

**DECISION**



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

**FILE:** B-212484

**DATE:** April 10, 1984

**MATTER OF:** Tobacco Inspectors, Department of  
Agriculture - Payment of Employee's  
Share of Health Insurance from Tobacco  
**DIGEST:** User Fee Fund

The Department of Agriculture asks whether it may pay the employee share of health insurance for tobacco inspectors in nonpay status from the tobacco user fee fund. Such expenditure may not be made. User fees collected from tobacco producers to provide tobacco inspection, certification and other services under the Tobacco Inspection Act are considered appropriated funds and are subject to laws controlling expenditure of such funds. Expenditure of appropriated funds to pay the employee share of health insurance for tobacco inspectors while they are in nonpay status is prohibited by the Federal Employees Health Benefits Act, which places a 75 percent ceiling on agency contributions, and regulations implemented by the Office of Personnel Management.

This decision is in response to a request from the Secretary of Agriculture, The Honorable John R. Block. The Secretary asks whether the Department of Agriculture may legally authorize payment of the employee share of health insurance for tobacco inspectors in nonpay status from the tobacco user fee fund. For the following reasons, we hold that user fees may not be used to cover the employee share of health insurance.

BACKGROUND

The Tobacco Inspection Act, 7 U.S.C. §§ 511-511q (1982), authorizes the Secretary of Agriculture to provide inspection and certification (grading) services at all designated tobacco auction markets. The Agricultural Marketing Service, Department of Agriculture, employs

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tobacco inspection personnel to provide inspection services under the Tobacco Inspection Act. According to the request submitted to this Office, tobacco inspectors are seasonal personnel who normally work 6 to 9 months each year, depending on the grading needs during each season.

Pursuant to the Federal Employees Health Benefits Act of 1959, as amended, 5 U.S.C. §§ 8901-8913 (1982), Federal employees and annuitants may purchase health insurance as a fringe benefit of their Government employment. The Government pays part of the cost of coverage for each employee, with the employee assuming the remainder under criteria set forth in § 8906. Section 8906(b)(2) provides that "[t]he biweekly Government contribution for an employee or annuitant enrolled in a plan under this chapter shall not exceed 75 percent of the subscription charge."

In accordance with 5 U.S.C. § 8901(1)(A), and 5 U.S.C. § 2105(a), tobacco inspectors employed by the Department of Agriculture are "employees" for purposes of coverage under the Federal Employees Health Benefits Act and, as the record before us discloses, tobacco inspectors participate in the health benefits program.

The Federal Employees Health Benefits Act designates the Office of Personnel Management (OPM) as the agency responsible for the implementation of the health benefits program. 5 U.S.C. § 8913. Under OPM regulations in effect prior to August 1982, neither employees nor the Government were required to make their respective contributions to the program during periods when employees were in a nonpay status even though the health insurance remained in effect. See 5 C.F.R. §§ 890.303, 890.304, 890.501 and 890.502 (1982). Therefore, tobacco inspection personnel were provided health insurance coverage without cost during the months they were in nonpay status.

Effective August 1982, OPM revised its regulations to require employees and the Government to pay their respective contributions to the program for each pay period during which the employees' enrollment continued, whether the employees were in pay status or nonpay status. 5 C.F.R. §§ 890.501(e), 890.502(b) (1983). Therefore, under current regulations, tobacco inspectors must pay their share of health insurance while in nonpay status.

LEGAL DISCUSSION

This request raises two questions: (1) whether the OPM regulations discussed above comply with the law and are reasonable, and (2) whether user fees, collected from tobacco producers under the Tobacco Inspection Act, may be expended for payment of the employee share of health insurance for tobacco inspectors while they are in nonpay status.

First we will consider the legality of the OPM regulations. During the 30-day period allowed for comments on the revised regulations, OPM received comments stating that tobacco inspectors should be excluded from the new regulations. OPM considered these comments in developing the final regulations. They found no basis for exempting these employees from the requirement that they pay their share of health premiums while in nonpay status. In the supplementary information announcing the final regulations, OPM stated that "[t]he [tobacco inspector] employee share is not an expense to the Government for providing this service, just as it is not an expense to the Government for any other category of employees." 47 Fed. Reg. 30962 (1982).

As stated previously, OPM is directed, by statute, to implement the Federal Employees Health Benefits program. 5 U.S.C. § 8913. Regulations issued pursuant to or in execution of a statute which are within the bounds of the agency's authority have the force and effect of law. Recredit of Sick Leave of FBI Employee After Break in Service, B-209068, January 20, 1983. An agency's interpretation of a statute it is charged with implementing is entitled to deference and should be upheld unless irrational, arbitrary or capricious. See Udall v. Tallman, 380 U.S. 1 (1965). OPM revised these regulations with the intention of eliminating the need for most of the premium rate loading used to cover the cost of free coverage. 47 Fed. Reg. 30962, previously cited. We find this cost savings analysis to be reasonable. In addition, there is nothing in the Federal Employee Health Benefits Act providing for free coverage of health insurance to employees in nonpay status. Therefore, this Office will defer to OPM's interpretation of the Federal Employees Health Benefits Act rather than substituting our own judgment.

We next consider the legality of utilizing the tobacco user fee fund to pay the employee share of Federal health insurance for tobacco inspectors while they are in nonpay status.

The Tobacco Inspection Act, 7 U.S.C. §§ 511-511q, as amended by section 157 of the Omnibus Budget Reconciliation Act of 1981, Pub. L. 97-35, requires the Secretary of Agriculture to fix and collect fees for tobacco inspection, certification and other services provided for under the Act. The fees, as nearly as possible, are to cover the costs of the services, including administrative and supervisory costs. When collected, the fees "shall be credited to the current appropriation account that incurs the cost and shall be available without fiscal year limitation to pay the expenses of the Secretary incident to providing services under this chapter." 7 U.S.C. § 511d. See also 7 U.S.C. § 511e.

Statutes which authorize the collection of fees and their deposit into a particular fund, and which make the fund available for expenditure for a specified purpose, have long been viewed as constituting continuing or permanent appropriations. Therefore, they are subject to the statutory controls and restrictions applicable to appropriated funds. Fortec Constructors, 57 Comp. Gen. 311 (1978); 35 Comp. Gen. 615 (1956). This principle has been specifically applied to statutes authorizing user fees. For example, user fee toll charges collected by the Saint Lawrence Seaway Development Corporation were held to be appropriated funds in Saint Lawrence Seaway Development Corporation, B-193573, December 19, 1979. In addition, user fees collected from firms utilizing the meat grading services of the Food Safety and Quality Service, Department of Agriculture, were held to be appropriated funds in Department of Agriculture, B-191761, September 22, 1978. Thus, it follows that this principle would apply to fees collected from tobacco producers to provide tobacco inspection, grading and other services.

In his request, the Secretary stated that the expenditure in question is necessary to carry out the purpose of the tobacco user fee fund. According to the Secretary, there is little doubt that, if the tobacco inspectors are required to pay the employee share of health insurance during nonpay periods, it will be difficult to recruit and

retain highly qualified individuals.<sup>1/</sup> As a result, he says it will be virtually impossible to continue to provide the same quality of service to the tobacco industry.

An agency has reasonable discretion in determining how to carry out the purposes of an appropriation. However, an expenditure cannot be justified where it is prohibited by law. 38 Comp. Gen. 758 (1959); 6 Comp. Gen. 619, 621 (1927). User fees collected from tobacco producers under the Tobacco Inspection Act are to be used to cover the costs of tobacco inspection and other services. 7 U.S.C. §§ 511d and 511e. The Department uses these fees to pay tobacco inspectors' compensation, including the cost of fringe benefits such as the Government contribution for Federal health insurance. Under the clear and unambiguous terms of 5 U.S.C. § 8906(b)(2), however, a Federal agency may not pay more than 75 percent of the subscription charges for employees enrolled in health insurance plans under the Federal Employees Health Benefits Act. Congress passed the Act to establish a comprehensive health benefits program for Federal employees and provided for a 75 percent ceiling on agencies' contributions and all participating agencies are bound by that limitation.

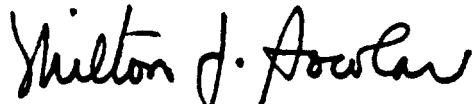
The Department of Agriculture is covered by and participates in the Federal Employees Health Benefits Program, and is consequently subject to the limitations on contributions set forth in 5 U.S.C. § 8906(b)(2), and the implementing regulations promulgated by the Office of Personnel Management as set forth in 5 C.F.R. § 890.501. Therefore, although the Secretary believes payment of the employee share of health insurance for tobacco inspectors while they are in nonpay status is necessary to carry out the purpose of the Tobacco Inspection Act, the expenditure is prohibited by the Federal Employees Health Benefits Act and its implementing regulations.

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<sup>1/</sup> The Department of Agriculture invests approximately \$45,000 in training each tobacco inspector. Tobacco buying organizations actively seek top graders for employment. During 1982, eight of the Department's most highly qualified tobacco inspectors resigned and accepted employment with tobacco companies.

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In view of the foregoing, the Department of Agriculture may not legally authorize payment of the employee share of health insurance for tobacco inspectors while they are in nonpay status.

*for*   
Comptroller General  
of the United States