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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Denali Commission—Statutory Pay for Commissioners

File: B-322832

Date: March 30, 2012

DIGEST

The Denali Commission may not accept waivers of compensation from the nonfederal commissioners because the rate of compensation is fixed by statute. If the Commission were to accept their waivers, such acceptance would violate the voluntary services prohibition of the Antideficiency Act.

DECISION

The Inspector General of the Denali Commission requests a decision under 31 U.S.C. § 3529(a) regarding whether the Commission may accept waivers of statutorily-required compensation from its nonfederal commissioners. Letter from Inspector General, Denali Commission, to Managing Associate General Counsel, GAO, Nov. 25, 2011 (Request Letter). As explained below, the statute establishing the Denali Commission sets a specific rate at which the Commission must compensate its nonfederal commissioners for services they perform on the Commission's behalf. The Antideficiency Act prohibits waivers of compensation in such circumstances.

Our practice when issuing decisions and opinions is to obtain the views of the relevant agencies to establish a factual record and to establish the agencies' legal positions on the subject matter of the request. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), available at www.gao.gov/products/GAO-06-1064SP. The record in this case consists of the Request Letter and the record of a conference call between GAO staff and Commission staff. Telephone Conversation among Inspector General, Denali Commission; Chief Financial Officer, Denali Commission; Assistant General Counsel, GAO; and Senior Attorney, GAO (Jan. 11, 2012) (Teleconference).

BACKGROUND

Congress established the Denali Commission as a federal agency in the Denali Commission Act of 1998. Pub. L. No. 105-277, div. C, title III, §§ 301, 303, 112 Stat. 2681-1, 2681-637 (Oct. 21, 1998), *classified in* 42 U.S.C § 3121 note. The Commission operates in, and for the benefit of, the State of Alaska for the purposes of: (1) delivering services of the federal government in the most cost-effective manner practicable by reducing administrative and overhead costs; (2) providing job training and other economic development services in rural communities; and (3) promoting rural development, providing power generation and transmission facilities, modern communication systems, water and sewer systems, and other infrastructure needs. *Id.* § 302.

There are seven commissioners appointed by the Secretary of Commerce, as provided by the Denali Commission Act. Six commissioners are, by statute, officials of the State of Alaska or Alaska organizations, including the Governor of Alaska (or his nominee) who serves as the State Co-chair. The Denali Commission Act designates, in addition to the Governor of Alaska, the President of the Alaska Municipal League, the President of the Alaska Federation of Natives, the Executive President of the Alaska State AFL-CIO, and the President of the Associated General Contractors of Alaska as the remaining nonfederal commissioners. Pub. L. No. 105-277, § 303(b). The seventh member is a federal official who serves as the Federal Co-chair. *Id.* § 303(b)(2).

The commissioners' statutory role is to propose a work plan for providing federal financial assistance in Alaska.¹ *Id.* § 304(a). The commissioners present the proposed work plan to the Federal Co-chair, who approves or disapproves it. *Id.* § 304(b). The Denali Commission Act provides that each nonfederal commissioner "shall be compensated at a rate equal to the daily equivalent of the annual rate of basic pay" for certain federal employees "for each day (including travel time) during the time such [member] is engaged in the performance of the duties of the Commission." *Id.* § 306(a). Notwithstanding this language, in recent years most nonfederal commissioners have declined to accept compensation from the Commission. Request Letter.

According to the Inspector General (IG), the Commission interprets the statutory language that the nonfederal commissioners "shall be compensated" as a legal requirement that the Commission may not waive. Request Letter. In a good faith attempt to comply with this interpretation, the Commission has obligated, but not

¹ Commission staff solicit project proposals from local governments and other entities and organizations in Alaska for rural and infrastructure development and job training in the area covered under the work plan. Pub. L. No. 105-277, § 304.

disbursed, amounts equal to the nonfederal commissioners' compensation.² *Id.* The IG seeks clarification as to whether the Commission may accept the nonfederal commissioners' waiver of their statutory right to compensation.

ANALYSIS

The Antideficiency Act prohibits federal agencies from accepting voluntary services without specific statutory authority. 31 U.S.C. § 1342. Congress enacted the "voluntary services prohibition" over a century ago to reinforce Congress' constitutional power of the purse, and to force agencies to operate within the amounts provided by Congress, without the supplementation of voluntary services. B-309301, June 8, 2007.

The voluntary services prohibition notwithstanding, agencies may accept uncompensated services in certain circumstances. Early decisions of the Attorney General, the Comptroller of the Treasury, and the Comptroller General drew a distinction between voluntary services, prohibited by the Antideficiency Act, and gratuitous services, which are performed pursuant to an advance agreement or contract in which the provider of services has agreed to serve without compensation. 30 Op. Att'y Gen. 51 (1913); 27 Comp. Dec. 131 (1920); 7 Comp. Gen. 810 (1928). Where an advance agreement specifies that services will be provided with no financial obligation to the agency and no expectation of payment by the party providing services, the services are not "voluntary" within the meaning of the prohibition. B-308968, Nov. 27, 2007.

However, no compensation may be waived, by advance agreement or otherwise, where Congress has fixed by law the rate or amount of the compensation sought to be waived. *Glavey v. United States*, 182 U.S. 595, 609 (1901). Allowing waiver in such circumstances would defeat the express will of Congress that a certain amount, nothing more and nothing less, should be paid. *See id.* *See also* 58 Comp. Gen. 383 (1979); 54 Comp. Gen. 393 (1974); 27 Comp. Gen. 194, 195 (1947).

We addressed a situation similar to that at issue here in 54 Comp. Gen. 393. There, nonfederal members of the Commission on Marijuana and Drug Abuse attempted to waive compensation that was established statutorily. 54 Comp. Gen. at 394. The operative statutory language provided that the nonfederal commissioners "shall receive \$100 per diem while engaged in the actual performance of the duties" of the commission. *Id.* Accordingly, those commissioners could not waive their compensation. *Id.* *See also* 32 Comp. Gen. 236 (1952) (nonfederal members of a

² The Commission receives no-year appropriations for its operations. *See* Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, Div. B, title IV, 125 Stat. 786, 880 (Dec. 23, 2011).

board could not waive their compensation when the operative statute provided that they “shall receive compensation” at a fixed rate).³

We reach the same conclusion here. The Denali Commission Act provides that each nonfederal commissioner “shall be compensated at a rate equal to the daily equivalent of the annual rate of basic pay prescribed for Level IV of the Executive Schedule under [5 U.S.C. § 5315] for each day (including travel time) during the time such [commissioner] is engaged in the performance of the duties of the Commission.” Pub. L. No. 105-277, § 306(a). This language is similar in all relevant respects to that considered in the 1974 decision; it establishes a fixed rate of compensation that the nonfederal commissioners “shall be” paid. Thus, the Commission may not accept the offer by the nonfederal commissioners to waive their statutory compensation and volunteer their services.⁴

Nor does the Commission’s authority to accept gifts provide an avenue for the nonfederal commissioners to perform their duties for the Commission without compensation. The Denali Commission Act provides the Commission with authority to “accept . . . gifts or donations of services or property.” Pub. L. No. 105-277, div. C, title III, § 305(c). However, such gift acceptance authority, while permitting agencies to accept services from purely private sources, does not authorize individuals appointed to positions with a statutorily fixed rate of compensation to waive any portion of that compensation.⁵ 57 Comp. Gen. 423, 424–25 (1978).

The IG also asks us to define the scope of the services performed by the nonfederal commissioners for which the Denali Commission Act requires that they be compensated. Request Letter. As the IG notes, the Denali Commission Act provides that the nonfederal commissioners shall be compensated for the time during which they are “engaged in the performance of the duties of the Commission.” Pub. L. No. 105-277, div. C, title III, § 306(a); Request Letter. The statutory role of the nonfederal commissioners is to develop and propose an annual

³ Where a law establishes only a maximum amount of compensation to be paid to an employee, the agency may agree to accept services from that employee without providing compensation. 58 Comp. Gen. 383.

⁴ While the Commission has obligated amounts equal to the nonfederal commissioners’ compensation, it has not paid some of them because they have refused to provide the information necessary to effect payment. January 2012 Teleconference; Request Letter. By obligating these amounts, the Commission has avoided violating the Antideficiency Act.

⁵ Nevertheless, the Commission’s gift acceptance authority would allow the nonfederal members to return their compensation to the Commission as a gift. 58 Comp. Gen. 383. The nonfederal members would be liable for applicable taxes, such as income taxes, on the compensation they receive. *Id.*

work plan for providing federal financial assistance in Alaska. *Id.* § 304(a). The Secretary of Commerce, who appoints commissioners, and the Federal Co-chair are in the best position to determine what activities are necessary and incident to this duty. We defer to the Secretary and Federal Co-chair in this regard.

CONCLUSION

The Denali Commission may not accept waivers of statutorily-required compensation from its nonfederal commissioners. Because the rate of compensation is fixed by statute, the Commission would violate the Antideficiency Act's voluntary services prohibition if it were to accept the waivers.

A handwritten signature in black ink, appearing to read "Lynn H. Gibson". The signature is written in a cursive, somewhat stylized font.

Lynn H. Gibson
General Counsel