COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON D.C. 20548

June 2, 1986

B-222334

The Honorable Patricia Schroeder
Chairwoman, Subcommittee on
Civil Service
Committee on Post Office and
Civil Service
House of Representatives

Dear Madam Chairwoman:

This is in response to your letter dated March 14, 1986, requesting our investigation and report concerning arrangements between the Tennessee Valley Authority (TVA) and retired Admiral Steven White, who is serving as Manager of the TVA Office of Nuclear Power. Your letter asked 13 questions concerning this matter and payments to Mr. Norman Zigrossi as the Inspector General of TVA. We have set forth hereafter 6 of the 13 questions which are essentially legal, a summary of the TVA response to each question, and our analysis. We have provided copies of the two TVA reports on the questions to your staff. To the extent that you believe additional audit work is needed on the remaining seven questions, we will be glad to discuss the matter further with your staff.

Our opinion on the 6 legal questions is advisory only since, in accordance with the Tennessee Valley Authority Act of 1933, as amended, 16 U.S.C. § 831h, the TVA has final settlement authority over all claims and expenditures. However, consistent with our audit responsibilities under the Government Corporation Control Act, 31 U.S.C. §§ 9101-9109, and 16 U.S.C. § 831h(b) we are obliged to report to the Congress financial transactions which we believe were made without authority of law.

By way of background, we note that in January 1986 the TVA entered into certain contractual arrangements for the services of Mr. Steven A. White to fill the position of Manager of Nuclear Power. The services of Mr. White and up to 12 additional personnel are provided through a contract

with Stone and Webster Engineering Corporation (Stone & Webster), and TVA has agreed to pay Stone & Webster $29,600 per month ($355,200 per year) for Mr. White's services. Further, as an incentive to Mr. Norman Zigrossi to accept the position of TVA Inspector General, TVA made certain management incentive payments and additional retirement payments to Mr. Zigrossi. Your legal questions concerning these matters, TVA's responses, and our analyses are set forth below.

I.

Question: It appears that one reason Mr. White wanted to be hired by contract was to avoid the pay ceiling (currently $72,300) on TVA employees. Can the pay ceiling be legally avoided by hiring someone by contract to perform the same functions as if he were a TVA employee? If so, is new legislation needed to plug this loophole? Is the amount that Mr. White is being paid under his contract with TVA in line with what other individuals in similar positions are being paid?

TVA Response: The TVA report explains in some detail its position that Mr. White is not a "regular employee" of TVA and, therefore, is not subject to the statutory limitation on the salaries of TVA employees. See 16 U.S.C. § 831b (1982), which provides that the salary of a TVA employee may not exceed that received by a member of the TVA Board of Directors, which is Level IV of the Executive Schedule, currently $72,300. See 5 U.S.C. § 5315 (1982).

The TVA report first cites the difficulties TVA has faced in retaining and recruiting managers and key personnel for its electric power facilities, particularly the nuclear generating facilities. The report next contends that TVA has broad statutory authority to enter into contracts deemed necessary by the TVA Board of Directors, analogous to the broad power "customarily conferred on private corporations."

The TVA report continues by stating that our Office has recognized the authority of TVA to hire "consultants" at rates in excess of the statutory salary limitations. The report also notes that during the 1930's, TVA hired Mr. John Lord O'Brian, a prominent constitutional lawyer, to assist the TVA legal staff in two significant cases.

TVA states that payments received by Mr. O'Brian exceeded the statutory limits then applicable to members of the TVA Board and that these payments were noted in prior GAO reports and were "expressly approved" by the Joint Congressional Committee investigating TVA.

Finally, the TVA report states that the prevailing rates of compensation for executives in positions comparable to TVA's Manager of Nuclear Power greatly exceed the cap on salaries of regular TVA employees, and it is "almost inevitable and generally recognized" that services obtained by contract for a limited period will cost more per year than services obtained under a long-term contract or through an employment relationship.

GAO Opinion: At the outset we note that TVA is a wholly owned Government corporation as defined in 31 U.S.C. § 9101(3)(M) (1982), and TVA has specific statutory authorization to appoint, fix the compensation, and define the duties of its employees without regard to the Federal civil service laws. However, the courts have recognized that employees of the TVA, a corporate agency and instrumentality of the United States, are employees of the United States. See Posey v. Tennessee Valley Authority, 93 F.2d 726 (5th Cir. 1937); Tennessee Valley Authority v. Kinzer, 142 F.2d 833 (5th Cir. 1944). We also note that TVA has raised concerns related to its ability to hire and retain key personnel under the existing limitations on the payment of TVA salaries. While we are mindful of the practical difficulties TVA may experience, we must analyze the legality of these contractual arrangements within the context of TVA's existing statutory authority.

For the reasons set forth below, we conclude that the retention of Mr. White by TVA under these contractual arrangements constitutes the improper use of a personal services contract and represents a circumvention of the statutory ceiling on salary payments to TVA employees.

The Memorandum of Understanding between the Board of Directors of TVA and Mr. White, dated January 3, 1986, provides that Mr. White shall serve as the Manager of Nuclear Power and shall manage, control and supervise TVA's nuclear power program, including design, construction, maintenance, and operation of all TVA nuclear power plants. His responsibilities also include establishing management

and operating policies and procedures for TVA's nuclear program and serving as TVA's principal spokesman on public information matters. The Memorandum of Understanding further provides that the Manager of Nuclear Power shall--

> "* * * be responsible for all personnel, planning, scheduling, regulatory, licensing, engineering, construction, operational, quality assurance, training, maintenance, and other technical or administrative matters relating to the TVA nuclear power program * * *."

The functions vested in this position are those normally performed by Government employees, thus raising a question whether the contract constitutes an improper personal services contract. Our decisions have held that personal services for the Government must be performed by Federal employees under Government supervision. See 43 Comp. Gen. 390 (1963) and decisions cited therein. Any contract for services to the Government must be on a basis that does not establish an employer-employee relationship. Consultant Services-T.C. Associates, B-193035, April 12, 1979; and B-183487, April 25, 1977.

The contractual arrangement between TVA and Mr. White clearly establishes an employer-employee relationship and therefore constitutes an improper personal services contract. This TVA contractual arrangement does not involve the performance of a particular job or task without supervision and control by the Government, but rather involves the management of TVA's nuclear power program, including hiring, firing, and assigning work to TVA employees. Mr. White and the other contractor personnel occupying management positions in TVA's nuclear power program are supervised by Federal employees, the TVA Board of Directors, and are appointed by authority of that Board. Thus, it is clear that this contractual arrangement meets all indicia of the employer-employee relationship. See B-164105, November 1, 1973.

Furthermore, we believe that TVA's arrangement with Mr. White circumvents the statutory limitation on salaries of TVA employees. Under the provisions of 16 U.S.C. § 831b (1982), cited above, no "regular officer or employee" of the TVA may receive a salary in excess of that received by a

member of the TVA Board of Directors. We previously considered the application of this statutory limitation to a proposal by the TVA to pay bonuses to managers and executives who agreed to remain at TVA for 3 years. In our advisory opinion to the Congress, B-205284, November 16, 1981, we held that such payments which might exceed the salary limitations in the TVA Act were in circumvention of the statutory limitation on TVA salaries. Subsequent to that decision, the Congress has precluded TVA from using appropriated funds "to implement a program of retention contracts for senior employees" of TVA. See Public Law 98-50, § 505, 97 Stat. 247, 261 (1983); Public Law 98-360, § 505, 98 Stat. 403, 420 (1984); and Public Law 99-141, § 504, 99 Stat. 564, 579 (1985). We believe this represents a clear statement by the Congress that TVA employees may not avoid the statutory salary limitation through supplemental payments.

In our view, TVA may not avoid the statutory salary limitations by contracting out functions normally performed by TVA employees, absent a specific Congressional authorization. The TVA response analogizes Mr. White's situation to consultants hired previously by TVA and to the hiring of Mr. O'Brian, who assisted in defending TVA's authority on constitutional grounds. We disagree with TVA on this point. Unlike Mr. White, there is no indication that either these consultants or Mr. O'Brian assumed complete managerial responsibility for a division or office within TVA or that they performed functions normally performed by TVA employees. We have recognized that agencies may procure the services of private attorneys for specific projects where an employer-employee relationship is not established. See U.S. Advisory Commission on Public Diplomacy, 61 Comp. Gen. 69 (1981), and decisions cited therein. However, for the reasons set forth above, we believe that TVA's contractual arrangements with respect to Mr. White have established an employer-employee relationship and are clearly distinguishable from the past instances which TVA describes.

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II.

Question: Another reason that Mr. White may have wanted to be hired by contract was to avoid the salary offset which would have taken place against his Federal salary under the Dual Compensation Act if he had been hired as a Federal employee. Is Mr. White a double dipper, drawing a full ($64,122 a year) pension and a full ($355,200 a year) salary? Does the Dual Compensation Act preclude this? Is new legislation needed to ensure that service by contract is not used as a loophole to get around the Dual Compensation Act?

TVA Response: TVA advises that Mr. White receives about $48,000 per year in military retired pay but that the Dual Compensation Act, 5 U.S.C. §§ 5531-5532, does not apply to him since he does not hold a "position" as defined in 5 U.S.C. § 5531(2).

GAO Opinion: As TVA concedes, the Dual Compensation Act does apply to "positions" within TVA. While the Act does not affect persons serving under a proper contract with Federal agencies, it is our view, stated previously, that Mr. White's contract is not proper. Thus, this contractual relationship also appears to be a circumvention of the Dual Compensation Act. As to the amount of Mr. White's retired pay, the Navy Finance Center has informally advised us that Mr. White receives $4,477 gross retired pay per month, or $53,724 gross retired pay per year.

III and IV.

Question: Clause 2 of the Memorandum of Understanding indicates that Mr. White has "authority to hire, remove, assign, reassign, or direct * * * any TVA personnel engaged in nuclear power program activities as he may deem necessary or desirable." Is it not true that the Federal Acquisition Regulations state that a contractor can never have a direct supervisory role over Federal employees? Therefore, is not this contract provision illegal and void?

Question: Clause 2 of the Memorandum of Understanding also states that Mr. White has "direct authority and responsibility for the management, control and supervision of TVA's entire nuclear program." Is it not true that the Federal Acquisition Regulations prohibit a Federal agency from contracting out the management of a Federal program? Therefore, is not this contract provision illegal and void?

TVA Response: TVA states that the Federal Acquisition Regulations (FAR) are not applicable to the TVA since TVA is not subject to the Federal Property and Administrative Services Act of 1949 (FPASA), 40 U.S.C. §§ 471-544, or the Office of Federal Procurement Policy Act of 1974 (OFPP Act), 41 U.S.C. §§ 401-412. In addition, TVA points out that in two recent decisions of our Office we stated that TVA would not be subject to the procurement procedures of the FPASA and the FAR if the TVA Board of Directors decided not to follow such procedures. Monarch Water Systems, Inc., 64 Comp. Gen. 756 (1985), 85-2 CPD ¶ 146, and Newport News Industrial Corporation, B-220364, December 23, 1985, 85-2 CPD ¶ 705. TVA states that its Board of Directors on February 14, 1986, decided not to comply with the requirements of the FAR or other procurement regulations promulgated under the authority of the FPASA or the OFFP Act.

GAO Opinion: Our recent decisions in Newport News and Monarch Water, cited above, reviewed the jurisdiction of our Office to consider TVA bid protests under the Competition in Contracting Act of 1984 (CICA), 31 U.S.C.A. §§ 3551 et seq. (West Supp. 1985). We held that TVA meets the applicable definition in the FPASA and the CICA of a Federal agency subject to our bid protest jurisdiction. However, we further held that in view of TVA's broad statutory authority regarding its contracts and expenditures, the TVA would not be bound by the procedures set forth in the FAR if TVA decided not to follow those procedures.

Since the TVA has decided not to follow the provisions of the FAR, its provisions would not apply to these contracts. However, for the reasons set forth in our response to your first question, we conclude, wholly apart from application of the FAR, that TVA has not entered into a proper contract for filling these management positions.

V.

Question: It appears that the new TVA Inspector General, Norman Zigrossi, was given a large relocation allowance ($22,000). Was this relocation allowance in excess of what can be provided to other Federal employees under General Services Administration (GSA) regulations? Is TVA immune from these GSA regulations? Additionally, TVA reportedly paid $33,500 into a TVA retirement account for Mr. Zigrossi. Under what legal authority did TVA do that?

TVA Response: TVA reports that to induce Mr. Zigrossi to relocate and accept the positon of TVA's Inspector General, he was offered a "management staffing incentive payment" of $22,000. TVA advises that such payments are made to help fill positions where relocation is necessary by providing an incentive to the candidate to accept the position. TVA contends that such payments are within the authority of TVA to fix the compensation of its employees. See TVA Instruction, PM Section 3, October 17, 1985.

These incentive payments are separate and apart from relocation allowances which TVA pays in accordance with regulations promulgated by GSA. TVA advises that the relocation expenses which may be payable to Mr. Zigrossi include transportation and subsistence expenses for his travel from Washington, D.C., to Knoxville, Tennessee, temporary quarters allowance, shipment of his household goods, a miscellaneous expense allowance, real estate costs associated with selling his old residence and purchasing a new residence, and payment of a relocation income tax allowance. TVA advises that Mr. Zigrossi to date has claimed only reimbursement for his travel to Knoxville and payment through the relocation service contractor for the equity in his old residence.

As to the payment into TVA's retirement account, TVA states that it long ago established an "independent, tax-qualified retirement plan which is integrated with Social Security." Moreover, TVA has established a separate "Merit Incentive Supplemental Retirement Income Plan" to provide managers with additional income upon retirement and to provide benefits comparable to the retirement and Social Security benefits received by private sector employees. Payments are made by the TVA Board into each manager's account for reasons of recruitment purposes,

meritorious performance, and other reasons, and, upon retirement, the TVA manager may elect payment from the account in lump sum or in ten annual payments.

TVA contends that in a 1981 GAO opinion examining TVA's compensation arrangements, B-205284, November 16, 1981, we concluded that the statutory salary limitation for TVA employees did not include "occasional bonuses based on job performance or special circumstances or retirement fund contributions." Thus, TVA concludes that such payments are not subject to the limitation on TVA salaries.

GAO Opinion: The payments proposed by TVA for relocation expenses appear to be consistent with payments authorized under the applicable statutes and regulations prescribed by 5 U.S.C. §§ 5721-28 (Supp. II, 1984) and the Federal Travel Regulations promulgated by the General Services Administration, incorp. by ref., 41 C.F.R. § 101-7.003 (1985). However, we know of no legal basis for TVA to pay Mr. Zigrossi a "management staffing incentive" payment or a "merit incentive supplemental retirement" payment which, when combined with his annual salary, would exceed the $72,300 statutory limitation on salaries for regular TVA officers and employees.

As noted above, TVA employees are subject to a statutory ceiling on the payment of salary not to exceed that of a member of the TVA Board of Directors, currently $72,300 per year. See 16 U.S.C. § 831b (1982). As to what constitutes "salary" for purposes of this statutory ceiling, our 1981 opinion in B-205284 adopted TVA's own longstanding interpretation that "salary" was distinguishable from "basic compensation" or "annual rate of compensation" and that "salary" did not include overtime compensation, occasional bonuses based on job performance or special circumstances, retirement fund contributions, and miscellaneous fringe benefits.

While we agreed in our 1981 opinion that occasional bonuses or TVA's regular contribution to the employee's retirement fund were legitimately excludable from the salary limitation, we rejected TVA's proposal to make retention payments of up to $36,000 per year to senior TVA managers who agreed to remain with TVA for the following 3 years.

In that opinion we concluded that such retention payments were clearly designed to set a higher rate of basic pay for TVA's top executives in excess of the statutory ceiling. B-205284, cited above.

We see little difference between the retention payments proposed by TVA in 1981 and the "recruitment incentives" or "merit retirement bonuses" described by TVA in the present case. Each represents an alternative way to compensate employees in a manner comparable to private sector positions but which circumvents the salary limitation contained in the TVA Act. Although TVA states that our Office recognized the validity of such payments in our 1981 opinion, we disagree. Payments such as $22,000 under the management staffing plan or $33,500 under the merit incentive supplement retirement plan far exceed any reasonable interpretation of our 1981 opinion. B-205284, cited above.

These management staffing payments do not reimburse the TVA employees for expenses incurred, nor do they recognize on-the-job accomplishments. Such payments appear to be merely the inverse of the retention payments we questioned in 1981. Furthermore, the merit retirement plan payments are in addition to the agency's normal contribution on behalf of the employee into either the TVA retirement plan or the Civil Service Retirement Fund and appear to be a form of deferred compensation. Therefore, we conclude that these payments to Mr. Zigrossi cannot reasonably be viewed as anything other than part of his "salary" which is subject to TVA's statutory salary limitation.

VI.

Question: It is further reported that the Inspector General is being permitted to collect his $33,500 annual pension in addition to his $72,300 salary. Is this true? If so, why does the Dual Compensation Act not apply to him?

TVA Response: TVA concedes that the Dual Compensation Act would apply to Mr. Zigrossi but for the fact that he is not currently receiving retirement benefits under the Civil Service Retirement Fund. TVA reports that Mr. Zigrossi remains under the Civil Service retirement system in his position at TVA and that both he and TVA continue to make contributions to that Fund.

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GAO Opinion: We concur with TVA's interpretation that if Mr. Zigrossi were receiving an annuity from the Civil Service Retirement Fund, his pay from his TVA position would be subject to reduction as provided in 5 U.S.C. § 8344 (1982). We agree that this statute does not affect Mr. Zigrossi's salary from TVA so long as he is not actually receiving payments from the Civil Service Retirement Fund.

We trust that the above analyses are responsive to the essentially legal aspects of your inquiry.

Sincerely yours,

for Milton J. Socolar
Comptroller General
of the United States

1. POSTAL SERVICES
   Private contract v. Government personnel
   Criteria

   PERSONAL SERVICES
   Private contract v. Government personnel
   Rule

2. COMPENSATION
   Double
   Concurrent military retired and civilian service pay

3. TENENESSEE VALLEY AUTHORITY
   Contracts
   Statutory authority

4. TENNESSEE VALLEY AUTHORITY
   Employees
   Compensation
   Increase for top executives
   Contrary to salary limitation statute

5. COMPENSATION
   Double
   Concurrent military retired and civilian service pay