

NOTICE TO THE ADMINISTRATORS:

SUBJECT: Policies and Procedures (P&P) 402.3, Premium Pay

Executive Summary

This P&P has been updated from the October 1997 issuance. It delineates premium pay rules and regulations applicable to REE employees. This premium pay directive addresses, overtime, compensatory time, Sunday and night pay differential, holiday pay, travel, training, and attendance at conferences. The revision has incorporated regulatory changes and has clarified a number of issues and definitions concerning compensatory time, Sunday differential, the biweekly pay limitation, holiday pay when no work is performed, and when time spent in transit is counted as hours of work. The changes have been made, based on the types of questions frequently received by the Pay and Leave staff from our customers.

ARS □ CSREES □ ERS □ NASS

Policies and Procedures

Title: Premium Pay

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Table of Contents

- 1. Introduction 2
- 2. Overtime Work Determinations 3
- 3. Compensatory Time 5
- 4. Religious Compensatory Time Off 5
- 5. Sunday Pay and Differential 6
- 6. Night Pay and Differential 6
- 7. Holiday Pay 7
- 8. Official Travel/Temporary Duty Station 9
- 9. Training 11
- 10. Conferences, Lectures, and Presentations 11
- 11. Summary of Responsibilities 12
- 12. Glossary 13

1. Introduction

When employees are required to work more time on the job than is normally required by the job, those employees must be compensated, either through additional pay or through time off. This is also sometimes true in situations when employees are asked to work, to travel, or be trained at night, on Sundays, or on holidays. While the concepts are simple enough, the rules governing their implementation are not. This Policy and Procedure (P&P) will explain those rules and resulting procedures to clarify premium pay administration for REE employees.

The management of premium pay and even the discussion of premium pay issues are difficult for two main reasons: (1) there are two sets of rules--two laws--operating in the premium pay environment, and (2) the existence of these two laws has encouraged the adoption of some rather awkward terminology, which has fostered some confusion. This was not always the case. Prior to 1974, all Federal employees were gathered under the same umbrella, Title 5 of the United States Code. In that year, however, Congress amended the Fair Labor Standards Act (FLSA), which also addressed premium pay, to include Federal employees, but the FLSA would not cover everyone. As is true of its application within the private sector, the provisions of the FLSA are largely restricted to lower graded, non-supervisory General Schedule (GS), and Federal Wage System positions.

In the REE agencies, the following types of positions are generally covered by the FLSA: clerical and technical support positions, grades GS-9 and below; professional and administrative positions, grades GS-7 and below; supervisory positions at GS-9 and below with a large percentage of non-supervisory duties (more than 20 percent of the duties are non-supervisory); Wage Grade (WG) positions; and some Wage Supervisory (WS) positions. All other GS and high level WS positions in the REE agencies remain outside the perimeter of the FLSA. Also exempt are any positions, regardless of grades or assigned duties, whose incumbents are permanently stationed outside the United States or its territories. (Employees on temporary duty outside the United States would also be exempt from the FLSA, provided they remain at the foreign location for a full workweek or more.)

The use of the term "exempt" in this context has no doubt prompted the use of "nonexempt" to describe those positions covered by the FLSA. Such terminology can often prove baffling, since a negative term (nonexempt) is used to describe a positive concept (the position is covered under FLSA), and vice versa. Although the terms "exempt" and "nonexempt" are frequently used to describe the employee in the position, these designations technically attach only to the position. The Human Resources Division (HRD) personnel specialist who establishes and classifies the position also determines its status in terms of the FLSA. The status of a given position may be learned by checking Block 35 of the most current form SF-50, Notification of Personnel Action, or Block 32 of form AD-332, Position Description Cover Sheet.

Fortunately, the gap between the two laws governing these two groups of employees is not great, but it is wide enough to require some awareness on the part of both employees and managers. While most of the following guidance applies to both exempt and nonexempt employees, at

certain junctures their two paths diverge.

2. Overtime Work Determinations

To qualify as overtime, the hours worked must: exceed 8 hours in a day or 40 hours in a week and be in addition to the normal daily (e.g., more than 9 hours on a scheduled 9 hour day) or weekly (e.g., more than 44 hours on a weekly flexible work schedule of 44 hours) work requirement; be officially ordered or approved; be performed by an employee; be documented in writing and attached to the Time and Attendance (T&A) Log. This definition applies to all employees, those who are exempt from the FLSA and those who are nonexempt.

Employees cannot order or approve their own overtime. Officials in charge of field offices or one-person stations may certify that they, in fact, worked overtime, providing the overtime had been previously approved by an individual authorized to do so.

In addition to overtime, employees on flexible schedules may also earn credit hours. **Credit hours differ from overtime/compensatory time in that credit hours are voluntary, while overtime/compensatory time is not. Employees choose and supervisors approve the working of credit hours; however, they are ordered to work overtime/compensatory time.** Supervisors may, of course, offer employees the option of working credit hours. However, employees must not be indirectly intimidated to interfere with their choice to work or not to work credit hours, or to request or not to request compensatory time off “in lieu of” payment for overtime hours.

In certain situations, employees may work overtime on a continuing basis as a fixed part of their established schedules. This regularly scheduled overtime is somewhat rare in the Federal service and is seldom, if ever, encountered in the REE agencies. The type of overtime that occurs in the REE agencies is irregular or occasional overtime. This type of overtime, which does not form any predictable pattern, cannot be made a part of the employees’ regular schedule. Irregular or occasional overtime is ordered on an ad hoc basis in response to needs that may arise.

All Federal employees, except for members of the Senior Executive Service, experts and consultants employed on a temporary basis, and employees whose basic pay in any pay period or calendar year equals or exceeds the rate of a grade GS-15, step 10, may earn overtime (either overtime pay or compensatory time off “in lieu of” overtime). Overtime is credited in quarter hour increments. Any odd minutes worked (i.e., time worked which is less than a full quarter hour) are either “rounded up” or “rounded down” to the nearest quarter hour; employees who work 8 minutes are credited with a quarter hour of overtime (i.e., the 8 minutes are rounded up to a quarter hour); employees who work 7 minutes are not credited with a quarter hour of overtime (i.e., the 7 minutes are rounded down to zero). This rule of calculation only applies to overtime.

Employees who are requested to work on a day that was not originally scheduled as a workday, or complete a normal workday schedule and depart, only to be called back to the office or other place of employment for additional duty later in the day, earn a minimum of 2 hours overtime. If the employees work more than 2 hours, the full time worked is credited; if the employees work less than 2 hours, 2 hours are credited.

Hours worked in excess of 8 hours per day are not included in computing hours of work in excess of 40 hours per week. This means that employees who have already received overtime credit for extra hours worked in a day cannot also use those hours to earn additional credits for the week. Only regular hours (this includes paid leave) not a combination of regular hours plus overtime or credit hours count toward meeting the 40 hours per week standard.

T&A Transaction Code 19 is used for overtime when an employee works more than their tour of duty for that day, which also exceeds 8 hours, but does not work over 40 hours for the week. T&A Transaction Code 21 is used when an employee's work exceeds their weekly tour of duty.

3. Compensatory Time

An agency may grant compensatory time off "in lieu of" overtime pay at the request of all employees (including prevailing rate or wage grade employees and nonexempt employees) under a flexible work schedule. Employees, whether nonexempt from the FLSA or FLSA exempt, whose rate of basic pay is equal to or less than the rate for GS-10, step 10, **may not** be required to take compensatory time off "in lieu of" overtime pay, though they may choose to do so. However, employees exempt from FLSA, and earning more than the basic pay of a GS-10, step 10, may be required to take compensatory time off "in lieu of" overtime pay for irregular or occasional overtime work under the same circumstances. The rate of basic pay for GS-10, step 10, includes an applicable locality-based comparability payment and any applicable special rate of pay.

Employees should use compensatory time off before using credit time, time off award hours, restored annual leave, or annual leave. Supervisors have the authority to disapprove requests for annual leave (and other types of non-sick leave) until compensatory time is used up. Exceptions to this policy are when employees are in a "use or lose" or "leave forfeiture" situation at the end of the leave year; and when the Family Medical Leave Act (FMLA) is invoked and annual leave is being substituted for Leave Without Pay (LWOP). Compensatory time may remain in the employee's account until the end of the leave year following the year in which it was earned, or until the employee is separated from the agency, whichever comes first. At that point, any remaining compensatory time will be paid at the overtime rate that was in effect at the time the compensatory time was earned. GS employees earning above the rate of a GS-10, step 1, earn overtime based on the overtime rate of a GS-10, step 1. Injured employees on Continuation of Pay who were regularly or irregularly scheduled for overtime work do not receive payment for that overtime/compensatory time.

When approving compensatory time (which is a form of pay) for employees who earn near the maximum bi-weekly pay limitation (GS-15, step 10, or Executive Schedule Level V, whichever is higher), supervisors should first consult with the Pay and Leave Staff to make sure that the pay does not exceed the aforementioned limit.

4. Compensatory Time Off For Religious Observances

An employee whose personal religious beliefs require their absence from work during certain

periods of time may elect to engage in religious compensatory overtime work for the time lost in meeting those religious requirements.

To the extent that such modifications in work schedules do not interfere with the efficient accomplishment of an agency's mission, the agency shall, in each instance, afford the employee the opportunity to work religious compensatory overtime. The agency shall also, in each instance, grant compensatory time off to an employee requesting such time off when the employee's religious beliefs require that the employee abstain from work.

At least 2 weeks in advance, the employee should submit to the supervisor a request specifying dates and times for the desired time off, along with a proposed make-up schedule. If the employee's proposed make-up schedule is not suitable, the supervisor and employee will try to find one that is mutually accommodating. For planning purposes, employees should inform their supervisors of time off anticipated over the course of a year. Final arrangements may be made closer to when the time off is actually used.

The employee may work religious compensatory overtime before or after the grant of compensatory time off. A grant of advanced compensatory time off should be repaid by the appropriate amount of compensatory overtime work normally within several pay periods. It **must** be made up before paid overtime/compensatory time may be earned.

Supervisors should not question the nature or validity of an employee's personal religious beliefs.

5. Sunday Pay and Differential

Sunday pay is a 25 percent differential for the entire daily tour of duty, up to 8 hours. It is for full-time employees who are scheduled in advance of the workweek to perform non-overtime work on any hour of a Sunday. Thus, it is possible for an employee to have two daily tours of duty that begin or end on the same Sunday.

Part-time, intermittent, and SES employees are not entitled to premium pay for Sunday work.

An employee may not be paid Sunday premium pay for credit hours.

Full-time employees who are regularly scheduled to work non-overtime hours on Sunday, but do not work during their Sunday tour of duty because they are on paid leave or excused absence, because they are using compensatory time off or credit hours, or because Sunday is a holiday, are **not** entitled to Sunday premium pay.

Sunday premium pay may be paid only for periods when an employee **performs** work on Sunday. For example: If an employee is using annual leave on the Sunday for which he or she is regularly scheduled to work, Sunday premium pay will not be paid for that Sunday.

6. Night Pay and Differential

Night pay is a 10 percent differential for only those quarter hours that GS employees are scheduled to work between 1800 hours (6 p.m.) and 0600 hours (6 a.m.). It is a 7.5 percent differential for the entire shift for wage grade, wage leaders, and wage supervisors, when a majority of scheduled hours fall between 1500 hours (3 p.m.) and 2400 hours (12 a.m.). It is a

10 percent differential for the entire shift for wage grade, wage leaders, and wage supervisors, when a majority of scheduled hours fall between 2300 hours (11 p.m.) and 0800 hours (8 a.m.). Work that is performed by GS and WG employees between these hours respectively, at the initiative of the employee, is not considered night pay.

A GS employee is entitled to a night pay differential for the period of paid leave only when the total amount of that leave in a pay period, including both night and day hours, is less than 8 hours.

7. Holiday Pay

Holidays include the set Federal holidays of the Fourth of July, Christmas, New Year's, and Veterans Day, as well as the movable Federal holidays such as Martin Luther King Jr.'s Birthday, President's Day, Memorial Day, Labor Day, Columbus Day, and Thanksgiving Day. "In-lieu-of" holidays include those Mondays or Fridays that are treated as holidays when the set holidays fall on a Saturday or Sunday.

Employees who are stationed overseas where U.S. Federal holidays are not observed will be granted holiday pay for those days. If work must be performed during the scheduled basic work requirement on the holiday, it will be considered holiday premium pay. If a foreign holiday occurs during the basic work requirement, and it is not possible to work because the site is closed down, (i.e., utilities shut off, or access is denied) administrative leave will be granted for the period of the basic work requirement.

Employees must be in pay status either their scheduled workday before or after the holiday to be compensated for the holiday. When the Government is closed for the entire day adjacent to the holiday due to an emergency, the closed day will not be counted as a day in pay status for those employees who were in a non-pay status for the period surrounding the holiday and day of closure. In this case, the employee would not receive compensation for the holiday or the day of closure.

All full-time employees, including those on flexible work schedules, are entitled to an "in lieu of" holiday when a holiday falls on a non-workday. Non-workdays include any regular days off on a maxiflex work schedule. In such cases, the employee's holiday is the basic workday immediately **preceding** the non-workday. A basic workday for this purpose includes a day when part of the basic work requirement for an employee under a flexible work schedule is planned or scheduled to be performed.

An exception to this is if the non-workday is Sunday or an "in lieu of" Sunday. In these cases, the **next** basic workday is the "in lieu of" holiday. An "in lieu of" Sunday is when an employee

whose basic workweek includes Sunday and must be given an alternate scheduled off day. That day will be considered as the employee's "in lieu of" Sunday for holiday purposes. For example: If an employee was scheduled to work on Saturdays and Sundays, and was scheduled off on Tuesdays and Wednesdays, then management would need to designate whether Tuesday or Wednesday would be the employee's "in lieu of" Sunday.

An employee is not entitled to another day off as an "in lieu of" holiday if a Federal office or facility is closed on a holiday because of a weather or other type of emergency, or when employees are furloughed on a holiday.

Credit hours may not be earned on a holiday unless the credit hours worked are outside the employee's regular tour of duty.

When No Work Is Performed

Full-time employees who are relieved or prevented from working on a day designated as a holiday (or an "in lieu of" holiday) by Federal statute or Executive Order are entitled to their rate of basic pay on that day for 8 hours. Those employees on flexible work schedules when **other than 8 hours** (e.g., 4, 5, 9, 10, etc. hours) are scheduled for the holiday will still receive 8 hours of paid administrative leave for the holiday. Leave may be taken, or other hours can be worked, or not worked to fulfill the employee's 80 hour biweekly work requirement.

If a holiday falls on a day during the part-time employees' tour of duty and they are relieved or prevented from working on that day, the employees **are entitled to** their rate of basic pay for the scheduled number of hours of work for that day (not to exceed 8 hours). If an "in-lieu of" holiday falls on a day during the part-time employees' tour of duty and they are relieved or prevented from working on that day, the employees **may** be compensated at their basic rate of pay by granting administrative leave for the scheduled number of hours of work for that day (not to exceed 8 hours).

When Work Is Performed

Full-time employees who perform non-overtime work on a holiday (or a day designated as the "in lieu of" holiday) are entitled to their rate of basic pay plus premium pay equal to his or her rate of basic pay for that holiday work. Holiday premium pay is limited to a maximum of 8 hours.

Note: Agencies must designate the 8 holiday hours applicable to all employees on a flexible work schedule. The 8 hours designated as holiday hours must include all applicable core hours.

Employees who work during non-overtime and non-holiday hours that are part of the employees' basic work requirement on a holiday are paid their rate of basic pay for those hours of work. For example, employees who work 10 hours on a holiday (including one hour of overtime work ordered by a supervisor) and who have a 9-hour basic work requirement on that day would earn

holiday premium pay for the 8 holiday hours designated by the agency, their rate of basic pay for 1 hour (within the basic work requirement), and 1 hour of overtime pay.

Employees assigned to duty on a holiday are entitled to a minimum of 2 hours of premium pay. Part-time employees are entitled to holiday premium pay only for work performed during their basic work requirement on a holiday (not to exceed 8 hours). If they are scheduled to work on a day designated as an “in lieu of” holiday for full-time, they are not entitled to holiday premium pay for work performed on that day.

Likewise, intermittent employees are entitled only to their rate of basic pay for hours worked on a holiday.

8. Official Travel (Transit)/Temporary Duty Station

Insofar as practical, travel during non-duty hours shall not be required of an employee. When it is essential that this be required and the employee may not be given overtime/compensatory time under existing regulations, the official concerned shall record his/her reasons for ordering travel at those hours and shall, upon request, furnish a copy of his statement to the employee concerned.

Caution: Some have felt that if an employee is a participant of the Flexible Work Schedule program, their supervisor may change their schedule to ensure that transit time originally not compensable will now fall within their new schedule and be compensable. OPM has advised that schedules must not be changed with the purpose of circumventing the intent of the law. In fact, the following statement is on the OPM Web site: “Note: An agency may not adjust an employee's normal regularly scheduled administrative workweek solely to include travel hours that would not otherwise be considered hours of work.”

It is important to distinguish time at the temporary duty station from transit time. Time at the temporary duty station is treated the same as time at the official duty station. Supervisors will determine whether employees at the temporary duty station in travel or training status will remain on a maxiflex schedule, convert to five 8-hour days for pay periods in which travel or training occurs, or require the employees to conform to operations at the temporary work site. Employees will remain on their existing schedule if the training or work to be performed at the remote site can accommodate this schedule.

When employees are in a transit status outside their regularly scheduled hours and their official duty station, a major factor in determining their hours of work is whether the employees are FLSA exempt or FLSA nonexempt. If they are FLSA exempt, there are few cases where the transit status is hours of work. One exception is where the employees are performing work that has to be done in transit, such as taking samples of plants and animals to see how well they ship.

Working on a speech en route to a conference is not interpreted as hours of work by the General Accounting Office (GAO). The other conditions such as “arduous conditions,” and “events that cannot be controlled administratively,” have been interpreted by the GAO so restrictively that for all intents and purposes FLSA exempt employees do not receive hours of work for transit status outside regularly scheduled hours.

If they are FLSA nonexempt, the following situations are considered hours of work:

- Required to drive a vehicle or perform other work while traveling;
- Required to travel as passengers on a one-day assignment;
- Required to travel as passengers on an overnight assignment away from the official duty station during hours on non-workdays that correspond to the employees' regular working hours; and
- Required to travel directly from home to a temporary duty location outside the limits of their official duty station. (The commuting time to the temporary duty station will count as hours of work, after deducting the time the employee would have spent in normal home to work travel.)

Because time spent in transit status outside regularly scheduled hours is not compensable in many cases, agencies must determine what constitutes regularly scheduled work for employees when they travel. Agencies must also determine the number of corresponding hours for FLSA nonexempt employees when they travel on a non-workday. Thus, for these occasions there must be a record kept of the actual clock hours that the employees are to work or, they must use the mathematical average of the employees' arrival times for the previous 2-week period. Those times are then used as a reference for determining the regularly scheduled clock hours.

Employees may not earn credit hours during transit status because travel in connection with Government work is not voluntary in nature. In other words, transit status itself does not meet the definition of credit hours, which are those hours within a flexible schedule which employees elect to work in order to vary the length of a workweek or a workday.

Time spent in transit status (exempt and nonexempt employees) on a holiday is hours of work (premium pay) only when it meets one or more of the following requirements:

1. The travel involves the performance of work while traveling,
2. The travel is incident to travel that involves the performance of work while traveling,
3. The travel is carried out under arduous conditions, or
4. The travel results from an event which could not be scheduled or controlled administratively, including travel by an employee to such an event and the return of such employee from such event to his or her official-duty station.

9. Training

Current law generally prohibits an exempt employee from receiving premium pay for time spent in training. However, an exception will be made if training scheduled outside the regular workday proves more cost effective. If the cost of after-hours training is less, even with premium pay factored in, than the cost of the same training held during regular work hours, an exempt employee attending the training may earn premium pay. The regulations list a number of other rare exceptions having to do with regularly scheduled overtime and night work. Contact your personnel management specialist if you think you may have an exception.

For nonexempt employees, time spent in training outside regular working hours will be considered hours of work and, therefore, would qualify as overtime if:

- the employee is **directed to participate** in the training by his or her employing agency **and** the purpose of the training is **to improve the employee's performance** of the duties and responsibilities of his or her current position.
- **directed to participate** means that the training is required by the agency and the employee's performance or continued retention in his or her current position will be adversely affected by non-enrollment in such training.
- training "**to improve the employees' performance**" of his or her current position is distinguished from upward mobility training or developmental training to provide an employee the knowledge or skills needed for a subsequent position in the same career field.

10. Conferences, Lectures, and Presentations

Time that nonexempt employees spend attending a lecture, presentation, meeting, or conference outside the employees' regular working hours will be considered hours of work if:

- the agency directs the employee to attend the event, or
- while attending the event, the employee performs work that will benefit the agency.

For exempt employees, time spent outside the employees' regular working hours at professional society meetings delivering papers, making presentations, or further advancing the programs of the agency would be considered hours of work when it is evaluated through the performance appraisal process. If the employees attend a specific event of the professional society, it would rest with the supervisors as to whether they would count their attendance as hours of work, as credit hours, or as donated time.

11. Summary of Responsibilities

Agency Heads

ARS

- Has delegated the approval/disapproval authority to each successive supervisory level.

CSREES

- Has delegated the approval/disapproval authority to the Deputy Administrators and Unit Directors.

ERS/NASS

- Has delegated the approval/disapproval authority to Division Directors and Branch Chiefs.

Next Level of Authority

ARS (Division/Area Directors)

- In writing, redelegates or does not redelegate the authority to the next supervisory level.
- Determines if successive supervisory levels have redelegation authority.

CSREES (Deputy Administrators/Unit Directors)

- Exercise the delegated authority by approving or disapproving overtime/compensatory time.

ERS/NASS (Division Directors)

- Exercise the delegated authority by approving or disapproving overtime/compensatory time.

ERS/NASS (Division Director/Branch Chiefs)

- Division Directors have delegated authority to approve or order overtime, compensatory time and Holiday premium pay.
- Branch Chiefs have delegated authority to approve credit hours.

REE Supervisors

- Plan and organize work assignments to minimize the need for premium pay, including overtime and compensatory time.
- Order overtime work as necessary and acknowledge employees' written requests to substitute compensatory time off "in lieu of" overtime pay.

In addition, **ARS (Supervisors)**

- In writing, redelegates or does not redelegate the authority to the next supervisory level.
- Determines if successive supervisory levels have redelegation authority.

12. Glossary

Administrative Workweek. A period of 7 consecutive calendar days set by the Secretary of Agriculture as beginning on Sunday at 0001 hours (12:01 a.m.) and ending the following Saturday at midnight (12 p.m.).

Basic Pay. The rate of pay fixed by law for employees' positions, including locality pay, but excluding any additional pay of any kind.

Basic Workweek. The 40-hour workweek established for full-time employees and the officially prescribed days and hours within the administrative workweek which do not extend over more than 6 of any 7 consecutive days.

Compensatory Time Off. At the request of employees, time off granted them during regular hours of work "in lieu of" overtime pay for overtime work. Or, time off instead of overtime pay given by management to exempt employees whose pay is above GS-10, step 10.

Credit Hours. Time off earned by an employee on a flexible work schedule in recompense for voluntarily working beyond the basic scheduled requirement. Credit hours differ from compensatory time off in that they are earned at the initiative of the employee, and not directed by management.

Exempt. Label applied to positions (and, by extension, to employees in those positions) that are not covered by the provisions of the Fair Labor Standards Act.

Fair Labor Standards Act (FLSA). A law designed to guarantee fair treatment for employees in junior level positions within the work force. The law establishes a minimum wage and sets forth provisions for the handling of overtime.

"In lieu of". In place of.

Irregular or Occasional Overtime. Overtime work that is not part of employees' regularly scheduled basic workweek.

Nonexempt. Label applied to positions (and, by extension, to employees in those positions) that are covered by the provisions of the Fair Labor Standards Act.

Non-paid Absence. Employee absence that earns no compensation (e.g., leave without pay, absence without leave, suspension, or furlough).

Official Duty Station. The corporate limits of the city or town in which an employee is permanently assigned, (for Washington, D.C. based employees, it is the Washington Metropolitan Area) or if not within an incorporated entity, a 50-mile radius.

Overtime Pay. Additional pay authorized for overtime work.

Paid Absence. Employees' absence during which normal pay and benefits are earned (e.g., annual leave, sick leave, legal holidays, administrative leave, etc.).

Premium Pay. Includes overtime, compensatory time, Sunday and night pay, holiday pay, and various types of differentials.

Regularly Scheduled Overtime. Overtime work that is part of employees' regularly scheduled administrative workweek.

Title 5, United States Code. The basic law addressing issues related to Government organization and employees.

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Administrative and Financial Management