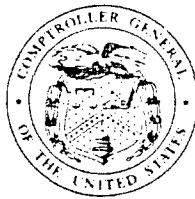


DECISION



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

J. Lupton
GGM
GAO 184

8786

AGC 214

FILE: B-191737

DATE: January 5, 1979

MATTER OF: Bureau of Mines - [Live Entertainment for National
Hispanic Heritage Week *AND UNAUTHORIZED*
Procurement ACTION]

DIGEST: 1. The Spanish-Speaking Program was established as a component of the Federal Equal Employment Opportunity Program by presidential proclamation on November 5, 1970. Under 42 U.S.C. § 2000e-16(b), the Civil Service Commission promulgated Federal Personnel Manual letter 713-18, January 23, 1973, making the Spanish-Speaking program a special emphasis area within the Federal EEO program. Accordingly, the Bureau of Mines, within the Department of Interior, is authorized to institute a Spanish-Speaking EEO program.

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2. In the absence of specific authority in statute or regulations, appropriated funds may not be expended to procure entertainment for Federal employees. Hence agencies without specific authority may not procure entertainment such as live ethnic music and artistic presentations, characterize it as training and present it in connection with EEO programs. We will not question past agency characterizations of EEO program entertainment as training; however, all future entertainment expenses whether or not in connection with EEO programs will not be allowed.

3. Department of Interior questions the legality of appropriated fund expenditure by Bureau of Mines, a subordinate agency, where EEO officer, who lacked delegated procurement authority, procured services of contractors and payment was eventually made for services rendered. Agreements violated the prohibition against the provision of entertainment from appropriated funds and included payments for premiums on insurance coverage of art objects exhibited incident to National Hispanic Heritage Week, contrary to the longstanding policy of Government to assume its own risks of loss and not to purchase commercial insurance. The employee has been advised of the limits of his authority. In view of the special facts and circumstances involved, we believe no useful purpose will be served by taking exceptions to these payments.

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This action involves a request from Mr. Larry E. Meierotto, Deputy Assistant Secretary, United States Department of Interior, for a ruling on the legality of two vouchers paid by the Bureau of Mines, a subordinate agency of the Department. The vouchers are BV # 8681 for insurance premiums in the amount of \$109.50 in favor of L. E. Harris Agency, Inc., and BV # 8687 for theatrical performance fees in the amount of \$275 in favor of Sonia Castel.

The facts and circumstances surrounding these payments are as follows. Pursuant to a Joint Resolution approved by Congress on September 17, 1968, 36 U.S.C. § 169f (1976), the President of the United States issued Proclamation 4516, on August 31, 1977, 3 CFR 41 (1978), proclaiming the week beginning September 11, 1977, as National Hispanic Heritage Week. The Secretary of the Interior promulgated a memorandum dated August 31, 1977, subject: "Hispanic Heritage Week," implementing the Presidential Proclamation by announcing a Department Program in honor of Hispanic Week.

In previous years the Bureau of Mines co-sponsored activities for this week with the Department and its other sub-agencies. In 1977, however, responding to criticism that the Bureau's Spanish Speaking Program was not sufficiently visible, Mr. Ronald Shelton, Equal Employment Opportunity Officer for the Bureau, arranged with the Equal Employment Opportunity Commission (EEOC) to co-sponsor a joint program on a cost sharing basis at Columbia Plaza, Washington, D.C., where major elements of both agencies are located. Mr. Shelton explained his actions as follows:

"The Bureau's cultural performances for observance of National Hispanic Heritage Week were arranged through the District of Columbia Department of Recreation. Ms. Sonia Castel, Department of Recreation, arranges such cultural events for the entire D.C. area. However, because she acts as a cultural clearinghouse that is a public service, the billing cannot be handled through the DC Dept. of Recreation. Therefore, she uses Stage Directions to handle the business end of all her arrangements. Stage Directions or Ms. Castel make no profits from their activities."

Ms. Castel referred them to, and worked with, a non-profit organization called "Stage Directions" which develops such programs on a fee basis. Negotiations followed which lead to Mr. Shelton's requisition through Stage Directions for performers to present traditional music while showing the relevance of the music to the Hispanic culture and to coordinate an exhibition of art objects created by Hispanic artists. Through Ms. Castel,

Mr. Shelton requisitioned insurance coverage from the L. E. Harris Agency, Inc., on the art objects included in the exhibition.

Pursuant to Part 205 of the Bureau of Mines Manual, Mr. Shelton is delegated requisitioning authority; however, he does not have procurement authority. Moreover, he entered into the agreements described above without the concurrence of the Bureau of Mines Contracting Officer.

We are advised that the agreements were duly performed in accordance with their terms and conditions. Ms. Castel, who continued to assist Mr. Shelton in arranging the program, paid Stage Directions \$275 on October 3, 1977, the share of the contract price attributable to the Bureau of Mines. She explained her action to the Bureau of Mines as follows:

"I was professionally embarrassed by your agency's delay in payment; I personally paid the amount of two-hundred-seventy-five dollars (\$275) to Stage Directions for your share of your joint program with EEOC. I made this payment because it was due and owing for services rendered and needed to be paid."

Ms. Castel had also personally deposited \$100 with the L. E. Harris Agency, Inc., for insurance premiums to provide coverage for the art objects. She subsequently billed the Bureau of Mines for the Stage Directions payment and also advised that her deposit would not be returned until the insurance agency received payment.

The Bureau of Mines finally paid the two vouchers on December 21, 1977. However, the Department of Interior has questioned the legality of the payments. The specific issues raised by the Department of Interior are as follows:

- "1. Since the various laws, acts, publications, etc., concerning the Bureau of Mines Equal Employment Opportunity funding are so general, particularly concerning the Spanish-Speaking Program, is the Spanish-Speaking Program to be considered as an integral part of the Bureau's Equal Employment Opportunity Program?
- "2. If your answer to question 1 above is affirmative, are the types of entertainment and exhibit expenses we paid in the enclosed vouchers proper for the Spanish-Speaking Program?

- "3. Since Mr. Shelton did not have procurement authority, is the legality of these contracts and subsequent payments in question?"

AUTHORITY FOR THE SPANISH SPEAKING PROGRAM

The first question concerns whether the Bureau of Mines may legally fund the Spanish Speaking Program under its Equal Employment Opportunity Program. By virtue of the authority contained in 5 U.S.C. § 1301 et. seq. 3301, 3302 and 7301, governing the appointment, examination, selection and regulation of conduct of Federal Employees, the President announced on November 5, 1970, the initiation of a 16 point program to assist Spanish-speaking American citizens to obtain employment in the Federal Service and thereby assure full application of the Federal Service EEOC program to this group.

Pursuant to the authority contained in 42 U.S.C. § 2000e-16(b), to promulgate regulations covering the Federal Service Equal Employment Opportunity Program, the Civil Service Commission implemented the President's 16 point program through the issuance of Federal Personnel Manual Letter No. 713-18, dated January 23, 1973, Subject; "Equal Employment Opportunity - Implementing the Spanish-Speaking Program." The purpose of this letter was to specifically advise Federal officials that the Spanish-Speaking minority is included in the disadvantaged minority group that the EEO program is designed to assist. In addition, the FPM letter provides guidance for use by agency officials in developing agency EEO affirmative action measures to accommodate the special needs of the Spanish-Speaking employees and prospective employees. Finally the letter cautions that the Sixteen Point Program is not to be viewed as a separate equal employment opportunity program, but as a special emphasis effort within the context of a total EEO program.

In accordance with our general practices we solicited the views of the Civil Service Commission on this issue. The Commission's General Counsel has formally advised us that the Spanish-Speaking Program has been incorporated into the Federal Service Equal Employment Opportunity Program since 1970. In view of the above and our own analysis of the law, we are of the opinion that the Bureau of Mines Spanish-Speaking Program is a legitimate component of that agency's EEO Program.

LEGALITY OF ETHNIC MUSIC AND EXHIBIT PROGRAM

Next, Interior questions whether the Bureau of Mines may have exceeded its legal authority by the expenditure of appropriated funds for the "entertainment and exhibit" programs. At the outset, we note that it is a general principle of law that funds appropriated for Government departments and agencies may not be used for entertaining individuals except as specifically authorized by law. 47 Comp. Gen. 657 (1968);

43 id. 305 (1963). Entertainment has been defined as a source or means of amusement, a diverting performance, especially a public performance, as a concert, drama or the like. People v. Klaw, 106 N.Y.S. 341, 351 (1907). Also, entertainment denotes that which serves for amusement and amusement is defined as a pleasurable occupation of the senses, or that which furnishes it, as dancing, sports, or music. Young v. Board of Trustees of Broadwater County High School, 4 P. 2d 725, 726 (1931). Thus, if Interior has properly characterized these expenditures as entertainment, there would be no authority to expend appropriated funds.

The Bureau of Mines Program for Hispanic Week consisted, according to the record before us, of several different elements. At 2:30 p.m. on Wednesday, September 14, 1977, there was a presentation made in the Columbia Plaza cafeteria which was available to all employees. Following introductions by the Directors of the Equal Employment Opportunity offices of EEOC and the Bureau of Mines, and opening remarks by the chairperson of the EEOC, Mr. Patrick Apodaca, Associate Counsel to the President, addressed the gathering. Thereafter there was a 1 hour lecture-demonstration of South American folk music by two musicians from Argentina. According to the materials presented us,

"their program has two aims; first, to make American audiences of all ethnic backgrounds aware of the richness and variety of Argentina's musical contribution to the world; and second, to explain and to enlighten their audience on the study of folk music. Their explanations of the geographic and demographic factors which contribute to each folk form is both educational and famous. * * *"

At the end of these proceedings, there was a reception honoring Mr. Apodaca. We assume that any refreshments served were paid from private funds or from appropriations specifically available for entertainment purposes. The use of Federal funds not specifically available for this purpose would, of course, be unauthorized.

On Friday, September 16, there were two separate programs offered. At noon, in the Plaza area, 12 musicians and a guest singer from Puerto Rico provided a two hour concert of traditional and popular music typical to various Caribbean and Latin American countries. We are advised that the different ethnic contributions (Spanish, European, African and Native American) to the music of Latin America was emphasized. In addition, the group performed some of their own original music. This group

performed outdoors so that the employees were able to participate in this program during their lunch hour. We are advised that "the purpose of this program was to expose the agency employees to the richness of the musical traditions of the majority of Spanish-Americans. For most participants, this was a unique opportunity to expand their awareness of Latin American popular musical tradition."

Later in the afternoon, in one of the rooms in Columbia Plaza, after remarks by Mr. Shelton and the Director of the Bureau of Mines, a slide presentation on Hispanic Americans was given. This activity was not part of Interior's inquiry.

In addition, there was a slide presentation developed by the audio-visual department of EEOC shown continuously in the main lobby. Also there was an Hispanic art and ceramics exhibit by five artists. The exhibit was open for 2 hours a day during Hispanic Week with one artists available each day to discuss his or her work with visitors. The information we were provided stated:

"We hope that this program served to expose many people to the fine arts and in particular to the contributions made to the fine and plastic arts by Spanish-Americans."

As noted above, under our decisions, appropriated funds may not be expended to provide entertainment for employees except when specifically authorized by statute or implementing regulations. See, for example, 43 Comp. Gen. 305, supra. When we analyze within the context of our decisions the artistic presentations which were components of the Bureau of Mines Hispanic Week, they seem very similar to the kinds of activities which we have consistently characterized in the past as "entertainment." We recognize that there may be some confusion regarding the kinds of activities which are authorized to commemorate Hispanic Week and similar occasions, or which could be carried out under any agency's EEO program, and that some agencies in the past have expended appropriated funds to provide entertainment characterized as training in connection with EEO programs. While we accept without question past agency characterizations that this entertainment type activity was EEO training or, at least, an authorized part of its EEO program and we will not take exception to any such past expenditures by the Bureau of Mines or other agencies, we feel that no similar expenditures in the future should be incurred unless made in strict conformance with statute or applicable Civil Service Commission regulations.

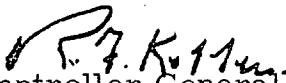
UNAUTHORIZED PROCUREMENT ACTION

We note that as part of the overall EEO package procured by Mr. Shelton, there was insurance coverage, in the amount of \$300 each for thirteen paintings and three sculptures, for a total of \$4,800. It is a longstanding policy of the United States to assume its own risks of loss and not to purchase commercial insurance coverage. 55 Comp. Gen. 1196 (1976); 39 id., 145 (1959); and 21 id. 1928 (1942). Thus, we must hold that this insurance coverage should not have been obtained.

While Mr. Shelton as the Bureau of Mines' Equal Employment Opportunity Officer had authority to approve requisitions, he had not been delegated authority to enter into procurement action on behalf of the Government. Notwithstanding this lack of authority, Mr. Shelton entered into a procurement agreement purportedly on behalf of the Bureau of Mines for the ethnic music presentations and for insurance coverage of the art objects.

It is a general principle of law that an agent of the Government must have actual authority in order to bind the United States and individuals entering into contractual arrangements with the United States are charged with the responsibility of ascertaining the authority of the agent to act for the Government. The contractor must assume the risk if the employee does not have the authority to enter into the contract on behalf of the Government. The contractor's remedy where the employee lacks authority will be against the unauthorized agent, in this case Mr. Shelton. It is our understanding that Mr. Shelton has been made aware of the extent of his authority.

Thus, not only did Mr. Shelton enter into agreements which involved improper use of appropriated funds, but he had no authority to enter into any kind of agreements on behalf of the United States. Nonetheless, the contracts have been performed and payment made. We have determined not to take exception to payments made in the past by other agencies, and we see no useful purpose in doing so in his case.


Deputy Comptroller General
of the United States