

Memorandum

B-39772-O.M., July 30, 1976 JAN 16 1975

TO : General Counsel

FROM : Director, OAS - Larry A. Herrmann

SUBJECT: Availability of Appropriations to Provide Suitable Space for a Day Care Center

The Ad Hoc Committee for a GAO Day Care Center has questioned me regarding the availability of space within the GAO building for an employee operated day care center. During our discussion questions arose concerning what, assuming the Comptroller General were to make whatever determinations are necessary, we could legally do to support such a center. Since these considerations are basic ones, what is your opinion regarding the following questions:

1. Can the Comptroller General allocate space within the GAO building for an employee funded and operated day care center?
2. If a center can use GAO space, must they pay "rent"? If so, how much?
3. Can our present appropriations be used to make GAO space suitable for a center (space design, renovation, supplies and equipment)? Would this require mention in our budget justifications or otherwise being brought to the attention of the appropriation committee?

Indorsement

B-39772-O.M.

JUL 30 1976

Director, OAS

Returned. For purposes of this memorandum, the assumption is made that any day care facility established would be limited to use by employees of the General Accounting Office (GAO), without consideration being given to use by employees of other agencies quartered in the GAO building.

B-39772-O.M.

Your first question is whether the Comptroller General can allocate space within the GAO building for an employee funded and operated day care center. No law now authorizes the use of appropriated funds for the operation of day care centers for children of Federal workers.* However, we are aware of no legal prohibition against the establishment by a voluntary group of GAO employees of a child day care center to be funded, and operated under the auspices of such an organization without assistance from federally appropriated funds. We note in this connection the proposed regulations of the General Services Administration (GSA) recognize the propriety of allowing Federal property to be used for day care centers (on a reimbursable basis). 40 Fed. Reg. 51013, November 20, 1975.

Concerning whether space can be assigned for the use of a day care center Title W of Pub. L. No. 93-604, January 2, 1975, provides in section 501(a) that: *→ 2 USC 51-1 (34) 1975*

"The Comptroller General of the United States shall be entitled to the use of such space in the General Accounting Office Building as he determines to be necessary, and the head of any Federal agency which exercises authority over such building shall provide the Comptroller General with such space within the building as the Comptroller General determines to be necessary."

The Comptroller General can thus requisition space within the building for any purpose for which he feels it is needed. This could include space for a day care center if that is determined by him to be necessary to the operations of the GAO. (As will be discussed further below, such a determination could be justified by a finding, for example, that the facility would enhance recruitment, morale, efficiency or productivity of employees.) Accordingly, in answer to your first question, nothing

* During the 92d Congress both Houses passed S. 2007, which included a specific provision for Federal Government Child Development Programs, which would have included, inter alia, the establishment of day care centers. The provision appeared in a proposed new Part D of an amended Title V of the Economic Opportunity Act of 1964. However, that bill was vetoed, Veto Message-Economic Opportunity Amendments of 1971, Senate Document No. 92-46, 92d Congress, 1st Session. Since then no legislation of this kind has been enacted.

B-39772-O.M.

precludes the Comptroller General from allocating space within the GAO building for an employee funded and operated day care center if he determines such action is necessary to effective operation of the Office and management of personnel.

In this connection, we note that day care centers for children of Federal agency employees have been established during recent years in seven civilian agencies of the Government under a variety of authorities and methods of financing.

Three of these have operated under authority of an agency mission as stated in legislation authorizing those missions. These are:

1. The "National Demonstration Center in Early Childhood Education" operated by the National Institute of Education (NIE) under its charter enacted as part of the Education Amendments of 1972, Pub. L. No. 93-318, 86 Stat. 235, 327, 20 U.S.C. § 1221 et seq.

The Center has been administered by a professional day care service under a contract which was expected to terminate at the end of June, 1976. We are now advised that that contract has been extended to August 31, 1976, while a voluntary association of parents prepares to assume responsibility for the Center after that date. NIE intends to assist the Parents Association with the contribution of a small grant from its appropriated funds and with advice and professional assistance from its in-house staff of educators. The Center has been fully funded by NIE.

2. The Social and Rehabilitation Service (SRS) of the Department of Health Education and Welfare operates the Penthouse Nursery which was established as a demonstration and research project in connection with SRS's responsibility for administering grants to States under Title IV of the Social Security Act section 426 Social Security Amendments of 1967, Pub. L. No. 90-246, 42 U.S.C. § 626 et seq. (1970), and its responsibilities under the Work Incentive program established by Title IV-C of the Social Security Act. Section 204, Social Security Amendments of 1967, supra, 42 U.S.C. § 630 et seq., as amended (1970). The agency has supplied rent-free space and substantial funding from its appropriated funds, supplemented by fees assessed and paid by parents using the Center.

3. The Department of Labor has operated a Child Day Care Center under authority of Title III of the Comprehensive Employment and Training Act, section 311, Pub. L. No. 93-203, 29 U.S.C. § 881 et seq. (1970) Supp. IV. The Department has provided rent-free space and substantial funding for operating expenses from its appropriations for Manpower Administration

supplemented by fees paid by parents. Recently questions have been raised by the Solicitor of the Department of Labor as to the legality of continuing this Center, which was initiated as a research project. We are advised by the Department of Labor that continued operation of the Center has recently been extended to the end of calendar year 1976. Some doubt now exists as to the continuance beyond that date.

The other four agency day care centers known to be now in operation are those which are fully funded by the beneficiary employees or employee associations with the exception, in two cases, of provision of rent-free space by agencies.

1. Department of Agriculture, operated under the sponsorship of the Plant Industry Station Employees' Association and the Agriculture Research Employees' Association. The Department of Agriculture provides space.

2. The National Aeronautics and Space Administration (NASA) Goddard Space Flight Center at Greenbelt, Maryland, sponsored the Goddard Day Care Club. NASA provides space for the Center.

3. National Institutes of Health, sponsored by a Parent Advisory Committee. No Federal appropriations, including space availability, are expended.

4. Social Security Administration (SSA) Headquarters at Baltimore, Maryland, sponsored by a Parents Group, with seed money from American Federation of Government Employees union local, the Federal Credit Union, Employees Activity Association, the Federal Women's Program and with volunteer assistance. This Center is located outside the headquarters building and no space is provided by SSA.

Your second question is whether an organization formed to operate a day care center would be required to pay rent and, if so, how much. The regulations of GSA governing the assignment and utilization of space in buildings under its control are set out at 41 CFR Part 101-17 (1975). The existing regulations do not specifically refer to utilization of space for day care centers. However, it is apparent from the language of the proposed GSA regulations relating to day care centers, supra, that GSA regards such centers as a form of concession, i.e. a commercial activity providing service to Federal employees, for which Federal property may be assigned and for which rent would be paid on the basis of the Standard Level User Charge. Thus, GAO must pay GSA the charge assessed for whatever space is requisitioned (unless GSA itself waives the charge, which it apparently will not do under present policy). The only issue, therefore, is whether GAO must be reimbursed for that expenditure by the day care center.

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B-39772 O.M.

We understand that present plans envision that the center would be "employee funded" in the sense that it would pay operating expenses, including rent, out of its revenues from fees. As to the amount to be charged the center, it would ordinarily be the amount which GAO is required to pay for the space. However, if operation of a day care center for children of employees is deemed a necessary expense, this Office could assume some or all of the rent expense involved.

The third question raises a similar issue: whether present appropriations can be used to make GAO space suitable for a day care center, including space design, renovation, supplies, and equipment. Any expenses incident to the establishment of a day care center may be borne by GAO if it is determined that these are necessary expenses incident to the execution of the functions of this Office. The decision as to whether a day care center is a necessary expense is partly a question of fact. Obviously, the Center benefits employees personally, but this Office has often authorized expenditures of that kind where the expense will also benefit the Government. Thus, it might be found that operation of a Center is necessary to recruit or retain staff or to maintain morale and hence productivity. Assuming that the factual determination can be made (and there is apparently evidence to that effect), no legal impediment exists to the use of appropriated funds for this purpose.

In considering the availability of appropriations for the purpose described, we have reviewed decisions of this Office concerning other kinds of employee welfare services analogous to day care centers for which appropriations not specifically intended for them have been found to be available. In this connection, there have been significant changes over the years in our view of the propriety of spending appropriated funds for purposes of employee welfare and morale, in the absence of specific authority.

Thus, we have approved subsidization of cafeterias for employees from agency appropriations under certain circumstances. B-169141, March 23, 1970; B-169141, November 17, 1970. We have also approved use of appropriated funds by the Federal Aviation Administration for the purchase of cooking utensils, B-173149, August 10, 1971; and the expense of renovating space to provide kitchen and lunchroom facilities for employees of the Occupational Safety and Health Review Commission. B-180272, July 23, 1974.

In a related area of employee welfare concern, the parking of private automobiles used for commuting by Government employees, we have held:

"* * * parking facilities are available to employees without charge at numerous Government installations and

B-39772-O.M.

We think there can be no question but that the provision for such facilities contributes a great deal toward employee welfare. Consequently, in view of the parking situations existing at the installations in question as described in the agency comments forwarded here as attachments, we cannot establish that the parking facilities involved are not 'necessary facilities for the welfare of the employees' if they are so determined administratively. It should be kept in mind that the criterion here involved is less stringent than a requirement that the facilities be essential for the operation of the installation. Cf. 43 Comp. Gen. 131 and 10 id. 140." B-155372-O.M., November 6, 1964. See, also, 49 Comp. Gen. 476 (1970).

Free parking space is available within the GAO building for certain employees, subject to stated conditions of use.

In other decisions allowing expenditures from appropriated funds for recreational and related employee morale building facilities, we have allowed recreational equipment for Corps of Engineers employees aboard seagoing dredges, B-61076, February 25, 1947; the cost of transporting recreational equipment to isolated arctic outposts of the Weather Bureau, B-144237, November 7, 1960; the costs of a health maintenance program, including membership dues in the Young Men's Christian Association, for employees of the National Science Foundation, B-171094-O.M., October 27, 1971; payments for scientifically programmed music (MUZAK) to improve the morale of employees of the Bureau of Public Debt, Department of the Treasury, 51 Comp. Gen. 797 (1972); and the purchase of a television set for employees aboard an Environmental Protection Agency contractor's vessel, 54 Comp. Gen. 1075 (1975).

Also of significance, and an additional source of legal authority, is the fact that day care facilities may be a means of meeting the equal employment responsibilities of the GAO. Executive Order No. 11478, 3 CFR 207 (1974), provides, in part, that:

"The head of each executive department and agency shall establish and maintain an affirmative program of equal employment opportunity for all civilian employees and applicants for employment within his jurisdiction in accordance with the policy set forth in section 1. It is the responsibility of each department and agency head, to the maximum extent possible, to provide sufficient resources to

B-39772-0.H.

administer such a program in a positive and effective manner; assure that recruitment activities reach all sources of job candidates; utilize to the fullest extent the present skills of each employee; provide the maximum feasible opportunity to employees to enhance their skills so they may perform at their highest potential and advance in accordance with their abilities; provide training and advice to managers and supervisors to assure their understanding and implementation of the policy expressed in this Order; assure participation at the local level with other employers, schools, and public or private groups in cooperative efforts to improve community conditions which affect employability; and provide for a system within the department or agency for periodically evaluating the effectiveness with which the policy of this Order is being carried out."

The Civil Service Commission, which has responsibility for assuring that the affirmative action requirements are carried out, promulgated section 713.203 of the Federal Personnel Manual (FPM) Supplement 990-1, which provides that:

"Under the terms of its program, an agency shall, to the maximum extent possible:

* * * * *

(f) Participate at the community level with other employers, with schools and universities, and with other public and private groups in cooperative action to improve employment opportunities and community conditions that affect employability; * * *."

Appendix D of FPM Chapter 713, reemphasizes agency affirmative action responsibilities for:

"Participation in community efforts to improve conditions which effect employability. * * * Cooperation with community groups in the establishment and support of child day care centers needed by employees or applicants."

B-39772-O.M.

In light of these considerations we believe expenditure of current GAO appropriations for any expenses associated with establishment of a day care center is proper, assuming that operation of the center is administratively determined to be necessary for employee welfare. However, recognizing that the matter is not free from controversy, and in order to avoid any difficulties with Congress, we believe any substantial capital expenditures for renovation should be set out in our budget presentation and made known to the cognizant Appropriation Committees if the Comptroller General desires to use appropriated funds for this purpose.

MILTON SCOTT, JR., Director

For Paul G. Dembling
General Counsel