GAO

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Office of the General Counsel

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May 25, 1993

Ms. Jacqueline L. Smith
Regional Administrator, Alaskan
Region, AAL-1
Federal Aviation Administration
222 West 7th Avenue #14
Anchorage, Alaska 99513-7587

Dear Ms. Smith:

This responds to your letter of December 23, 1992, requesting an opinion whether the Federal Aviation Administration (FAA) may reimburse its employees for ferry fares they incur to commute to their duty station at the Ketchikan airport on Gravina Island, Alaska.[1]

The only authority we are aware of that may authorize subsidizing the employees' commuting on the ferry system in question is section 629 of Pub. L. 101-509, 104 Stat. 1478 (1990), note in Chapter 79, title 5 U.S.C. (Supp. III 1991), which authorizes agencies "to participate in any program established by a State or local government that encourages employees to use public transportation." The statute also provides that such programs "may involve the sale of discounted transit passes or other incentives that reduce the cost to the employee of using public transportation." We have held that this statute authorizes agencies to use appropriated funds to participate in such programs. B-243677; B-243674, May 13, 1991. You have asked our opinion as to whether the situation at Ketchikan meets the requirements of section 629.

[1]Although on the basis of ., 71 Comp. Gen. 374 (1992), we previously declined to consider this matter when it was presented jointly by the FAA and a union for the purpose of resolving a pending grievance, you now state that there is no longer a labor management dispute in this matter; we also understand that there are some employees at Gravina who are not subject to negotiated grievance procedures under collective bargaining agreements. Therefore, we are providing this advice on the basis of the issue being one "of general application which [does] not involve specific employee claims." . at p. 378.

We understand that there are no housing facilities on Gravina Island, so all employees must commute to the island and parking spaces on the island are very limited. The Ketchikan Gateway Borough, a local government organization, operates the ferry system which is the only practical means for people and their vehicles to commute between the mainland town of Ketchikan and Gravina Island. The ferry system, in addition to accepting payment of fares in cash, has a program of offering farecards which can be purchased in different amounts and substituted for cash. It has a bifurcated fare system developed to encourage pedestrian transportation and decrease the number of vehicles using the airport ferry. To do so, for pedestrians the system charges $2.50 per day or $25 for a reduced rate monthly pass for employees who work at the airport, and $11 per day for a vehicle and parking access.

While the sponsor of the legislation that became section 629 stated that it was intended to allow agencies to find ways to get employees out of their cars and into public transportation, neither section 629 nor its legislative history defines the types of "programs" contemplated for participation in by a federal agency.[2]

The General Services Administration (GSA) in Bulletin FPMR D-227, July 11, 1991, and the Office of Management and Budget (OMB) in a Memorandum for the Heads of Departments and Agencies dated June 12, 1992, have provided guidance for agency participation in programs under section 629. (Copies enclosed.) While this guidance provides no specific definition of what constitutes a program, both GSA and OMB recognize that agency participation in such programs is discretionary with the agency. The OMB guidance also provides a policy statement, detailed guidelines, implementation and management goals, and information agencies are to collect to provide a basis for evaluation of participation in such a program. OMB's guidance, thus, gives a clear indication of the attributes OMB considers such a program should have.

In regard to establishing a subsidy program, OMB's policy statement provides that:

> ". . . agencies should determine whether the establishment of a transit subsidy program will significantly enhance the use of public

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[2]_See_ Introduction of S. 2978, 101st Cong., 2d Sess., 136 Cong. Rec. S12170 (daily ed. Aug. 3, 1990); Amendment 2619 to H.R. 5241, 101st Cong. 2d Sess., 136 Cong. Rec. S12707 (daily ed. Sept. 10, 1990), which became section 629, Pub. L. 101-509.

transportation and reduce the use of the automobile for employee commuting. Agencies may decide not to establish a transit subsidy program on the grounds that (a) there is little probability that subsidies will increase the use of public transportation, and/or (b) the use of subsidies, even if they are likely to increase use of public transportation, do nct represent the best use of limited agency resources."

Based on the language of the statute and guidance discussed above, we believe that the minimal requirement that any State or local activity must possess for an agency to consider participating in it under section 629 is an encouragement for employees to forsake their cars for public transportation.

Concerning the present case, we are aware that an FAA Assistant Chief Counsel has opined that since, as a practical matter, there is no alternative to use of the ferry, and there is no specific State or local program involved to encourage use of public rather than private transportation, subsidizing use of the ferry is not authorized under section 629. It is our view that subsidizing the purchase of an $11 fare on the Ketchikan ferry to carry an employee's car to Gravina Island clearly would not meet the purpose of section 629. Concerning pedestrian fares, however, while the local government at Ketchikan apparently has no formal program for the agency to participate in other than the purchase of pedestrian fare-cards, presumably the lower pedestrian fares, especially the monthly pass fare, encourage pedestrian use of the ferry, thus reducing the number of automobiles transported to Gravina by employees commuting to work there. That is, although the number of commuters using the ferry probably is unaffected by this fare system, it could negatively affect the number of automobiles brought to Gravina. On this basis, it may be that purchase of monthly pedestrian fare-cards could be considered to qualify for subsidization under section 629.

You should be aware, however, that even if the monthly pass fare for pedestrians does pass the minimal test to be considered a program under section 629, as noted above, OMB guidance states that agencies may decide not to establish subsidy programs if there is little probability that the subsidy would increase the use of public transportation. In this case it appears that there would be no increase in the use of public transportation in terms of numbers of commuters, but there may be a diversion of commuters from bringing their automobiles.[3] However, the number of employees commuting to Gravina Island may be so small that participation in a subsidy program would not achieve an impact significant enough to justify the expense. These considerations, among others outlined by OMB, are matters for the FAA to consider in deciding whether to use agency funds to participate in a subsidy program.

In addition, under the OMB guidance if the FAA decides to participate in a subsidy program, it would be required to designate a high-level official to implement the program, establish a method to measure "changes in existing employee commuting habits because of the program," and show the costs and benefits derived from the program. These requirements are to prevent abuse and to allow evaluation of the effectiveness of such programs, including the evaluation our Office is required to furnish to the Congress by June 30, 1993, pursuant to section 629(b).

Because of the apparent marginal aspects of considering the Ketchikan ferry fares for subsidization under section 629, we believe that if the FAA wishes to pursue the matter, it should first consult with OMB to see that all aspects of the "program" meet OMB requirements, including the accounting and evaluation controls. We must point out, in addition, that the authority provided by section 629 expires by its own terms December 31, 1993. Therefore, unless legislation is enacted to extend this authority, agency funds may not be used for this purpose beyond December 31, 1993.

Sincerely yours,

Seymour Efros

for James F. Hinchman
General Counsel

Enclosures

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[3]The OMB guidance also provides that an agency's participation in such a program may be terminated in 1 year "if it cannot document either reduced private automobile usage or increased mass transportation ridership as a direct result of the program."