefly in the form of general principles. The precise application of these principles must, in each case, be determined in light of all the circumstances surrounding a particular lapse in appropriations.

2/ The FTC actually sustained less than a one-day lapse in appropriations between the expiration, on April 30, 1980, of a transfer of funds for its use, Pub. L. 96-219, 94 Stat. 128 (Mar. 28, 1980), and the enactment, on May 1, 1980, of an additional transfer, Pub. L. 9624-, 94 Stat. 342. Prior to April 38, however, it appeared likely that a protracted congressional dispute concerning the terms of the FTC's eventual authorization, Pub. L. 96-252, 94 Stat. 374 (May 28, 1980). would precipitate a lapse in appropriations for a significantly longer period.

3/ See note 11 infra.

I

Section 665(a) of Title 31, United States Code provides:

> No officer or employee of the United States shall make or authorize an expenditure from or create of authorize an obligation under any appropriation or fund in excess of the amount available therein; nor shall any officer or employee involve the Government in any contract or obligation, for the payment of money for any purpose, unless such contract or obligation is authorized by law.

(Emphasis added.) Under the language of S 665(a) emphasized above, it follows that, when an agency's regular appropriation lapses, that agency may not enter contracts or create other obligations unless the agency has legal authority to incur obligations in advance of appropriations. Such authority, in some form, is not uncommon in the Government. For example, notwithstanding the lapse of regular appropriations, an agency may continue to have available to it particular funds that are subject to a multi-year or no-year appropriation. A lapse in authority to spend funds under a one-year appropriation would not affect such other authorities. 13 Op. A.G. 288, 291 (1870).

A more complex problem of interpretation, however, may be presented with respect to obligational authorities that are not manifested in appropriations acts. In a few cases, Congress has expressly authorized agencies to incur obligations without regard to available appropriations. 4/ More often, it is necessary to inquire under what circumstances statutes that vest particular functions in government agencies imply authority to create obligations for the accomplishment of those functions despite the lack of current appropriations. This, of course, would be the relevant legal inquiry even if Congress had not enacted the Antideficiency Act; the second phrase of S 665(a) clearly does no more than codify what, in any event and not merely during lapses in appropriations, is a requirement of legal authority for the obligation of public funds. 5/

4/ See, e.g., 25 U.S.C. S99; 31 U.S.C. S 668; 41 U.S.C S11.

5/ This rule has, in fact, been expressly enacted in some form for 160 of the 191 years since Congress first convened. the Act of May 1, 11820 provided:

> [N]o contract shall hereafter be made by the Secretary of State, or of the Treasury, or of the Department of War, or of the Navy, except under a law authorizing the same, or under an appropriation adequate to its fulfillment.

3 Stat. 568. The Act of March 2, 1861 extended the rule as follows:

> 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 fulfillment, 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.

Congress reiterated the ban on obligations in excess of appropriations by enacting the Antideficiency Act in 1870:

> [I]t shall not be lawful for any department of the government to expend in any one fiscal year any sum in excess of appropriations made by Congress for that fiscal year, or to involve the government in any contract for the future payment of money in excess of appropriations.

Act of July 12, 1870, ch. 251, S7, 16 Stat. 251. Congress substantially reenacted this provision in 1905, adding the proviso "unless such contract or obligation is authorized by law," Act of March 3, 1905, ch. 1484, S 4, 33 Stat. 1257, and reenacted it again in 1906, Act of Feb. 27, 1906, ch. 510, S 3, 34 Stat. 48. Section 665(a) of Title 31, United States Code, enacted in its current form in 1950, Act of Sept. 6, 1950, ch. 896, S 1211, 64 Stat. 765, is substantially the same as these earlier versions, except that, by adding an express prohibition against unauthorized obligations "in advance of" appropriations to the prohibition against obligations "in excess of" appropriations, the modern version indicates even more forcefully Congress' intent to control the availability of funds to government officers and employees.

Previous Attorneys General and the Comptrollers General have had frequent occasion to address, directly or indirectly, the question of implied authority. Whether the broader language of all of their opinions is reconcilable may be doubted, but the conclusions of the relevant opinions fully establish the premise upon which my april 25, 1980 memorandum to you was based: statutory authority to incur obligations in advance of appropriations may be implied as well as express, but may not ordinarily be inferred, in the absence of appropriations, from the kind of broad, categorical authority, standing alone, that often appears, for example, in the organic statutes of government agencies. The authority must be necessarily inferrable from the specific terms of those duties that have been imposed upon, or of those authorities that have been invested, in the offers of employees purporting to obligate funds on behalf of the United State. 15 Op. A. G. 235, 240 (1877).

Thus, for example, when Congress specifically authorizes contracts to be entered into for the accomplishment of a particular purpose, the delegated officer may negotiate such contracts even before Congress appropriates all the funds necessary for their fulfillment. E.g., 30 Op. A.G. 332 (1915); 30 Op. A.G. 186 (1913); 28 Op. A.G. 466 (1910); 25 Op. A.G. 557 (1906). On the other hand, when authority for the performance of a specific function rests on the particular appropriation that proves inadequate to the fulfillment of its purpose, the responsible officer is not authorized to obligate further funds for that purpose in the absence of additional appropriations. 21O; A.G. 244 (1895); 15 Op. A.G. 235 (1877); 9 Op. A.G. 18 (1857); 4 Op. A.G. 600 (1847); accord, 28 Comp. Gen. 163 (1948).

This rule prevails even though the obligation of funds that the official contemplates may be a reasonable means for fulfilling general responsibilities that Congress has delegated to the official in broad terms, but without conferring specific authority to enter into contracts or otherwise obligate funds in advance of appropriations. For example, Attorney General McReynolds concluded, in 1913, that the Postmaster General could not obligate funds in excess of appropriations for the employment of temporary and auxiliary mail carriers to maintain regular service, notwithstanding his broad authorities for the carrying of the mails. 30 Op. A.G.157. Similarly, in 1877 Attorney General Devens concluded that the Secretary of War could not, in the absence of appropriations, accept "contributions" of material for the army, e.g., ammunition and medical supplies, beyond the Secretary's specific authorities to contract in advance of appropriations. 15 Op. A.G. 209. 6/

6/ Accord, 37 Comp. Gen. 155 (1957) (Atomic Energy Commission's broad responsibilities under the Atomic Energy Act do not authorize it to enter into a contract for supplies or services to be furnished in a fiscal year subsequent to the year the contract is made); 28 Comp. Gen. 300 (1948) (Treasure Department's discretion to establish reasonable compensation for Bureau of the Mint employees does not confer authority to grant wage increases that would lead to a deficiency).

Ordinarily, then, should an agency's regular one-year appropriation lapse, the "authorized by law" exception to the Antideficiency Act would permit the agency to continue the obligation of funds to the extent that such obligations are: (1) funded by moneys, the obligational authority for which is not limited to one year, e.g., multi-year appropriations; (2) authorized by statutes that expressly permit obligations in advance of appropriations; or (3) authorized by necessary implication from the specific terms of duties that have been imposed on, or of authorities that have been invested in, the agency. 7/ A nearly Government-wide lapse, however, such as occurred on October 1, 1980, implicates one further question of Executive authority.

Unlike his subordinates, the President performs not only functions that are authorized by statue, but functions authorized by the Constitution as well. To take one obvious example, the President alone, under Art. II S 2, cl. 1 of the Constitution, "shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment." Manifestly, Congress could not deprive the President of this power by purporting to deny him the minimum obligational authority sufficient to carry this power into effect. Not all of the Presidents powers are so specifically enumerated, however, and the question must consequently arise, upon a Government-side lapse in appropriations, whether the Antideficiency Act should be construed as depriving the President of authority to obligate funds in connection with those initiatives that would otherwise fall within the President's powers.

7/ It was on this basis that I determined, in approving the September 30, 1980 memorandum, that the responsible departments are "authorized by law" to incur obligations in advance of appropriations for the administration of benefit payments under entitlement programs when the funds for the benefit payments themselves are not subject to a one-year appropriation. Certain so-called "entitlement programs,: e.g., Old-Age and Survivors Insurance, 42 U.S.C. S401(a), are funded through trust funds into which a certain portion of the public revenues are automatically appropriated. Notwithstanding this method of funding entitlement payments themselves, the costs connected with the administration of the trust funds are subject to annual appropriations. 42 U.S.C. 401(g). It might be argued that a lapse in administrative authority along should be regarded as expressing Congress' intent that benefit payments also not continue. The continuing appropriation of funds for the benefit payments themselves, however, substantially belies this argument, especially when the benefit payments are to be rendered, at Congress' direction, pursuant to an entitlement formula. In the absence of the contrary legislative history to the benefit program or affirmative congressional measures to terminate the program I think it proper to infer authority to continue the administration of the program to the extent of the remaining benefit funding.

In my judgement, the Antideficiency Act should not be read as necessarily precluding exercises of executive power through which the President, acting alone or through his subordinates, could have obligated funds in advance of appropriations had the Antideficiency Act not been enacted. With respect to certain of the President's functions, as illustrated above, such an interpretation could raise grave constitutional questions. It is an elementary rule that statutes should be interpreted, if possible, to preclude constitutional doubts, Crowell v, Benson, 285 U.S.22, 62 (1932), and this rule should surely be followed in connection with a broad and general statute, such as 31 U.S.C. S 665(a), the history of which indicates no congressional consideration at all of the desirability of limiting otherwise constitutional presidential initiatives. The President, of course, cannot legislate his own obligational authorities; the legislative power rests with Congress. As set forth, however, in Mr. Justice Jackson's seminal opinion in Youngstown Sheet & Tube Co., v. Sawyer, 343 U.S. 579, 593 (1952):

> The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity. Presidential powers are not fixed but fluctuate, depending on their disjunction or conjunction with those of Congress.

Id. at 635. 8/ Following this reasoning, the Antideficiency Act is not the only source of law or the only exercise of congressional power that must be weighed in determining whether the President has authority for an initiative that obligates funds in advance of appropriations. The President's obligational authority may be strengthened in connection with initiatives that are grounded in the peculiar institutional powers and competency of the President. His authority will be further buttressed in connection with any initiative that is consistent with statutes--and thus with the exercise of legislative power in an area of concurrent authority--that are more narrowly drawn than the Antideficiency Act and that would otherwise authorize the President to carry out his constitutionally assigned tasks in the manner he contemplates.

8/ A majority of the Supreme Court has repeatedly given express endorsement of Mr. Justice Jackson's view of the separation of powers. Nixon v. Administrator of General Services, 433 U.S. 425, 443 (1977); Buckley v. Valeo, 424 U.S. 1,112 (1976); United States v. Nixon, 418 U.S. 683, 707 (1974); National Association of Letter Carriers v. Austin, 418 U.S. 264, 273 n.5 (1974).

In sum, with respect to any presidential initiative that is grounded in his constitutional role and consistent with states other than the Antideficiency Act that are relevant to the initiative, the policy objective of the Antideficiency Act must be considered in undertaking the initiative, but should not alone be regarded as dispositive of the question of authority.

Unfortunately, no catalogue is possible of those exercises of presidential power that may properly obligate funds in advance of appropriations. 9/ Clearly, such an exercise of power could most readily be justified if the functions to be performed would assist the President in fulfilling his peculiar constitutional role, and Congress has otherwise authorized those or similar functions to be performed within the control of the President. 10/ Other factors to be considered would be the urgency of the initiative and the likely extent to which funds would be obligated in advance of appropriations.

9/ As stated by Attorney General (later Justice) Murphy:

> [T]he Executive has powers not enumerated in the statutes--powers derived not from statutory grants but from the Constitution. It is universally recognized that the constitutional duties of the Executive carry with them constitutional powers necessary for their proper performance. these constitutional powers have never been specifically defined, and in fact cannot be, since their extent and limitations are largely dependent upon conditions and circumstances. In a measure this is true with respect to most of the powers of the Executive, both constitutional and statutory. The right to take specific action might not exist under one state of facts, while under another it might be the absolute duty of the Executive to take such action.

39 Op. A.G. 343, 347-48-(1939)

10/ One likely category into which certain of these functions would fall would be "the conduct of foreign relations essential to the national security," referred to in the September 30, 1980 memorandum.

> No officer or employee of the United States shall accept voluntary service for the United States or employ personal service in excess of that authorized by law, except in cases of emergency involving the safety of human like or the protection of property.

Despite the use of the term "voluntary service," the evident concern underlying this provision is not government agencies' acceptance of the benefit of services rendered without compensation. Rather, the original version of S 665(b) was enacted as part of an urgent deficiency appropriation act in 1884, Act of May 1, 1884, ch. 37,23 Stat. 17, in order to avoid claims for compensation arising from the unauthorized provision of services to the Government by non-employees, and claims for additional compensation asserted by government employees performing extra services after hours. That is, under S 665(b), government officers and employees may not involve the Government in contracts for employment, i.e., for compensated labor, except in emergency situations. 30 Op. A.G. 129 (1913).

In sum, I construe the "authorized by law" exception contained within 31 U.S.C. S 665(a) as exempting from the prohibition enacted by the second clause of that section not only those obligations in advance of appropriations for which express or implied authority may be found in the enactments of Congress, but also those obligations necessarily incident to presidential initiatives undertaken within his constitutional powers.

II

In addition to regulating generally obligations in advance of appropriations, the Antideficiency Act further provides, in 31 U.S.C. S 665 (b):

Under S 665(b), it is thus crucial, in construing the Government's authority to continue functions in advance of appropriations, to interpret the phrase "emergencies involving the safety of human life or the protection of property." Although the legislative history of the phrase sheds only dim light on its precise meaning, this history, coupled with an administrative history--of which Congress is fully--aware--of the interpretation of an identical phrase in a related budgeting context, suggests two rules for identifying those functions for which government officers may employ personal services for compensation in excess of legal authority other than S 665(b) itself. First, there must be some reasonable and articulable connection between the function to be performed and the safety of human like or the protection of property. Second, there must be some reasonable likelihood that the safety of human life or the protection of property would be compromised, in some degree, by delay in the performance of the function in question.

As originally enacted in 1884, the provision forbade unauthorized employment 'except in cases of sudden emergency involving the loss of human life or the destruction of property. (Emphasis supplies.) The clause was added to the House-passed version of the urgent deficiency bill on the floor of the Senate in order to preserve the function of the Government's "life-saving stations." One Senator cautioned:

> In other words, at the life-saving stations of the United States, for instance, the officers in charge, no matter what the urgency and what the emergency might be, would be prevented [under the House-passed bill] from using the absolutely necessary aid which is extended to them in such cases because it had not provided for by law in a statute.

15 Cong, Rec. 2143 (1884) (remarks of Sen. Beck); see also id. at 3410-11 (remarks of Rep. Randall). This brief discussion confirms what the originally enacted language itself suggests, namely, that Congress initially contemplated only a very narrow exception to what is now S 665(b), to be employed only in cases of dire necessity.

In 1950, however, Congress enacted the modern version of the Antideficiency Act and accepted revised language for 31 U.S.C. S 665(b) that had originally been suggested in a 1947 report to Congress by the Director of the bureau of the Budget and the Comptroller General. Without elaboration, these officials proposed that "cases of sudden emergency" be amended to "cases of emergency," loss of human life" to "safety of human life," and "destruction of property' to "protection of property." These changes were not qualified or explained by the report accompanying the 1947 recommendation or by any aspect of the legislative history of the general appropriations act for fiscal year 1951, which included the modern S 665(b). Act of Sept. 5, 1950, ch. 896, S1211, 64 Stat. 765. Consequently, we infer from the plain import of the language of their amendments that the drafters intended to broaden the authority for emergency employment. In essence, they replaced the apparent suggestion of a need to show absolute necessity with a phrase more readily suggesting the sufficiency of a showing of reasonable necessity in connection with the safety of human like or the protection of property in general.

This interpretation is buttressed by the history of interpretation by the bureau of the Budget and its successor, the Office of Management and Budget, of 31 U.S.C. S 665(e), which prohibits the apportionment or reapportionment of appropriated funds in a manner that would indicate the need for a deficiency or supplemental appropriation, except in, among other circumstances, "emergencies involving the safety of human life, [or] the protection of property..." S 665(e) (1) (B). 11/ Directors of the Bureau to the Budget and of the Office of Management and Budget of the Office of Management and Budget have granted dozens of deficiency reapportionments under this subsection in the last 30 years, and have apparently imposed no test more stringent than the articulation of a reasonable relationship between the funded activity and the safety of human life or the protection of property. Activities for which deficiency apportionments have been granted on this basis include FBI criminal investigations, legal services rendered by the Department of Agriculture in connection with state meat inspection programs and enforcement of the Wholesome Meat Act of 1967, 21 U.S.C __ 601 et seq., the protection and management of commodity inventories by the Commodity Credit Corporation, and the investigation of aircraft accidents by the National Transportation Safety Board. These few illustrations demonstrate the common sense approach that has guided the interpretation of S 665(e). 12/ Most important under S 665 (e) (2), each apportionment or reapportionment indicating the need for a deficiency or supplemental appropriation has been reported contemporaneously to both Houses of Congress, and, in the face of these reports, Congress has not acted in any to alter the relevant 1950 working of S 665(e)(1)(B), which is, in this respect, identical to S 665(b). 13/

11/ As provisions containing the same language, enacted at the same time, and aimed at related purposed, the emergency provisions of S 665(b) and 665(e) (1) (B) should be deemed in pari materia and given a like construction, Northcross v. Memphis Board of Education, 412 U.S. 427, 428 (1973), although, at first blush, it may appear that the consequences of identifying a function as an "emergency" function may differ under the two provisions. Under S 665(b), if a function is an emergency function, OMB may allow a deficiency apportionment or reapportionment--thus permitting the expenditure of funds at a rate that count not be sustained for the entire fiscal year

without a deficiency--but the effect of such administrative action would not be to trigger new obligational authority automatically. That is, Congress could always decline to enact a subsequent deficiency appropriation, thus keeping the level of spending at the previously appropriated level.

This distinction, however, is outweighed by the common practical effect of the two provisions, namely, that when authority is exercised under either emergency exception, Congress, in order to accomplish all those functions it has authorized, must appropriate more money. If, after a deficiency apportionment or reapportionment, Congress did not appropriate additional funds, its purposes would be thwarted to the extent that previously authorized functions could not be continued until the end of the fiscal year. This fact means that, although deficiency apportionments and reapportionments do not create new obligational authority, they frequently impose a necessity for further appropriations as compelling as the Government's employment of personal services in an emergency in advance of appropriations. There is thus no genuine reason for ascribing, as a matter of legal interpretation, greater or lesser scope to one emergency provision than to the other.

12/ In my April 25, 1980 memorandum to you, I opined that the Antideficiency Act permits departments and agencies to terminate operations, upon a lapse in appropriations, in an orderly way. The functions that, in my judgement, the orderly shutdown of an agency for an indefinite period or permanently would entail include the emergency protection, under S 665(b), of the agency's property by its own employees until such protection can be

arranged by another agency with appropriations; compliance,

within the "authorized by law" exception to S 665(a), with statues providing for the rights of employees and the protection

of government information; and the transfer, also under the "authorized by law" exception to S 665(a), of any matters within

the agency's jurisdiction that are also under the jurisdiction of another agency that Congress has funded and thus indicated its intent to pursue. Compliance with the spirit, as well as the letter, of the Antideficiency Act requires that agencies incur obligations for these functions necessary to the fulfillment of their legal duties and with the end in mind of terminating operations for some substantial period. It would hardly be prudent, much less consistent with the spirit of the Antideficiency Act, for agencies to incur obligations in advance of appropriations in connection with "shutdown functions" that would only be justified by a more substantial lapse in appropriations than the agency, in its best judgement, expects.

13/ The Supreme Court has referred repeatedly to the:

> venerable rule that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, especially when Congress has refused to alter the administrative construction.

Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381 (1969) (footnotes omitted). since enacting the modern Antideficiency Act, including S 665(e)(1)(B), in 1950, Congress has amended the act three times, including one amendment to another aspect of S 665(e). At no time has Congress altered this interpretation of S 665(e)(1)(B) by the Office of Management and Budget, which has been consistent and is consistent with the statute. Compare 43 Op. A.G. No. 26 (1980).

It was along these lines that I approved, for purposes of the immediate crisis, the categories of functions that the Director of the Office of Management and Budget included in his September 30, 1980 memorandum as illustrative of the areas of government activity in which emergencies involving the safety of human like and the protection of property might arise. To erect the most solid foundation for the Executive branch's practice in this regard, I would recommend that, in preparing contingency plans for period of lapsed appropriations, each government department or agency provide for the Director of the Office of Management and Budget some written description, that could be transmitted to Congress, of what the head of the agency, assisted by its General Counsel, considers to be the agency's emergency functions.

In suggesting the foregoing principles to guide the interpretation of S 665(b), I must add my view that, in emergency circumstances in which a government agency may employ personal service in excess of legal authority other than S 665(b), it may also, under the authority of S 665(b), incur obligations in advance of appropriations for material to enable the employees involved to meet the emergency successfully. In order to effectuate the legislative intent that underlies a statute, it is ordinarily inferred that a statute" carries with it all means necessary and proper to carry out properly the purposes of the law." United States v. Louisiana, 265 F. Supp. 703, 708 (E.D. La. 1966) three-judge court), aff'd, 386 U.S. 270 (1967). Accordingly, when a statute confers authorities generally, those powers and duties necessary to effectuate the statute are implied. See 2A Sutherland, Statutes and Statutory Construction (Sanded.) S 55.04 (1973). Congress has contemplated expressly, in enacting S 665(b), that emergencies will exist that will justify incurring obligations for employee compensation in advance of appropriations; it must be assumed that, when such an emergency arises, Congress would intend those persons so employed to be able to accomplish their emergency functions with success. Congress, for example, having allowed the Government to hire firefighters must surely have intended that water and firetrucks would be available to them. 14/

III

The foregoing discussion articulates the principles according to which, in my judgement, the Executive can properly identify those functions that the Government may continue upon lapses in appropriations. Should a situation again present itself as extreme as the emergency that arose on October 1, 1980, this analysis should assist in guiding planning by all departments and agencies of the Government.

As the law is now written, the nation must rely initially for the efficient operation of government on the timely and responsible functioning of the legislative process. The Constitution and the Antideficiency Act itself leave the Executive leeway to perform essential functions and make the government "workable." Any inconvenience that this system, in extreme circumstances, may bode is outweighed, in my estimation, by the salutary distribution of power that it embodies.

Respectfully,

BENJAMIN R. CIVILETTI

Attorney General

14/ Accord, 53 Comp. Gen. 71 (1973), holding that, in light of a determination by the Administrator of General Services that such expenses were "necessarily incidental to the protection of property of the United States during an extreme emergency," id. at 74, the Comptroller General would not question General Services Administration (GSA) payments for food for GSA special police who were providing round-the-clock protection for a Bureau of Indian Affairs building that had been occupied with authority.

OFFICE MANAGEMENT AND BUDGET

Washington, D.C.

APPENDIX B

Bulletin No. 80-14, Supplement No. 1 August 20, 1982

TO THE HEADS OF EXECUTIVE DEPARTMENTS AND ESTABLISHMENTS

SUBJECT: Agency Operations in the Absence of Appropriations

1. Purpose. This supplement updates OMB Bulletin No. 80-14, dated August 28, 1980, and requires the submission of contingency plans for review by OMB. The purpose of the review is to assure adequate contingency planning and Government-wide compliance with the provisions of the Antideficiency Act.

2. Background. OMB Bulletin No. 80-14 instructed agencies to develop plans for an orderly shutdown in the event of a funding hiatus. It became necessary to carry out these plans during the November 1981 hiatus. In reviewing that experience and the operational plans in effect during the period immediately preceding enactment of the March 31, 1982 Continuing Resolution, certain difficulties were observed:

-- some agencies have not fully complied with the requirements of OMB Bulletin 80-14, and do not have fully operational contingency plans;

-- disparities appear to exist between some agencies as to the definition of activities necessary to protect life and property; and

-- disparities appear to exist between some agencies as to the time necessary to complete the orderly shutdown of nonexcepted activities.

3. Actions required:

a. Amend the date that appears in section 2 to January 16, 1981.

b. Delete the last sentence of subsection 3.c.

c. Add subsection 3.d. as shown in the attachment.

David A. Stockman

Director

Attachment

Attachment

Material to be added to

OMB Bulletin No. 80-14,

Section 3

d. Reporting. The plans required in subsection c will be submitted to OMB by September 15, 1982.

The following information will be provided with the plans:

(1) Estimated time to the nearest one-half day to complete the shutdown in accordance with the plan.

(2) Number of employees expected to be on-board before implementation of the plan.

(3) Total number of employees to be retained under the plan because (a) they are engaged in military, law enforcement, or direct health care activities, or (b) their compensation is financed by other than annual appropriations.

(4) Number of employees, not otherwise exempt, to be retained to protect life and property.

Within the guidance established by the Attorney General's opinion of January 16, 1981, and this bulletin, agency heads are to make such determinations as are necessary to operate their agencies during an appropriations hiatus, and to do so pursuant to normal agency processes for the resolution of issues of law and policy. Questions that cannot be determined by an agency should be addressed to OMB. All unresolved questions relative to the construction of the Antideficiency Act will be jointly referred to the Office of Legal Counsel of the Department of Justice.

If it is estimated that more than one-half day will be needed to complete the shutdown or that the number of employees to be retained to protect life and property will exceed five percent of the number of employees on board at the beginning of the hiatus less those exempt for reasons specified in item (3) above, agencies will submit policy statements and legal opinions supporting those estimates.

EXECUTIVE OFFICE OF THE PRESENT

OFFICE OF MANAGEMENT AND BUDGET

Washington, D.C. 20503

Bulletin No. 80-14 August 28, 1980

TO THE HEADS OF EXECUTIVE DEPARTMENT AND ESTABLISHMENTS

SUBJECT: Shutdown of Agency Operations Upon Failure by the Congress to Enact Appropriations

1. Purpose and Coverage. This Bulletin provides policy guidance and instructions for actions to be taken by Executive Branch agencies when failure by the Congress to enact either regular appropriations, a continuing resolution, or needed supplementals results in interruption of fund availability. This Bulletin does not apply to specific appropriations action by the Congress to deny program funding. In the instance of partial funding interruptions, e.g., failure of the Congress to act on program supplementals, special procedures beyond those outlined in this Bulletin may be warranted. In such cases, OMB representatives responsible for the affected agency's budget estimates should be consulted.

2. Background. The Attorney General issued an opinion on April 25, 1980 that the language and legislative history of the Antideficiency Act (31 USC 665) unambiguously prohibits agency officials from

incurring obligations in the absence of appropriations. The essential elements of the Attorney General's advice are that:

a. In the absence of new appropriations, Federal officers may incur no obligations that cannot lawfully be funded from prior appropriations unless such obligations are otherwise authorized by law.

b. Under authority of the Antideficiency Act, Federal officers may incur obligations as necessary for orderly termination of an agency's functions, but no funds may be disbursed.

c. Under its enforcement responsibilities, the Department of Justice will take actions to apply the criminal provisions of the Antideficiency Act in the future when violations of the Act are alleged under such circumstances.

3. Actions required. Agencies faced with funding interruptions must take steps to forestall interruptions in operations and assure that they are in a position to limit their activities to those directly related to orderly shutdown to the agency.

a. Reallocation of funds prior to shutdown. Prior to initiation of orderly shutdown activities, agency heads will limit their operations to minimum essential activities and will reallocate to the extent permitted by law all available funds in order to forestall the fund interruption date as long as possible. Reallocation of funds will be made subject to the following requirements:

(1) Reallocation below the appropriation and fund account level will be accomplished by telephonic revision to allotments and suballotments (such revisions will be documented and immediately reflected in formal written changes to the regular allotment/suballotment documents).

(2) Agencies that have specific statutory authority to reallocate and transfer funds between appropriation and/or fund accounts will effect the transfers in accordance with current standard fiscal procedures. Such transfers generally will be effected on Standard Form (SF) 1151, "Nonexpenditure Transfer of Funds" (see OMB Circular No. a-11, section 21.2, for a description of when expenditure transfers might be required). This Bulletin does not convey new authority to transfer funds.

(3) For this purpose adjustment to amounts contained in OMB apportionments may be made without submission of a reapportionment request.

b. Orderly shutdown activities. When all available funds, including reallotted/reallocated funds, are exhausted, orderly shutdown activities must begin. Each agency head must determine the specific actions will will be taken; however, all actions must contribute to orderly shutdown of the agency and give primary consideration to protecting life and safeguarding Government property and records. Such actions should be accomplished in a way that will facilitate reactivation when funds are made available. Agency heads will notify OMB, OPM, Treasury, and GSA immediately when shutdown activities are being initiated. These central agencies will be responsible for notifying their own regional offices, except as noted in paragraph (3).

(1) Appropriations and funds. Agency heads will limit obligations incurred to those needed to maintain the minimum level of essential activities necessary to protect life and property; to process the necessary personnel actions; to process the personnel payroll for the periods prior to fund interruption; and to provide for orderly transfer of custody of property and records to the General Services Administration (GSA) and the Office of Personnel Management (OPM) for disposition.

(2) Personnel and personnel records. Necessary personnel actions will be taken to release employees in accordance with applicable law and Office of Personnel Management's regulations. Preparation of employee notices of furlough and processing of personnel and pay records in connection with furlough actions are essential shutdown activities. Agencies should plan for these functions to be performed by employees who are retained for orderly termination of agency activities, as long as those employees are available. As soon as agencies determine the date after which they will no longer be able to maintain custody of personnel records, they should notify the Office of Personnel Management to arrange for orderly transfer of custody of the personnel records to OPM and GSA, jointly, for caretaking and protection of the records. If necessary to protect the interests of individual employees during the period when all employees of the agencies are on furlough, OPM will provide access to the appropriate personnel records to retrieve information and/or process personnel actions, e.g., separation-transfer of an employee who secures employment in another agency. Guidance for planning such actions and relevant questions and answers as to employees' benefits will be provided separately by OPM.

(3) Property and nonpersonnel records. Inventories of property and records will be made to assure protection of the Government's interests and the claims of affected private entities and individuals (including vendors and beneficiaries of Federal programs). Upon determination that agency funds are no longer available, agency officials should contact the appropriate Regional Administrators, General Services Administration, for assistance in determining the disposition of agency records, real and personal property,

and outstanding requisitions, contracts, grants and related items. Detailed guidance on such matters are contained in:

-- 41 CFR 101-11.4; Dispositions of records.

-- 41 CFR 101-43 and 101-47; Disposition of personal property and real property.

-- FPMR 101-36.5, 101-37.203(c) and 101-37.307-1; Dispositions of automatic data processing, communications and telephone equipment.

-- GSA motor pool accounting and record system operations guide; Disposition of motor vehicles.

The transfer to the General Services Administration of property and records shall not be made until 30 days have elapsed from the start of shutdown activities and then only after a determination is made that the funding hiatus will continue indefinitely.

c. Planning. Agency heads should develop plans for an orderly shutdown that reflect the policy and guidance provided in this Bulletin. Such plans necessarily will be tailored to each agency's needs in recognition of the unique nature of its funding sources, missions, and authorities. While every agency should have a plan, the scope and detail of the plan should be commensurate with the likelihood that shutdown will be necessary and with the complexity of shutting down the agency.

4. Effective dates. The instructions in this Bulletin are effective immediately and remain in effect until rescinded.

5. Inquiries. Budgetary questions should be directed to the OMB representatives responsible for review of each agency's budget estimates.

Fiscal procedures questions should be directed to the Division of Government Accounts and Reports, Bureau of Government Financial Operations, Department of the Treasury, Treasury Annex #1, Washington, D. C. 20226 (Telephone: (202) 566-5844.

Agency officials may obtain additional information and technical assistance on personnel matters by contacting their agency officer at the Office of Personnel Management.

Property and nonpersonnel records disposition questions should be directed to Office of Plans, Programs, and Financial Management, General Services Administration, Washington, D. C. (Telephone: (202) 566-1807).

James T. McIntyre, Jr.

Director

UNITED STATES OF AMERICA

OFFICE OF PERSONNEL MANAGEMENT

Washington, D. C. 20415

APPENDIX C

Sep 10 1980

MEMORANDUM FOR DIRECTORS OF PERSONNEL

FROM: Jule M. Sugarman

Deputy Director

SUBJECT: Planning for Lapsed Appropriations

OMB recently issued guidance on planning for closedown of agency activities necessitated by lapses in appropriations authority (OMB Bulletin No. 80-14 dated August 29, 1980). That bulletin mentions that OPM will issue additional guidance on personnel management issues involved in such situations.

Attached is an outline of personnel management areas to be addressed in planning for lapsed appropriations contingencies and a series of questions and answers covering employee rights and benefits. Our experience in this area is limited, and the guidance provided represents our initial thinking on this subject.

For additional assistance in planning, please contact your OPM agency officer. Also, Agency Relations will be tracking your approach to this problem so that we can identify additional policy issues to be addressed and possibly share the results of your efforts with other agencies.

Attachments

GUIDANCE FOR PERSONNEL PLANNING FOR LAPSED APPROPRIATIONS

This guidance is predicated on the assumption that funding interruptions will not exceed 30 days. (Should agency heads determine that interruption of funding is likely to continue for more than 30 days, the Office of Personnel management should be consulted as to application of procedures prescribed in 5 CFR Part 351, Reduction in Force.) The first part of the Guidance identifies personnel management areas to be addressed in contingency planning. The second part provides specific information, in question and answer format, relating to employees' rights and benefits. Citations in parentheses refer to guidance contained in the U.S. Code (U.S.C), Code of Federal Regulations (CFR), and Federal Personnel Manual (FPM). Additional requirements may be contained in applicable labor-management agreements.

I. Personnel Management Areas to be Addressed in Contingency Planning

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- Determination of functions to be performed for orderly closedown.

- Determination of period of time necessary to accomplish closedown.

- Identification of essential positions for closedown activities.

- Plan to recall incumbents of essential positions who are on leave.

- Identification of employees to be released at various times during and at completion or orderly closedown.

- Explanation of the situation to employees to be retained. It is probably in their best interests to report for work if the agency has determined that their services are allowed:

- Notification, consultation, and/or negotiation with labor organizations, as appropriate (5 U.S.C. Chapter 71).

- Notification to employees to be released (5 U.S.C. 7511-7514; 5 CFR Part 752).

- Dissemination to employees of information concerning rights and benefits for furloughed employees.

- Procedures for recalling employees--or termination employees (including those on furlough) if appropriation is passed at reduced level.

- Communication system for keeping all employees fully informed.

II. Questions and Answers on Employee Rights and Benefits

Q. Upon a lapse in appropriations, may an agency's employees continue to work?

A. They may not continue to perform functions necessary to accomplish the agencies mission, but they may be asked to perform duties required to shut down the agency. However, no employee is required to work during a period for which no funds are available. An agency's acceptance of employees' services during this shut down period would not violate the prohibition on acceptance of voluntary services because it is an emergency situation. (31 U.S.C. 665) (b)) However, salary payments will not be made until funding is provided by the Congress.

Q. What personnel action is appropriate for those who do not work or who have completed work on orderly termination?

A. The agency should place its employees in a non-duty and non-pay status. This can be accomplished by the use of a furlough under adverse action procedures (5 CFR Part 752).

Q. Can employees appeal a furlough action?

A. Since a furlough of 30 days or less is an adverse action, certain employees will be entitled to appeal the action to the Merit Systems Protection Board (5 CFR part 752). Employees who are in the competitive civil service, and have completed one year of current continuous employment under an appointment other than a temporary appointment, may appeal the adverse action to the MSPB. Preference eligible in the excepted service may appeal to MSPB is they have completed one year of current continuous service in the same or similar positions. However, certain employees, including those who are serving in probationary status, do not have any adverse action appeal rights.

Employees who have appeal rights to MSPB and are covered by a collective bargaining agreement may elect to file a grievance under the negotiated grievance procedure, if applicable. (5 U.S.C. 7121 (e) (1)) Employees with neither MSPB appeal rights nor access to negotiated grievance procedures may file under an agency grievance procedure. Any employee may, of course, file a complaint with the Special Counsel if he or she believes that the action has been taken in violation of law, rule, or regulation. All employees have the right to file discrimination complaints if they feel they have been discriminated against on the basis of race, sex, color, religion, national origin, age, or handicap.

Q. What notice to employees is required for furlough?

A. Ordinarily, a minimum of 30 days' notice is required for furlough. Since it is generally assumed that Congress will provide appropriations authority on schedule, a sudden unplanned lapse in appropriations authority may create an emergency situation. Under such circumstances, the 30 day notice may be waived (5 CFR 752.404 (d) (3)).

Q. Can a furloughed employee take another job temporarily?

A. Normally, yes. Other than conflict of interest prohibitions, there is no restriction on Federal employees' taking additional jobs outside the Federal service. The lay (5 U.S.C. 5533) generally prohibits an employee from receiving pay for more than one Federal position for more than a total of 40 hours in one calendar week. However, in this case, since the employees would not be working for their "primary" employer, they would be free to take any other employment, subject to any conflict of interest prohibitions which may apply.

Q. How would furlough affect waiting periods for completion of probation and the service requirement for career tenure?

A. The employee would receive "free" credit for 22 work days toward completion of the probationary period and 30 calendar days toward completion of career tenure requirements. Any furlough time in excess of these amounts would not be counted toward completion of probation or the service requirement for career tenure. (FPM Chapter 315).

Procedural requirement

Q. If, after employees have been on furlough for 30 days, short term fundings were made available and then lapsed again, could adverse action (Part 752) procedures be used for the second furlough?

A. Yes.

Employees not covered by Part 752

Q. May employees who are not covered by Part 752 be furloughed?

A. Yes. Temporary employees and those serving probationary periods are not covered by Part 752 procedures. It is necessary only to notify them that they will be furloughed on a certain date. Excepted employees are covered under Part 752 for furlough purposes if they are preference eligible who have completed one year of current continuous service int he same or similar positions. Thus, they are entitled to full procedural protection. Excepted employees who are not preference eligible who have completed the year of service requirement may be treated as temporaries.

Q. What notice requirement and release procedures apply to Senior Executive?

A. As far as furloughs are concerned, SES members are not covered by subchapter II of Chapter 75, Title 5, U.S. Code (applying adverse action procedures to furloughs for 30 days or less). Therefore, notice requirements and release procedures for SES members are within the jurisdiction of the individual agency; and there is no appeal right.

Personnel records

Q. How shall furloughs be documented?

A. A Standard Form 50 (SF-50) or approved equivalent form shall be executed for furloughed employees using the appropriate PAC/NOA code, e.g., for a furlough of less or more than 30 days. If the agency desires, it may use the list form of notice to process the furlough actions. Instructions for preparing a list form of notice are found in Table 6 of Book V of FPM Supplement 296-31. These same procedures shall be used to process the subsequent return to duty actions.

Q. What action is required should a furloughed employee resign or find employee in another agency?

A. Under such circumstances, the processing actions necessary to effect either a resignation or a separation are described in Subtable 11 of Book V, FPM Supplement 296-31. The employee does not have to be returned to duty before the resignation or separation action is processed. The remarks section of the SF-50 or approved equivalent form for the resignation or separation should show "From furlough effective (date)."

The PAC/NOA's which will normally be used for these actions are:

317 - Resignation

320 - Separation - Transfer (if under Reg. 315.501)

321 - Separation - Appointment in (agency)*

311 - Resignation - Appointment in (agency)*

*These codes are to be used when the employee accepts an appointment in another agency other than by transfer under Regulation 315.501.

Q. Who processes personnel actions during a period of lapsed appropriations?

A. Such work should be dome by employees retained for orderly closedown.

Q. What data should be provided to the Central Personnel Data File (CPDF) when an agency is in an orderly shutdown mode?

A. Agencies need not provide data to CPDF while in an orderly shutdown mode. Agencies should contact the CPDF Systems Manager on 632-4425 once funding is received and when employees are returned to normal duties for instructions as to what data should be submitted to CPDF.

Labor-Management Relations Concerns

Q. Can an employee grieve the procedure used to issue an adverse action furlough notice under a negotiated grievance/arbitration procedure?

A. Yes, it matters covered under 5 USC 7512 (adverse actions) are not excluded from the negotiated grievance/arbitration procedure.

Q. What procedures should an agency follow for handling pending labor-management relations cases?

A. Grievances - contact each labor organization and work out an appropriate arrangement to insure that employees retain their rights while at the same time insuring that agency management will be able to respond to each grievance in a timely manner at an appropriate level within the organization after the agency returns to work.

Unfair Labor Practices - inform the FLRA Regional Director of a need for an extension of the time for filing an answer to any pending complaint(s) or any charge(s) filed during the shutdown period [5 CFR 2423.13]; if a hearing has been scheduled, contact the administrative law judge assigned to the case or the Chief Administrative Law Judge and inform him of the circumstances and the need for a postponement [5 CFR 2423.19].

Other Matters Before The FLRA - inform the Executive Director of the FLRA or the General Counsel of a need to waive any time limit; if possible, this should be dome in writing no later than 5 days before the established time limit (5 CFR 2429.23).

Q. What collective bargaining obligations does an agency have when developing plans for orderly shutdown?

A. Agencies should maintain constant and open communications with labor organization when there is any likelihood of an appropriations lapse. Agency management has the authority under 5 USC 7106(a)(2)(D) to take whatever action may be necessary to carry out the agency's mission during an emergency and may issue rules and regulations implementing a mandate of law or an outside authority if they are nondiscretionary [7117(a)(2) and r CFR 2424.11] without engaging in collective bargaining. However, agencies are required to afford unions an opportunity to bargain on the procedures which will be observed in exercising the agency's authority [7106(b)(2)] and appropriate arrangements to be made for employees adversely affected by the agencies'decisions. In those agencies where one or more unions have been granted national consultation rights [7113], the agency should follow its established procedures for those parts of the agency-wide shutdown plan effecting conditions of employment. Agencies are responsible for meeting their obligations to negotiate and/or consult with recognized labor organizations, as appropriate. All of this will have to be done in a much shorter time than normal.

Q. Should these Q & A's be shared with unions?

A. Yes, an agency should share these Q & A's with the union(s) representing its employees if a shutdown seems imminent.

BENEFITS--LEAVE, RETIREMENT, LIFE, AND HEALTH INSURANCE

Questions and answers deal with employees on nonpay, nonwork status, (furlough) and those on nonpay, work status. The latter category includes those who are retained to work during the period of lapsed appropriations, but who are not retroactively paid--which would happen if the appropriations authority were never passed or, if passed, failed to provide retroactive authority to pay salaries during the lapsed appropriations period. If employees "volunteer" to work during the lapsed appropriations period, and funding is subsequently provided, their benefits continue as during any normal working period.

LEAVE

Accruing Leave

Q. Will an employee annual leave and sick leave (a) during furlough? (b) during nonpay, work status?

A. a. An employee does not accrue annual or sick leave during each pay period he/she is in a furlough status for the full pay period. If the employee is in a pay status (paid leave or work status) during part of a pay period and in a furlough status for the remainder of the pay period at the beginning and/or end of the furlough, the employee will accrue leave on pro rata status. a table for crediting workdays on a pro rata basis can be found in FPM Supplement 990-2, Book 630, S2-3c(2).

b. An employee who is in a nonpay, work status will not accrue leave during each full pay period he/she is in a nonpay status, and will accrue leave for any partial pay period he/she is in a pay status at the beginning or end of the nonpay period, on the same basis as the employee who is in a furlough status (2a above). However, if the agency receives retroactive funding and the employee is paid retroactively for the

nonpay period, the employee will also retroactively be credited with annual and sick leave accrual for that period.

Substituting Leave

Q. Will the employee who has been furloughed be able to substitute annual leave or sick leave for all or a portion of the furlough period if the agency receives retroactive appropriations?

A. The employee who has been furloughed will not be able to substitute annual leave or sick leave for any portion of the furlough period. (38 Comp. Gen. 354; B-181087, Jun 21 1974; B-188242, 8-9-77).

Q. Will the employee who has been in a nonpay work status be granted annual or sick leave for those days he/she did not work during the period for which retroactive appropriations are authorized?

A. Annual or sick leave (LWOP) may be granted retroactively for those days an employee does not work during the period of nonpay work status upon payment of retroactive pay for that period provided the absence was requested, approved, and documented in accordance with agency policy in advance of the absence (except in emergency situations).

Use or Lose Leave

Q. Will an employee be subject to forfeiture of annual leave if the period of furlough extends into the subsequent leave year? If the period of nonpay, work status extends into the subsequent leave year?

A. It is important that any annual leave which is subject to forfeiture be scheduled in writing well in advance of the anticipated expiration of appropriations, for use at some period or periods prior to the end of the leave year.

RETIREMENT

Coverage

Q. What happens to retirement coverage and service credit of an employee who has been furloughed? Of an employee who has been in a nonpay work status for "close-out" activities?

A. Retirement coverage continues without cost to the agency or the furloughed or nonpay work status employee, providing the agency is still in existence. However, service credit for retirement purposes is granted only for time on the rolls in a nonpay status which does not exceed six months in the aggregate in a calendar year. Retirement coverage and retirement credit cease when the agency terminates. See FPM Supplement 831-1, S34, 5 USC 8332(f), 5 USC 8334; FPM Supplement 831-1,S21-3.

If full or partial retroactive appropriations are received, total employee retirement contributions for the period of furlough are withheld from retroactive pay, and coverage continues as through furlough had not occurred. Total agency contributions are due from the appropriations.

Early Retirement

Q. Does the lapse appropriations situation trigger eligibility for early retirement?

A. Not as we foresee such temporary lapses. If the agency is definitely terminated, of course, eligibility for early retirement would be triggered.

Refund of Retirement Contributions

Q. Can accumulated retirement contributions be refunded under these circumstances?

A. Only if the agency is ultimately terminated or the employee otherwise becomes eligible to receive it by resigning and having at least a 31-day break in service.

The requirement that leave must have been scheduled in advance to be considered for restoration will have been met. However, we have no precedent bases to ascertain that scheduled leave which is canceled because of the requirement to place an employee on furlough under these conditions would meet the requirement of 5 USC 6304(d 1 B) that an exigency of public business exists.

b. In the case of the employee who is continued in a nonpay, work status, it is likely that the agency head (or his delegated authority) would determine that an exigency of major importance existed and annual leave may not be used to avoid forfeiture (5 CFR 630.305), thereby meeting the requirements for restoration.

Lump Sum Leave Payment

Q. If any employee resigns during the lapsed appropriations period, how is the lump sum leave payment processed?

A. If the agency terminates, OPM can take over the necessary processing. Otherwise the lump sum payment is simply delayed until appropriations authority is passed.

LIFE INSURANCE

Q. What happens to regular and optional life insurance coverage of an employee who has been furloughed? Of an employee who has been in a non-pay work status for "close-out" activities?

A. Regular and optional life insurance coverage may be continued up to 12 months without cost to the agency or the furloughed or nonpay work status employee, providing agency is still in existence. If agency terminates, there is a 31 day extension of coverage after date of termination during which the employee may convert to a private plan.

If full retroactive appropriations are received:

Total regular and optional life insurance employee contributions for the period of furlough are withheld from retroactive pay and coverage(s) continue as through furlough had not occurred. Total agency contributions are due from the appropriations.

If partial retroactive appropriations are received:

Total regular and optional life insurance employee contributions for the period are withheld from retroactive pay and coverage(s) continue as though furlough had not occurred. Total agency contributions are due from the appropriations. If the amount of salary for a pay period is not sufficient to cover the full withholding, the balance of pay earned, after deduction for retirement or FICA tax, Federal income tax, and health benefits, must be withheld. Further information may be found in FPM Supplement 870-1, S4-2.

HEALTH BENEFITS

Q. What happens to health benefits coverage of an employee who has been furloughed under adverse action procedures for 30 days or less? Of an employee who has been in a non-pay work status for "closedown" activities?

A. Health benefits coverage may be continued up to 12 months without cost to the agency or the furloughed or non-pay work status employee, providing the agency is still in existence. If the agency terminates, there is a 31-day extension of coverage after date of termination during which employee may convert to a private plan (5 CFR 890.303(e) and FPM Supplement 890-1, S8-4).

An employee who has been granted a 31-day extension of coverage and who is confined in a hospital or other institution for care or treatment on the 31st day of the temporary extension is entitled to contribution but not beyond the 60th day after the end of the temporary extension. 5 CFR 890.401(b)

If full retroactive appropriations are received:

Total employee contributions for the furlough period are withheld from retroactive pay, and coverage continues as though furlough had not occurred. Total agency health benefit contributions are due from the appropriations.

If partial retroactive appropriations are received:

Total employee contributions for the furlough period are withheld from retroactive pay, and coverage continues as though furlough had not occurred. Total agency health benefit contributions are due from the appropriations. if the amount of salary for a pay period is not sufficient to cover the full withholding, no withholding and no agency contributions will be made for the pay period. Deductions for retirement, FICA tax, and Federal income tax have priority over health benefit withholdings. FPM Supplement 890-1,S19-2.

CREDITABLE SERVICE

Q. Will the period of furlough or nonpay, work status be creditable for all rights and benefits?

A. a. The period of furlough or nonpay, work status will be creditable for the following purposes to the extent indicated:

(1) Retirement - 6 months in the aggregate in any calendar year.

(2) Annual leave accrual rate - 6 months in the aggregate in any calendar year.

(3) Reduction in force - 6 months in the aggregate in any calendar year.

(4) Leave accumulation reduction - no reduction in leave accumulation because there is no accrual of leave during the period of furlough or nonpay, work status.

(5) Within-grade increases - for General Schedule employees, 2 weeks for advancement to steps 2, 3, and 4; 4 weeks for steps 5, 6, and 7: and 6 weeks for steps 8, 9, and 10. For Federal wage system employees see FPM Supplement 53201, S8-5.

(6) Severance pay - fully creditable for 12 months continuous service requirement of USC 5595(b); 6 months in the aggregate in any

calendar year creditable for computation of severance pay under 5 USC 5545(c).

b. In the case of an employee in a nonpay, work status, upon receipt of authority for retroactive payment of salary, the period would become fully creditable to the extent that it would have been creditable under normal working conditions.