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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Availability of Appropriations for Reimbursements for Health Insurance Expenses

File: B-323449

Date: August 14, 2012

DIGEST

Where the Office of Personnel Management (OPM) does not permit the enrollment of an employee's spouse under the Federal Employees Health Benefits Program (FEHBP), appropriated funds are not available to reimburse the employee for the costs of health insurance for his spouse. The Federal Employees Health Benefits Act of 1959 charges OPM with the administration of the FEHBP, and OPM has advised that same-sex spouses are not eligible for enrollment. Accordingly, a federal court may not use its appropriation to reimburse its employee for the cost of purchasing health insurance outside of the FEHBP.

DECISION

The Clerk of the U.S. District Court for the Northern District of California (court) has requested a decision under 28 U.S.C. § 613(c)[1] on the availability of the court's appropriation to make reimbursements for the health insurance expenses of a court employee. Letter from Clerk, District Court, to General Counsel, GAO, Apr. 16, 2012 (Request Letter). As explained below, we conclude that the court's appropriation is not available for this purpose, as the reimbursements constitute the payment of the employee's personal expenses.

[1] A certifying officer in the judicial branch has the right to obtain a decision of the Comptroller General on questions of law involved in payment requests. 28 U.S.C. § 613(c). The Director of the Administrative Office of the United States Courts (AOUSC) has designated the Clerk to serve as a certifying officer and as a disbursing officer. Memorandum from Chief Accounting Officer, AOUSC, *Designation of Certifying Officers*, effective March 4, 2002.

When rendering decisions and opinions, our regular practice is to obtain the views of the relevant federal agency to establish a factual record and to elicit the agency's legal position on the matter. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), *available at* www.gao.gov/legal/resources.html. In this case, the Clerk provided us with the court's Equal Employment Opportunity Plan and Employment Dispute Resolution Plan (EDR Plan),[2] an administrative order of the Chief Judge under the EDR Plan directing the Clerk to reimburse the employee (EDR Order),[3] a letter from the Administrative Office of the United States Courts (AOUSC) denying enrollment of the employee's same-sex spouse,[4] and other factual information. The affected employee also submitted his legal views.[5]

BACKGROUND

In 2011, a court employee submitted an application for the enrollment of his same-sex spouse in the FEHBP. EDR Order, at 2. AOUSC, referring to the Defense of Marriage Act[6] (DOMA) and OPM guidance, did not process the employee's application. AOUSC stated:

> "Section 8901(5) of title 5, United States Code, allows a federal employee to cover his/her current 'spouse' under his/her FEHBP enrollment as a family member eligible for coverage. [DOMA] states,

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[2] United States District Court, Northern District of California, *Equal Employment Opportunity Plan & Employee Dispute Resolution Plan*, incorporating amendments through Aug. 30, 2011.

[3] United States District Court, Northern District of California, San Francisco Division, *Order re: EDR Dispute*, April 3, 2012.

[4] Letter from Chief, Benefits Division, AOUSC, to Employee, Dec. 5, 2011 (AOUSC Letter).

[5] Letter from Employee to General Counsel, GAO, May 22, 2012 (Employee Letter). The Request Letter refers to payments ordered for two court employees. Request Letter, at 2. Because only one of the employees waived the confidentiality to which he was entitled under the EDR Plan, the Clerk included full documentation pertaining only to this employee with the Request Letter. *Id*. We, therefore, address only the reimbursements for the employee who is the subject of the documentation that the Clerk submitted to us. However, to the extent that the facts regarding reimbursements for other employees are similar to the facts presented here, our analysis and conclusions in this decision apply to other employees.

[6] Pub. L. No. 104-199, § 3, 110 Stat. 2419 (Sept. 21, 1996), *codified at* 1 U.S.C. § 7.

> the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a 'wife.' Same-sex partners, therefore, do not meet the definition of 'spouse.'"

AOUSC Letter. OPM administers the FEHBP and prescribes regulations and guidance necessary to carry out the program, including the manner and conditions under which an employee is eligible to enroll. *See* 5 U.S.C. § 8913; 5 C.F.R. §§ 890.101–890.1308. AOUSC explained that OPM states that "[s]ame sex partners are not eligible family members." AOUSC Letter.[7] AOUSC said that it is "bound by the OPM regulations," and that, "regardless of the legal recognition of such relationships provided under the laws of any state, same-sex spouses cannot receive coverage under the FEHB program." *Id.*

The employee subsequently filed a complaint under the court's EDR Plan, alleging that the denial of benefits to his same-sex spouse constituted a violation of a substantive right protected by the EDR Plan. *See* EDR Order, at 2–3. The Chief Judge of the court, sitting in an administrative capacity as a hearing officer under the court's EDR Plan, conducted a hearing to resolve the employee's complaint. *See* EDR Order, at 2–3. The Chief Judge concluded that the denial of health benefits to the employee violates a substantive right provided to him by the EDR Plan, and granted an award to the employee consisting of:

> "(1) back pay for the period in which he was forced to purchase health insurance coverage for his same-sex spouse, following [AOUSC's] refusal to afford him such coverage, up to the date of this Order; and (2) front pay in an amount that equals the cost of health insurance for his same-sex spouse, for as long as Complainant remains a married employee of the District and [AOUSC] refuses to afford him such coverage."[8]

EDR Order, at 10–11. The Chief Judge ordered the Clerk to determine "the amount of a reimbursement allowance" and pay such an allowance to the employee. *Id*. On

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[7] OPM provides guidance in this regard. *See*, *e.g.*, *Federal Employees Health Benefits Program Handbook*, *available at* www.opm.gov/insure/health/reference/handbook/fehb28.asp#domact (FEHBP Handbook) (last visited Aug. 1, 2012); *Frequently Asked Questions, Same Sex Domestic Partner Benefits*, *available at* www.opm.gov/faqs/topic/domesticpartner/index.aspx (Frequently Asked Questions) (last visited Aug. 1, 2012).

[8] Although stated as "back" and "front" pay, the amount is not pay within the meaning of Title 5, but is instead a reimbursement for health insurance costs. *See* 5 U.S.C. § 5596; 5 C.F.R. § 550.803.

April 12, 2012, the Chief Judge granted a limited stay of the EDR Order to permit the Clerk to seek a GAO decision.[9]

For fiscal year 2012, Congress enacted a lump sum appropriation for the salaries and expenses of the U.S. Circuit Courts of Appeals and District Courts. *See* Financial Services and General Government Appropriations Act, 2012, Pub. L. No. 112-74, 125 Stat. 786, 884, 899 (Dec. 23, 2011). The Clerk requests our decision on the propriety of making the payments granted in the EDR Order. Request Letter, at 1.

DISCUSSION

At issue here is whether the court's appropriation is available to reimburse a federal employee for the cost of health insurance purchased outside of the statutorily-authorized FEHBP.

As the Supreme Court has stated, "The established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress." *United States v. MacCollom*, 426 U.S. 317, 321 (1976); *see also Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990); *Department of the Navy v. Federal Labor Relations Authority*, 665 F.3d 1339, 1346–47 (D.C. Cir. 2012) (citations omitted). Under the purpose statute, 31 U.S.C. § 1301(a), appropriated funds may be used only to achieve the objects for which they were appropriated. We do not read the purpose statute to require that every item of expenditure be specified in an appropriations act. Rather, the spending agency, or in this case the court, has reasonable discretion to determine how to achieve the objects of its appropriation. Under this concept, known as the necessary expense rule, an expenditure may be justified if it (1) bears a logical relationship to the appropriation sought to be charged; (2) is not prohibited by law; and (3) is not otherwise provided for in some other appropriation. B-230304, Mar. 18, 1988.

When applying the necessary expense rule, GAO and the federal courts have consistently concluded that appropriations are not available for employee personal expenses—that is, expenses that are primarily for the personal convenience or comfort of an employee—unless Congress provides otherwise by statute. B-307316, Sept. 7, 2006; 3 Comp. Gen. 433 (1924). Recently, in *Navy v. Federal Labor Relations Authority*, the Circuit Court of Appeals for the District of Columbia (D.C. Circuit Court) applied the necessary expense rule to conclude that the Navy's appropriation was not available to pay for bottled water for Navy employees because bottled water is a personal expense. 665 F.3d at 1342 ("Funds appropriated for agency operations may be used for 'necessary expenses' but not for employees'

[9] United States District Court, Northern District of California, San Francisco Division, *Order Staying April 3, 2012 Order Re: EDR Dispute*, April 12, 2012.

'personal expenses.'"). The D.C. Circuit Court pointed out that, under the Appropriations Clause of the Constitution, no money "can be paid out of the Treasury unless it has been appropriated by an act of Congress." *Id*. at 1346, *quoting Office of Personnel Management*, 496 U.S. at 424 (internal quotation marks omitted). The D.C. Circuit Court stated that an agency would violate the purpose statute, 31 U.S.C. § 1301, if it paid for employees' personal expenses without statutory authority. Congress's control over federal expenditures is "absolute." 665 F.3d at 1348; *accord, Office of Personnel Management,* 496 U.S. at 423–24 ("Any exercise of power granted by the Constitution to one of the other Branches of Government is limited by a valid reservation of congressional control over funds in the Treasury.").

The cost of employee health benefits is a personal expense and, therefore, must be borne by the employee, unless there is statutory authority permitting the government to pay. *See*, e.*g.*, B-253159, Nov. 22, 1993; 57 Comp. Gen. 62 (1977); 53 Comp. Gen. 230 (1973); 22 Comp. Gen. 32 (1942). In that regard, Congress, in the Federal Employees Health Benefits Act of 1959, established a health benefits program to provide health insurance for federal employees and other beneficiaries and permitted use of appropriations to pay for the government contribution under the statutorily-authorized health benefits program, 5 U.S.C. § 8906(f).

The Federal Employees Health Benefits Act charges OPM with the administration of the FEHBP. 5 U.S.C. § 8913. OPM prescribes regulations necessary to carry out the program, including the "means and conditions under which an employee is eligible to enroll." *Id.* § 8913(b). OPM, in its guidance, states that "[t]he Federal Employees Health Benefits Act . . . limits health insurance coverage to spouses and children of federal employees" and that "[DOMA] further limits spousal eligibility to a person of the opposite sex who is a husband or wife."[10] In accordance with this guidance, AOUSC did not process the employee's request to enroll his spouse as an eligible family member under the FEHBP.

In light of the discretion Congress vested in OPM to administer the FEHBP and to prescribe regulations defining the means and conditions under which an employee is eligible to enroll, it would be inappropriate for either AOUSC or this Office to act contrary to OPM's guidance. *Accord, Golinski v. OPM,* 781 F. Supp. 2d 967, 972–975 (N.D. Cal. 2011) (order denying preliminary injunction).[11] We are aware of no

[10] FEHBP Handbook.

[11] The court subsequently concluded that DOMA is unconstitutional and issued a permanent injunction barring OPM from interfering with the enrollment of the plaintiff's same-sex spouse in her family health benefits plan. *Golinski v. OPM*, 824 F. Supp. 2d 968 (N.D. Cal. 2012). In response to the court's injunctive order OPM directed an FEHBP-participating carrier to enroll the same-sex wife of the federal employee of the Court of Appeals for the Ninth Circuit in the employee's federal health benefits plan. Letter from Assistant Director, OPM, to Vice President,

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statute other than the Federal Employees Health Benefits Act that permits the use of appropriations to pay for an employee's personal expense of health insurance for the employee's spouse. We conclude, therefore, that the court's appropriation is not available to reimburse an employee for the expense of purchasing health insurance coverage for a spouse for whom OPM would not permit enrollment in the FEHBP.

In arriving at our conclusion, we take note of the court's EDR Order finding that AOUSC's denial of health insurance coverage for the employee's spouse violates a substantive right provided by the court's EDR Plan. EDR Order, at 8; *see also* Employee Letter. We note, also, that AOUSC's denial was based on OPM's guidance regarding the application of DOMA. AOUSC Letter. Section 3 of DOMA states that

> "[i]n determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or wife."

Pub. L. No. 104-199, § 3, 110 Stat. 2419 (Sept. 21, 1996), *codified at* 1 U.S.C. § 7. OPM states that "[t]he Federal Employees Health Benefits Act . . . limits health insurance coverage to spouses and children of federal employees" and that "[the Defense of Marriage Act] further limits spousal eligibility to a person of the opposite sex who is a husband or wife."[12] Accordingly, "[s]ame sex partners are not eligible family members."[13]

The constitutionality of DOMA has been, and continues to be, the subject of litigation.[14] Indeed, the U.S. District Court for the Northern District of California

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Blue Cross and Blue Shield Association (Mar. 9, 2012). Importantly, OPM cautioned that its position was taken pursuant to the court order, specifically applied only to that employee's spouse, and would have "no effect on enrollments requested by other same-sex spouses." *Id.* This case does not present the same facts as in *Golinski*.

[12] Frequently Asked Questions.

[13] FEHBP Handbook.

[14] The President "has made the determination that Section 3 of [DOMA], as applied to same-sex couples who are legally married under state law, violates the equal protection component of the Fifth Amendment." Letter from the Attorney General to the Speaker of the House of Representatives, Feb. 23, 2011, *available at* www.justice.gov/opa/pr/2011/February/11-ag-223.html (last visited Aug. 1, 2012).
(continued...)

concluded that section 3 of DOMA is unconstitutional and enjoined OPM "from interfering with the enrollment" of a court employee's same-sex spouse in the FEHBP. *Golinski v. OPM*, 824 F. Supp. 2d 968, 1003 (N.D. Cal. 2012). Two appeals are being taken from this decision. Both OPM and the Bipartisan Legal Advisory Group of the U.S. House of Representatives appealed the *Golinski* ruling to the Court of Appeals for the Ninth Circuit. *Golinski v. OPM*, *appeal docketed*, No. 12-15388 (Feb. 24, 2012) and No. 12-15409 (Feb. 28, 2012). OPM also petitioned the Supreme Court for a writ of certiorari before judgment in July 2012. *OPM v. Golinski*, *petition for cert. filed*, No. 12-16 (July 3, 2012). In a May opinion, in a matter that also has been appealed to the Supreme Court, the U.S. Court of Appeals for the First Circuit held that section 3 of DOMA is unconstitutional and enjoined federal officials and agencies from enforcing DOMA. *Massachusetts v. Department of Health and Human Services*, 682 F.3d 1 (1st Cir. 2012), *petition for cert. filed*, No. 12-15 (July 3, 2012). However, the First Circuit stayed its injunctive order pending likely Supreme Court review of DOMA. *Id*. at 17. Thus, two petitions seeking review of the constitutionality of DOMA are currently before the Supreme Court.

It is not our role nor within our province to opine upon or adjudicate the constitutionality of a duly enacted statute. *See* B-321982, Oct. 11, 2011. In our view, legislation that was passed by Congress and signed by the President, thereby satisfying the Constitution's bicameralism and presentment requirements, is entitled to a heavy presumption in favor of constitutionality. *Id.* (citations omitted). Although two courts have found DOMA's section 3 unconstitutional, the First Circuit stayed its injunctive order, "[a]nticipating that certiorari will be sought and that Supreme Court review of DOMA is highly likely." 682 F.3d at 17. The First Circuit expressed its view that "only the Supreme Court can finally decide this unique case." *Id.* at 11. The First Circuit opinion, in fact, has been appealed to the Supreme Court, and the parties await the Court's decision whether to accept certiorari. GAO is not the appropriate forum to decide the constitutionality of DOMA.

The Clerk has asked also whether he may be relieved of liability for an improper payment should he certify and disburse the payments specified in the Order. Request Letter, at 1. The Clerk, as a certifying officer, is statutorily responsible and accountable for the legality of a proposed payment, and is pecuniarily liable for restitution for certifying a prohibited payment. 28 U.S.C. §§ 613(b)(1)(B), 613(b)(2). GAO adheres to the general principle of administrative law that an agency should follow its own decisions, or give a reasoned explanation for departure,[15] and the

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Accordingly, the Attorney General stated that "the Department [of Justice] will cease defense of Section 3 [of DOMA]." *Id*.

[15] *See, e.g., FCC v. Fox Television Stations*, 556 U.S. 502, 514–516 (2009); *Hinson v. National Transportation Safety Board*, 57 F.3d 1144 (D.C. Cir. 1995).

conclusion we reach herein would have precedential weight as GAO might consider subsequent, related matters, including a request for relief of liability. GAO, in subsequent decisions, may modify or overrule a decision based on changed circumstances, including, as pointed out earlier, a Supreme Court decision addressing the constitutionality of DOMA's section 3.

CONCLUSION

Where the Office of Personnel Management (OPM) does not permit the enrollment of an employee's spouse under the Federal Employees Health Benefits Program (FEHBP), appropriated funds are not available to reimburse the employee for the costs of health insurance for his spouse. The Federal Employees Health Benefits Act of 1959 charges OPM with the administration of the FEHBP, and OPM has advised that same-sex spouses are not eligible for enrollment. Accordingly, a federal court may not use its appropriation to reimburse its employee for the cost of purchasing health insurance outside of the FEHBP.

If you have any questions regarding this decision, please contact Thomas H. Armstrong, Managing Associate General Counsel, at (202) 512-8257.

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