Seldin

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

**FILE:** B-221585 **DATE:** June 9, 1986

**MATTER OF:** Nonreimbursable Transfer of Administrative Law Judges

**DIGEST:** 1. Proposed transfer of 15 to 20 National Labor Relations Board administrative law judges to Department of Labor on nonreimbursable basis under the authority in section 3344 of title 5, which provides for transfers, but does not indicate whether the transferring or receiving agency is to pay for the judges, is improper. Where a detail is authorized by statute, but the statute does not specifically authorize the detail to be carried out on a nonreimbursable basis, the detail cannot be done on that basis. Nonreimbursable details contravene the law that appropriations be spent only on the objects for which appropriated, 31 U.S.C. § 1301(a), and unlawfully augment the appropriation of the receiving agency. 64 Comp. Gen. 370 (1985) affirmed.

2. Proposed detail of 15 to 20 administrative law judges (ALJs) from the National Labor Relations Board (Board) to the Department of Labor on a nonreimbursable basis for the remainder of fiscal year 1986 does not conform to either of the exceptions in 64 Comp. Gen. 370 (1985) in which we generally found nonreimbursable details to be improper. The exception where the detail has a negligible fiscal impact is a de minimus exception for administrative convenience where the detail is for a brief period and the number of persons and costs involved are minimal. The detail of 15 to 20 ALJs and the related amount of salary expenses far exceeds the de minimus standard we intended to establish. Furthermore, the detail is not particularly related to the purpose for which the Board's appropriations are provided. Thus the proposed nonreimbursable detail does not fall within the other exception set forth in 64 Comp. Gen. 370.

035689 / 130102

The Department of Labor asks whether it may utilize on a nonreimbursable basis the equivalent of 10 judge years from the administrative law judge corps of the National Labor Relations Board (Board) during the remainder of fiscal year 1986. At this point in fiscal year 1986, the Department's request for the equivalent of 10 judge years means 15 to 20 judges. For the reasons given below, we find that the proposed transfer of administrative law judges (ALJs) is improper.

The Department informs us that it needs additional ALJs to assist in adjudicating a backlog of some 20,000 black lung cases,[1/] see 30 U.S.C. §§ 901 et seq. However, it cannot reimburse the Board for its judges since it already is using all available black lung program funds. Funds for the black lung program cases are appropriated in the yearly Department of Labor appropriations acts under the line item "Black Lung Disability Trust Fund." E.g., Pub. L. No. 99-178, __ Stat __. Funds for the Board's ALJs come from the yearly lump-sum salaries and expense appropriation to the Board. Id.

The legislative history of both the 1985 Supplemental Appropriations Act, Pub. L. No. 99-88, 99 Stat. 293, 370, and the fiscal year 1986 Department of Labor Appropriations Act, supra, reflects congressional concern about the backlog and provides suggestions about how to resolve it. The Senate report accompanying the 1985 Supplemental directed the Department, to the extent practical, to increase its efforts to temporarily borrow ALJ's from other agencies with less pressing workloads. S. Rep. No. 82, 99th Cong.,

---

1/ The number of black lung cases appealed to the Department's ALJ corps increased from 484 at the end of fiscal year 1979 to 20,450 at the end of fiscal year 1984. According to the Department, this increase resulted primarily from the Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95, 96-97 103-04, which liberalized criteria for determining coal miners' and dependents' eligibility for Black Lung benefits and required review of previously denied and pending claims using the new criteria. See General Accounting Office, Adjudication of Black Lung Claims, app. I at 7 (B-216900, HRD-85-19, Oct. 26, 1984).

1st Sess. 158 (1985). For fiscal year 1986, aside from recommending an additional $4.4 million for 15[2]/ new ALJs, and a substantial number of attorneys and support positions, the Senate again directed the Department to actively pursue borrowing ALJs from other agencies. S. Rep. No. 151, 99th Cong., 1st Sess. 18-19 (1985). Both congressional debate and hearings accompanying the 1986 appropriations act contain similar comments. 131 Cong. Rec. S.8586 (daily ed. June 20, 1985) (statement of Senator Byrd); 131 Cong. Rec. H.8033-34 (daily ed. Oct. 2, 1985) (statement of Representative Rahall); Departments of Labor, Health and Human Services, Education and Related Agencies Appropriations for Fiscal Year 1986: Hearings before a Subcomm. of the House Appropriations Comm., 99th Cong., 1st Sess. at 54-55, 1257, 1318-19 (pt. 1, 1985) (statements of Department officials).

Although the Senate Report accompanying the 1985 Supplemental suggested that the borrowing be done on a nonreimbursable basis, S. Rep. No. 82, supra, at 158, the Senate Report accompanying the 1986 Department of Labor appropriations act was silent about how the borrowing was to be funded. S. Rep. No. 151, supra, at 18-19. In hearings on the fiscal year 1986 appropriations act, however, several Department officials suggested that the borrowing could only be done on a reimbursable basis. House hearings, supra, at 1318-19; Departments of Labor, Health and Human Services, Education and Related Agencies Appropriations for Fiscal Year 1986: Hearings on H.R. 3424 before a Subcomm. of the Senate Comm. on Appropriations, 99th Cong., 1st Sess. 357 (pt. 2 1985) (Comments of Chief ALJ Litt of the Labor Department).

The Department points out that section 3344 of title 5 of the United States Code, which permits agencies occasionally or temporarily insufficiently staffed with ALJs to use[3]/ ALJs of other agencies, is silent on the question of reimbursement. Thus a question is raised about whether a nonreimbursable borrowing would conflict with our decision in 64 Comp. Gen. 370 (1985) in which we held that, absent specific statutory authority, nonreimbursable interagency and intra-agency details were unlawful. This holding, which reversed previous GAO decisions, found that such details violated the law that appropriations be only

---

2/ A similar increase was supported by the House. S. Rep. No. 151, 99th Cong., 1st Sess. 19 (1985).

3/ We regard the term "use" in the statute as synonymous with detail or transfer.

spent on the objects for which they are appropriated, 31 U.S.C. § 1301(a), since the appropriation funding the details neither provided for the details nor were so connected with the work that was being done that the details also furthered a specific purpose for which the appropriation was made. Correspondingly, we found that such details augmented the appropriations of the receiving agency. Our holding covered situations both in which the detail was not authorized by statute, and in which the detail was so authorized, 5 U.S.C. 3341, but the statute said nothing about how the detail was to be funded.4/ 64 Comp. Gen. at 376-82.

In our decision, however, we did formulate two exceptions to the prohibition: one where the detail involves a matter (1) related to the loaning agency's appropriations and which would aid it in accomplishing a purpose for which its appropriations are provided; and (2) where the detail would have a negligible impact on the loaning agency's appropriations and would conform to the time limits in Federal Personnel Manual Chapter 300, subchapter 8.5/ 64 Comp. Gen. at 380-81.

In response to our decision the Office of Personnel Management (OPM) incorporated these exceptions into Federal Personnel Manual Letter number 300-31, dated Aug. 27, 1985. The Department of Labor urges that the described transfer would conform to the second exception. As only a limited number of Board ALJs would be detailed, and all additional expenses resulting from the detail, such as transportation and travel allowances, would be paid for by the Department, it thinks that the detail would have a negligible fiscal impact on Board appropriations. Furthermore, since the time involved would be for less than a year and would be coordinated through OPM's ALJ staffing group, the detail would conform to OPM's time limitations. Informally, the Department also has suggested that the transfer involves a labor matter related to the Board's functions and will aid the Board in accomplishing a purpose for which the Board's appropriations are provided. The Board does not agree with

---

4/ Reimbursable details generally are authorized by section 601 of the Economy Act, 31 U.S.C. § 1535.

5/ This section allows intra-agency details of up to 1 year under certain conditions without OPM approval and extensions beyond that limit with prior OPM approval.

this last assertion, according to a letter dated January 30, 1986, which we received from its Assistant Director for Administrative Law Judges Staffing Group. Neither the Board nor OPM object to the idea of the proposed detail so long as it is legally proper.

Initially, we would point out that neither of the exceptions set forth in 64 Comp. Gen. at 380-81 and adopted by OPM in FPM Letter 300-31 applies here. The Department misconstrues the exception where a detail would have a negligible fiscal impact. This is a de minimus exception for administrative convenience when a detail is for a brief period and the number of persons and costs involved are minimal, notwithstanding that 31 U.S.C. § 1301(a) technically would be violated. The detail proposed here, involving 15 to 20 ALJs and the related substantial amount of salary expenses, far exceeds the de minimus standard we intended to establish. Although we think it prudent not to be overly restrictive and state what precise dollar amount or number of people participating in a detail would be considered de minimus, the Board indicates that the salary costs, exclusive of benefits, would come to $674,250 for the balance of fiscal year 1986. In view of the modest size of the NLRB's fiscal year 1986 appropriation for salaries and expenses, it would be difficult to conclude that this amount, if not reimbursed, would have a "negligible fiscal impact."

We are also unable to find that the transfer of Board ALJs to the Department to handle Black Lung Program cases is so related to the purpose for which the Board's appropriations are provided, that the detail falls within the first exception. There is no particular connection between the Board's appropriations and the resolution of Black Lung Program cases. By statute, the Black Lung Program is a Department of Labor responsibility. See 30 U.S.C. §§ 901 et seq. Moreover, as mentioned earlier, the Board itself finds the first exception "clearly not applicable."

Consistent with this discussion, it is evident that the propriety of the detail depends upon the authority provided by section 3344 of title 5. This section was enacted as part of section 11 of the Administrative Procedure Act of 1946, Pub. L. No. 79-404, 60 Stat. 237, 244, the section which described how ALJs (then called hearing examiners) were to be paid and used. Neither the legislative history of section 3344 of title 5 nor the regulations implementing the section, 5 C.F.R. §§ 930.201 et seq., provide any clarification about whether the loaning or borrowing agency is to pay for the detailed ALJs.

Neither OPM, the agency responsible for administering the ALJ program, nor the agencies involved have interpreted section 3344 one way or the other. Nevertheless, OPM has told us that its policy is to allow agencies to work out the issue of reimbursement between themselves. As a practical matter, OPM indicates that the vast majority of the 150 to 200 ALJs who are temporarily transferred per year to hear one or a number of cases in agencies other than the agency by whom they are employed are paid by the agency to whom they are transferred. Moreover, even though the transferring agency does occasionally pick up the costs, this has been done when the transfer involves minimal costs and never, to our knowledge, in a situation like the present one which involves a large number of ALJs.

We see no reason why the basis for our holding in 64 Comp. Gen. 370 (1985) that section 3341 of title 5 does not authorize nonreimbursable details should not apply here. As indicated, section 3344, like section 3341, is a statute that authorizes details but says nothing about reimbursement.

Section 1301(a) of title 31 is one of a number of statutes expressing Congress' constitutional control over the appropriations process. U.S. Const. art 1, § 9, cl. 7. As pointed out in 64 Comp. Gen. at 382, when the Congress has found it desirable to do so it has enacted legislation that specifically allows for nonreimbursable details. Thus, for example, section 3343 of title 5 specifically authorizes such details to international organizations.

It is true that the Senate reports referenced above clearly intended the Department to borrow ALJs to help dispose of the black lung case backlog. Moreover, at least in its report accompanying the 1985 Supplemental Appropriations Act, S. Rep. No. 82, supra, the Senate indicated that the borrowing, to the extent practicable, be done on a nonreimbursable basis. However, it is well settled that suggestions or expressions of congressional intent in committee reports, floor debates and hearings are not legally binding unless they are incorporated either expressly or by reference in an appropriations act itself or in some other statute. 64 Comp. Gen. 359, 361 (1985); 55 Comp. Gen. 307, 319 (1975). Moreover, in this instance, even the Senate's position is not clear. The report accompanying the 1986 Labor Department appropriation said nothing about how the directed details were to be paid for. This was consistent with departmental suggestions in the hearings that nonreimbursable transfers would be unlawful. We also point out

that in 1978, congressional concern with nonreimbursable details was expressed during the process of enacting amendments clarifying the authority for employing personnel in the White House Office and the President's authority to employ personnel to meet unanticipated needs, Pub. L. No. 95-570, 92 Stat. 2445, 2449-50. S. Rep. No. 868, 95th Cong., 2d Sess. 1, 4, 11 (1978); H.R. Rep. No. 979, 95th Cong., 2d Sess. 10-11 (1978).

For the reasons given above, we affirm the principles stated in 64 Comp. Gen. 370, and find that the proposed transfer in this case is improper if made on a nonreimbursable basis.

for Shelton J. Jordan
Comptroller General
of the United States