



**Comptroller General  
of the United States**

Washington, D.C. 20548

B-219740.3

February 23, 1989

The Honorable David Pryor  
Chairman, Subcommittee on Federal Services,  
Post Office, and Civil Service  
Committee on Governmental Affairs  
United States Senate

Dear Mr. Chairman:

This is in response to your recent inquiry as to the legality of the determination by the Office of Personnel Management (OPM) to extend coverage under the Federal Employees Health Benefits Program (FEHBP) to certain temporary Schedule C employees.

By Interagency Advisory Group memorandum dated February 1, 1989, OPM determined to provide FEHBP coverage for individuals occupying "Identical Temporary Schedule C" (ITC) and "New Temporary Schedule C" (NTC) positions. Temporary appointments to these positions, as authorized by 5 C.F.R. § 213.3302 (1988), "may be made for 120 days, with one additional extension of 120 days." According to OPM, these ITC and NTC positions are used during the transition between Presidential Administrations and are filled by individuals who will be appointed to permanent positions in the new Administration. For the reasons stated hereafter, we conclude that OPM's determination is inconsistent with its current FEHBP regulations.

The definition of "employee" in the FEHBP statute, 5 U.S.C. § 8901(1) (1982), does not include--

"(iv) an employee excluded by regulation of the Office of Personnel Management under section 8913(b) of this title . . . ."

Section 8913(b) of title 5 provides OPM with discretionary authority to prescribe regulations necessary to carry out the FEHBP, including the authority to prescribe the conditions under which an employee is eligible to enroll in an approved health insurance benefits plan and the authority to exclude an employee on the basis of the nature and type of employment. Under this authority, OPM has issued

regulations which exclude from FEHBP coverage (among other categories of exclusions) employees serving under appointments of 1 year or less.

Thus, 5 C.F.R. § 890.102 (1988) provides, in part:

"(c) The following employees are not eligible:

"(1) An employee serving under an appointment limited to 1 year or less, except an acting postmaster, and a Presidential appointee appointed to fill an unexpired term."

Section 890.102(e) of the regulations provides:

"The Office of Personnel Management makes the final determination of the applicability of this section to specific employees or groups of employees."

In response to our request for comments, the OPM General Counsel, by letter dated February 22, 1989, argues that the ITC and NTC employees are distinguishable from other temporary employees since they are appointed with the expectation that they will soon receive permanent Schedule C appointments and since they may be converted to permanent Schedule C positions without first being listed on an appropriate register. Based on that distinction, the OPM General Counsel contends that OPM properly exercised its discretionary authority in 5 C.F.R. § 890.102(e) to extend FEHBP coverage to these ITC and NTC employees.

We recognize that OPM has the regulatory authority to include and exclude certain classes of employees for purposes of FEHBP coverage. However, we believe that OPM acted in a manner inconsistent with its own regulations by allowing the ITC and NTC temporary employees health insurance coverage since the applicable regulation, 5 C.F.R. § 890.102(c)(1), expressly and unequivocally excludes employees serving under an appointment of 1 year or less, with two specific exceptions not applicable here. The exclusion under 5 C.F.R. § 890.102(c)(1) of temporary employees serving under appointments of 1 year or less applies equally to all such appointments, including ITC and NTC appointments.<sup>1/</sup>

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<sup>1/</sup> Only employees who are not members of an excluded class have a right to health insurance benefits. Anderson v. United States, 5 Cl. Ct. 573, 580 (1984), aff'd, 764 F.2d 849 (Fed. Cir. 1985).

We also recognize that OPM has reserved authority under 5 C.F.R. § 890.102(e) to make final determinations concerning the applicability of section 890.102. However, while this authority provides OPM with discretion to interpret the regulation, it cannot be used to waive or ignore the plain terms of the regulation.

We therefore conclude that the current provisions of its statutory regulations do not support OPM's determination to grant ITC and NTC employees health insurance benefits coverage.

Sincerely yours,

*Wilton J. Auster*  
for Comptroller General  
of the United States