

# Federal Workers' Compensation Conference



Return to Work



under the

Federal Employees' Compensation Act

~A Comprehensive Perspective~

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## Overview

- ❑ Statute/Regulations
- ❑ Roles and Responsibilities
  - Injured Worker
  - Employing Agency (EA)
  - OWCP
- ❑ RTW- EA Perspective
- ❑ The Job Offer
- ❑ Suitability Determination & Next Step
- ❑ Refusal of Job Offer
- ❑ Procedures – RTW & LWECs.

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## Federal Employees' Compensation Act 5 USC § 8106(c)

- ❑ A partially disabled employee who –
  - (1) refuses to seek suitable work; or
  - (2) refuses or neglects to work after suitable work is offered to, procured by, or secured for him; is not entitled to compensation.
- ❑ ECAB has said that 5 USC § 8106(c) is a penalty provision to be narrowly construed.

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## Code of Federal Regulations

- ❑ An injured employee who cannot return to the position held at the time of injury (or earn equivalent wages) due to the work-related injury, but who is not *totally* disabled for all gainful employment, is considered to be *partially* disabled. (20 CFR § 10.402)
- ❑ An employer may offer suitable employment to a partially disabled employee. (20 CFR § 10.507)
- ❑ OWCP may offer vocation rehabilitation services to the employee. (20 CFR §10.518)
  - This may result in placement in new position in or out of Federal service and/or a reduction in WC benefits.

*GOAL: RETURN THE EMPLOYEE TO WORK IN A JOB HE OR SHE CAN DO, PREFERABLY WITH THE PREVIOUS EMPLOYER.*

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## Roles and Responsibilities

### Injured Worker:

- ❑ To seek or accept suitable employment. (20 CFR § 10.515)
- ❑ To resume regular Federal employment if capable, even while in recovery.
- ❑ To provide physician with info on any available light duty **and** accept temporary light duty assignments within restrictions under 20 CFR § 10.509.
- ❑ To advise employing agency of limitations imposed by attending physician.
- ❑ To report efforts to obtain suitable employment, if requested by OWCP or the agency. **AND EARNING!**

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## Roles and Responsibilities

### Employer:

- ❑ Assist the employee in return to work.
  - Advise employee in writing of their obligation to return to work.
- ❑ Monitor the employee's medical progress and duty status.
  - Correspondence with treating physician must only be in writing. (20 CFR § 10.506)
  - Form CA-17 "Duty Status Report" usually sufficient for this purpose.
- ❑ Place employee in former or equivalent position if fully recovered within one year.
- ❑ Locate suitable work within commuting area or confirm none is available.
  - Commuting area is 50 miles or less from the employee's home or previous duty station. (20 CFR 10.508)

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## Employer Roles and Responsibilities continued

- ❑ If alternative positions are available for a partially disabled employee, advise the employee in writing of specific duties and physical demands.
- ❑ Make a written job offer for work employee is actually capable of performing.
  - Work within medical restrictions that the employee is vocationally qualified to perform.
  - Job offer can be by phone but **MUST** be followed up with written offer within 2 business days. 20 CFR 10.507(c)
  - Must provide OWCP with copy of the job offer when sent to the employee.
- ❑ Where no alternative position available, advise injured worker of accommodations agency can make to his/her regular job.

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## OWCP Roles and Responsibilities

- ❑ OWCP's goal is to return each disabled employee to suitable work as soon as he or she is medically able. (20 CFR § 10.500)
- ❑ Develop evidence showing temporary or total disability and/or return to full duty.
- ❑ Review job offer and determine suitability if job offer declined
- ❑ Provide notice in accordance with DOL regulations and ECAB case law.
- ❑ Provide appeal rights if OWCP terminates wage loss/schedule benefits.

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## Return to Work- EA Perspective

### Change Your Mindset

- ❑ It is not what an injured employee cannot do after a work related injury or illness, it is what they can do.
- ❑ Every employee adds value to your organization. They were hired for their unique skill set and contribution to the agency's core mission.
- ❑ Injured employees are not totally disabled from all work unless the medical evidence supports total disability.

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## Return to Work- EA Perspective

- ❑ Each agency should have a plan to return its injured workers to some form of suitable employment.
  - Develop a toolkit providing supervisors with step by step instructions on how to return employees to suitable employment.
  - Conduct mandatory RTW training for supervisors each year.
- ❑ Use ECOMP Agency Reviewer Imaging (ARi) to view the claim file for case management and return to work activities.
  - Provides authorized users with a look into the OWCP case file.

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## Return to Work- EA Perspective

- ❑ Supervisors should be active participants in the return to work effort starting on the **first day** of disability.
  - Expect a call from the COP nurse (traumatic injury only) if temporary total disability starts during the COP period.
  - If not, remain engaged with the employee, the treating physician (CA-17, OWCP-5c) and OWCP claims examiner.

The longer injured workers are out of work, the less likely they are to return.



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## Return to Work- EA Perspective

### Supervisor Actions

- ❑ Make good faith effort to ensure job offer is suitable.
- ❑ An injured or ill employee is still your employee and the supervisor bears responsibility for employee welfare and their contribution to the agency's mission.



- ❑ The agency is billed by OWCP for all expenses paid out on workers' compensation claims as long as residuals of accepted condition exists. True whether employee remains with the agency or not.

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## Return to Work- EA Perspective

Benefits of a Suitable Job Offer and Successful Return to Work

- ❑ The injured employee retains status as a Federal employee.
- ❑ The employing agency does not expend the expense or time of separating a current employee and hiring/training a new employee.
- ❑ The employing agency does not have to bear the costs of additional vocational rehabilitation and/or possible loss of wage-earning capacity expenses.

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## Return to Work- EA Perspective

Workers' Compensation vs Labor Management Relations

- ❑ Employee fails to perform after job offer is accepted
  - ✓ Not a reason for mgt. to withdraw job offer.
  - ✓ Not a reason for employee to stop working after job offer accepted based on restrictions unless new injury or recurrence.
- ❑ Once the job offer is accepted, employee performance is handled the same way as any other performance related issue.
  - ✓ Document in performance deficiencies in writing.
  - ✓ Employ progressive disciplinary measures.

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## The Job Offer

All Medical Conditions Must Be Considered...

If medical evidence in file document either a preexisting medical condition OR a condition which has arisen since the compensable injury, and these conditions disable the claimant from the offered job, the job will be considered unsuitable (even if the preexisting/ subsequently-acquired condition is not work-related).

**In nut shell...**

If any medical condition makes it impossible for the employee to do the job offered, then the rejected job offer will be deemed unsuitable by OWCP.

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## The Job Offer

- ❑ Employer must determine what duties are available based on the employee's medical restrictions.
  - ✓ Medical
- ❑ Employer may modify an existing job to fit the employee's medical restrictions.
  - ✓ Medical
- ❑ ECAB has said that whether a job offer is suitable generally turns on the medical evidence.
  - ✓ Medical

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## The Job Offer

- ❑ The employer should offer suitable employment in the location where the employee currently resides. If this is not practical, the employer may offer suitable employment at the employee's former duty station or other location. Lack of work in commuting area must be documented in the file!
- ❑ *L.D., 2006ER 10502-816* (April 9, 2013)(finding OWCP improperly determined a job suitable 140 miles away without making determination regarding local availability.
- ❑ *D.C. Docket No. 17-582* (September 6, 2017) Reversing because the job was 100 miles from residence and OWCP did not determined whether employment was possible at residence.
- ❑ Relocation expenses if >50 miles.



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## The Job Offer

The job offer must be in writing and include the following:

- ❑ (a) A description of the duties to be performed;
- ❑ (b) The specific physical requirements of the position and any special demands of the workload or unusual working conditions;
- ❑ (c) The organizational and geographical location of the job;
- ❑ (d) The date on which the job will first be available;
- ❑ (e) The claimant's work schedule (including telework);
- ❑ (f) Pay rate (salary) information; and
- ❑ (g) The date by which a response to the job offer is required.
- ❑ A copy of the job offer must be sent to OWCP when it is sent to the employee. 20 CFR 10.507.



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## Employer's Responsibilities under the Rehabilitation Act

- ❑ An employer bears certain responsibilities under Section 501 of the Rehabilitation Act of 1973.
- ❑ The responsibility to reasonably accommodate an employee lies with the employer.
- ❑ An employer should check with the agency HR office or with agency counsel to determine the agency's responsibilities for "reasonable" accommodation.
- ❑ The mere fact that a job offer is being made within the FECA context does **NOT** excuse the agency's responsibilities in this area nor does the responsibility for reasonable accommodation shift to OWCP.

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## Suitability Determinations

- ❑ If the employee declines the job offer, OWCP will review the job offer and the employee's medical restrictions and issue a decision as to whether the offer is suitable.
- ❑ In determining what constitutes "suitable work" OWCP considers:
  - ✓ All of the employee's current physical and mental limitations
  - ✓ Employee's commuting area
  - ✓ Employee's qualifications to perform such work, and
  - ✓ Other relevant factors such as the physical ability to commute to the offered position.

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## Suitability Determinations

### Job Offer: OWCP's Two Notices

- ❑ **30 Days:** The employee has 30 days to accept the offer or present any reasons to counter OWCP's finding of suitability.
- ❑ **15 Days:** If OWCP finds the employee's reasons unacceptable and the job offer still suitable, OWCP must give the employee 15 days to accept the offer.  
(See 20 CFR 10.516; *Maggie Moore* case.)
- ❑ OWCP **must** tell the employee why the reasons are unacceptable and give the 15 days to accept the offer. See *R.M.*, ECAB Docket No. 14-1378 (Feb. 5, 2015)(where appellant submitted medical evidence, OWCP was required to notify appellant that the medical evidence was insufficient).

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## Suitability Determinations

- ❑ An employee who refuses or neglects to work after suitable work has been offered or secured for him has the burden to show that this refusal or failure to work was reasonable or justified.
- ❑ The employee may submit a medical report from his physician explaining why he is physically unable to perform the offered job.



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## Reasons for Refusal

- ❑ The offered position was withdrawn.
- ❑ The claimant found other work which fairly and reasonably represents their earning capacity (in which case compensation would be adjusted or terminated based on actual earnings).
- ❑ The medical evidence establishes that the claimant's condition has worsened since the beginning of the reemployment effort such that the claimant is now disabled for the job in question.

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## Reasons for Refusal

### Unacceptable Reasons

- ❑ The claimant's preference for the area in which he currently resides.
- ❑ Personal dislike of the position offered or the work hours scheduled.
- ❑ Lack of potential for promotion.
- ❑ Lack of job security.
- ❑ Retirement.
- ❑ Previously-issued rating for LWEC based on a constructed position where the claimant is not already working at a job which fairly and reasonably represents his WEC.

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## Reasons for Refusal

### Job Offer: Referee Examination



- ❑ If the employee submits rationalized medical evidence that he cannot perform the job, OWCP may perform additional medical development and/or find a conflict in medical evidence exists.
- ❑ OWCP then refers employee to a third impartial referee physician to resolve the conflict.
- ❑ The results of the referee examination will be given “special weight” in determining the suitability of the offer.

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## Reasons for Refusal

### Suitable Work Penalty



- ❑ An employee who refuses to seek suitable work, or refuses to or neglects to work after suitable work is offered to or arranged for him, is not entitled to compensation benefits.
- ❑ If claimant refuses job, only OWCP may make a suitability determination that can result in termination of compensation benefits.
- ❑ The employee remains entitled to medical benefits only.
- ❑ Penalty also bars a schedule award for period after termination based on refusal of suitable employment.

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## Reasons for Refusal

### Terminating Benefits

- ❑ After OWCP makes an offer of suitable employment, and OWCP determines that the evidence the employee submits is not an acceptable reason to refuse the employment, the employee is given another **15 day** opportunity to accept the job.
- ❑ If the offer is not accepted, the employee receives a formal decision terminating all benefits except medical benefits.

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## Appealing OWCP's Decision

- ❑ OWCP's formal decision terminating benefits is accompanied by an explanation of the employee's rights to further administrative review.
  
- ❑ Employee may appeal the termination by:
  - 1.) Requesting reconsideration before the OWCP district office based on new evidence or legal arguments OR
  - 2.) Hearing (generally telephonic) or review of the written record before an OWCP hearing representative OR
  - 3.) Appeal to the Employees' Compensation Appeals Board (ECAB).

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## OWCP Procedure Manual, 2-0814

### Job offers and Return to Work

- ❑ Procedure Manual states that while ideally a job offer should be made for the number of hours for which a claimant has been released to work, other alternatives are acceptable and found suitable.
- ❑ The EA may offer a job for fewer hours than the claimant was actually released to work, and as long as the job offer is for at least half of the total hours for which the claimant has been released to work, the job offer can be found suitable.
- ❑ A job offer of less than 2 hours per day & less than 20 hours per pay period will **always** be unsuitable for purposes of an §8106(c) sanction.
- ❑ If the EA cannot accommodate the full number of hours for which the claimant has been released to work, the EA must provide written verification that it is unable to provide work for the full number of hours for which the claimant has been released to work. If this written verification is on file, a position with less than that number of hours can be found suitable.

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## Temporary Assignments

20 C.F.R. §10.500 provides

- (a) Benefits are available only while the effects of a work-related condition continue. *Compensation for wage loss due to disability is available only for any periods during which an employee's work-related medical condition prevents him or her from earning the wages earned before the work-related injury.* For example, an employee is not entitled to compensation for any wage-loss claimed on a CA-7 to the extent that evidence contemporaneous with the period claimed on a CA-7 establishes that an employee had medical work restrictions in place; that light duty within those work restrictions was available; and that the employee was previously notified in writing that such duty was available. Similarly, an employee receiving continuing periodic payments for disability was not prevented from earning the wages earned before the work-related injury if the evidence establishes that the employing agency had offered, in accordance with OWCP procedures, a temporary light duty assignment within the employee's work restrictions. **(The penalty provision of 5 U.S.C. §8106(c)(2) will not be imposed on such assignments under this paragraph.)** [Emphasis added]

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## Temporary Assignments (cont.)

- ❑ §10.500 explains the different actions required when such a temporary light duty assignment is offered to a claimant who is on the periodic roll versus a claimant who is not, and describes an offer of a temporary, light-duty assignment to be made to a claimant on the periodic roll.
- ❑ When a temporary light duty assignment ends or the work is no longer available, the claimant should submit Form CA-2a through the EA, and that the claimant is entitled to be placed back on the periodic roll (PR) immediately if the medical evidence supports disabling employment-related residuals. Resuming PR wage-loss compensation payment should not be unnecessarily delayed. *If the agency can offer only temporary light duty to an employee who was permanent at the time of injury, the EA must confirm no suitable permanent positions available.*
- ❑ G.C. Docket No. 17-140 (issued April 13, 2017) As appellant did not accept a temporary light-duty assignment offered by the employing establishment that was within her physical capabilities, OWCP properly adjusted her compensation under section 10.500(a).

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## 20 C.F.R. 10.500 caselaw

- *J.V.*, Docket No. 17-1268 (March 23, 2018) Where the employing agency offered him a temporary modified assignment as a sales retention team member and the offer indicated that shuttle bus transportation was furnished from the parking lot to and accessible parking was available adjacent to the parking lot bus stop, ECAB found that the OWCP met its burden of proof to terminate the claimant's compensation as the medical evidence showed that the claimant could perform the temporary limited-duty assignment. OWCP complied with its procedural requirements by providing notice of the assignment and opportunity to accept the assignment or provide reasons for his refusal, and notifying him that his wage-loss compensation would be reduced or terminated if he failed to submit sufficient evidence showing such reduction was not justified.

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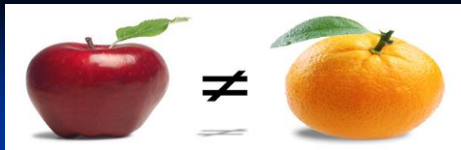
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- *A.M.*, Docket No. 16-0962 (December 8, 2017) Where appellant was not afforded any formal notice of a termination under section 8106(c) until she received the March 8, 2016 termination decision, OWCP may not impose the penalty provision of section 8106(c) to a job assignment found appropriate under section 10.500(a).

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## ECAB Case Law—Relocation

- ❑ *L.D.*, Docket No. 12-0816 (April 9, 2013). OWCP erred in terminating compensation benefits without positive evidence showing job offer in the location where the employee currently resided was not possible or practical—ECAB reversed an 8106 suitability determination on a job offer 70 miles away.
- ❑ *W.D* Docket No. 15-1297, (Aug. 23, 2016) If the job offer is for a site outside of the claimant's residential area, the employing establishment must document that it first searched for suitable employment in the claimant's current geographic area. The offered position was not suitable, as the employing establishment did not conduct the required search in appellant's current commuting area. It searched for an entirely different job. OWCP thus failed to meet its burden to justify imposing the penalty under 5 U.S.C. § 8106(c)(2).

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## ECAB Cases – Maggie Moore

- ❑ *C.C.* Docket No. 15-1778 (Aug. 16, 2016) While OWCP properly provided the initial 30 day notice, OWCP failed to sufficiently discuss or analyze the new medical evidence and arguments. OWCP's decision erroneously stated appellant did not respond to OWCP's 30-day notice. OWCP improperly terminated her eligibility for wage-loss and schedule award compensation under 5 U.S.C. § 8106(c)(2).
- *S.B.*, Docket No. 17-1797 (April 11, 2018) OWCP terminated appellant's entitlement to wage-loss and schedule award compensation on July 22, 2017 without issuing a 15-day letter giving her the opportunity to accept the offered position without penalty. As she submitted additional evidence within the 30-day period afforded by OWCP for responding to the suitability determination, appellant was entitled to have this evidence evaluated to determine whether or not she had provided acceptable reasons for refusing the offer of suitable work.

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## ECAB Case Law – All Impairments

- *J.R.* Docket No. 15-0045 (Sept. 22, 2016) OWCP did not meet its burden of proof to show that the modified clerk position offered by the employing establishment was suitable and therefore its termination of appellant's compensation for refusing such employment was improper. OWCP must consider preexisting and subsequently acquired medical conditions. OWCP did not adequately consider whether appellant's total medical condition negatively affected her ability to work the offered position. ECAB has held that **all** impairments, whether work related or not, must be considered in assessing the suitability of an offered position.
- *D.H.*, Docket No. 17-1014 (October 3, 2017) **Where** record included evidence that appellant had a heart attack in 2012 and diabetes mellitus with peripheral neuropathy, OWCP must consider all of appellant's preexisting, work related, and subsequently acquired conditions in determining suitability. As a penalty provision, section 8106(c)(2) of FECA must be narrowly construed.

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## Suitable Work and Retirement

- *R.F.*, Docket No. 10-1020 (January 13, 2011) ECAB affirmed termination--under OWCP procedures, retirement is not an acceptable reason for refusing an offer of suitable work. Appellant's contention that the employing establishment withdrew the job offer was not supported by the record. Job was open and available-with no evidence supporting assertion that the employer "tricked" her into returning to work.

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## §8106 termination reversed on stale medical evidence

- *M.W.*, Docket No. 17-1205 (April 26, 2018) November 14, 2014 report found "stale" with regard to the March 8, 2016 modified job offer. Noting the importance of medical evidence being contemporaneous with a job offer so a claimant is medically capable of returning to work (and where the exam occurred in October 2014 15 months prior to employment offer and over 18 months prior to termination and doctor's more recent August 2015 report merely reviewed a November 17, 2014 FCE report and the doctor did not reexamine claimant), ECAB found the medical evaluation relied upon by OWCP to find the position suitable was **not reasonably current** and therefore OWCP had not met its burden of proof to terminate appellant's compensation for refusing suitable work.

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## Commuting and §8106

- *R.L.*, Docket No. 16-1275 (September 27, 2017) ECAB affirmed suitable work termination. While claimant alleges "inability to drive" OWCP properly considered that claimant could use public transportation. Distinguished *C.W.* where ECAB reversed—in that case claimant was unable to drive due to narcotic medications and OWCP failed to address whether claimant could commute to work by other means.

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## Abandoning Suitable Work

- *D.S.*, Docket No. 16-1593, (Dec. 21, 2016) ECAB finds that the 2013 mail processing clerk job offer accorded with existing medical restrictions and was medically suitable--no evidence that the job offer was otherwise vocationally unsuitable. Appellant indicated his work stoppage was because he chose OPM retirement, not a valid reason for leaving suitable work. If there was medical evidence that he could no longer perform the position, appellant could establish that the work stoppage was valid. As the medical evidence did not support this, ECAB found OWCP properly terminated appellant's compensation pursuant to 5 U.S.C. § 8106(c)(2). The position that appellant performed from April 20 to May 29, 2013 was suitable work, and he did not provide valid reasons for the work stoppage.

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## FECA References and Guidance

- 5 USC § 8101 et seq.
- 20 CFR Part 10 FECA Regulations
- DOL Website: OWCP District Office addresses and telephone contacts
- Decisions of the ECAB (Case law on DOL Website and searchable)
- Program Procedures --Federal (FECA) Procedure Manual, FECA Bulletins & Circulars
- FYI: No judicial review of FECA determinations 5 USC 8128 (b)

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