

# Appropriations Issues for Political Appointees:

## Frequently Asked Questions/Food for Thought

- A. Why is it important to acquaint your agency's political appointees with appropriations law issues?
- It's Congress's constitutional "Power of the Purse" and Congress exercises its power by imposing funding levels and limitations on executive agencies.
  - Many new political appointees come from the private sector where the rules are different.
  - "An ounce of prevention is worth a pound of cure."
    - Enable appointees to spot concerns and know when to seek advice of counsel.
    - Prevent embarrassing missteps and mistakes.
    - Be more effective in accomplishing goals with fewer distractions and diversions.
    - Avoid invalid contracts.
    - Lessen unnecessarily hostile hearings and other adverse congressional attention.
    - Avoid unflattering media coverage.
    - Reduce the likelihood of critical Inspector General and GAO audit reports.
    - Save appointees from themselves.
- B. How can counsel best acquaint political appointees with appropriations law issues?
- Build relationships of trust and respect between appointees and counsel to preempt confrontations.
    - Briefing appointees on a case-by-case basis as problems arise is indispensable, but
    - Briefing appointees upon their appointment, before problems arise, may prevent problems, and
    - Help to foster open discussions and proactive problem-solving.
  - Hold informal one-on-one presentations by counsel.
  - Prepare briefing packages.
  - Offer "brown bag" seminars.

- Identify formal training courses.
- Leverage other training opportunities—such as mandatory ethics training.
- A combination of some or all of the above.

C. What tools and visual aids are useful in acquainting appointees with appropriations law issues?

- Use the “Washington Post Test”: Share articles from major newspapers about past incidents.
- Share copies of previous critical IG/GAO/Congressional reports.
- Refer to excerpts from GAO’s “Red Book” and Budget Glossary to provide background and context.
- Print desk reference and wallet cards—highlight potential issues and identify counsel to contact.
- Reproduce PowerPoint slides—explain the impact of appropriations law and how counsel can help.
- Produce topical memorandums on common potential appropriations law issues and concerns.
- Establish (or leverage already established) agency handbooks to explain the law and agency policies.

## POTENTIAL SITUATIONS ENCOUNTERED BY NEW POLITICAL APPOINTEES THAT HAVE APPROPRIATIONS LAW IMPLICATIONS

Situation or Expense	Appropriations Law Concern	GAO Resources and Relevant Statutes
Cars & Aircraft	<ul style="list-style-type: none"> <li>▪ Limited authority; requires specific statutory authority in most cases</li> </ul>	<ul style="list-style-type: none"> <li>▪ B-308010, Apr. 20, 2007, <i>citing</i> 31 U.S.C. § 1343 (USDA/APHIS cooperative agreement for use of private aircraft did not violate statutory prohibition on <u>purchase</u> of aircraft).</li> <li>▪ 31 U.S.C. § 1343 (prohibition on purchase of vehicles and aircraft).</li> </ul>
Cooks, Chauffeurs, Personal Servants, & Home-to-Work Transportation	<ul style="list-style-type: none"> <li>▪ Personal services</li> <li>▪ Personal v. official expenses</li> <li>▪ Requires specific statutory authority</li> </ul>	<ul style="list-style-type: none"> <li>▪ Agency-specific Appropriations Act restrictions, <i>see, e.g.,</i> Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, sec. 6, Div. F, Title IV, § 404, 121 Stat. 1844, 2144 (Dec. 26, 2007) (DOI, EPA &amp; USDA) (personal cook, chauffeur, other personal servants).</li> <li>▪ 20 Comp. Gen. 601 (1941), <i>citing</i> predecessor to 5 U.S.C. § 5536 (maid, cook, and other personal services for nurses assigned to Navy quarters).</li> <li>▪ 5 U.S.C. § 5536 (restrictions on additional pay or allowances for employees and military members).</li> <li>▪ 62 Comp. Gen. 438 (1983) (home-to-work transportation for State Department political appointees).</li> <li>▪ 31 U.S.C. § 1344(a)(1) (restricting home-to-work transportation).</li> <li>▪ B-162111, Dec. 17, 1975, <i>citing</i> 5 U.S.C. § 3103 (personal chauffeur).</li> <li>▪ 5 U.S.C. § 3103 (agencies may employ individuals “only for services actually rendered in connection with and for the purposes of the appropriation” from which they are paid).</li> </ul>

Situation or Expense	Appropriations Law Concern	GAO Resources and Relevant Statutes
<p>Conferences &amp; Meetings</p>	<ul style="list-style-type: none"> <li>▪ Augmentation: <ul style="list-style-type: none"> <li>○ No-cost contracts for conference planning services</li> <li>○ Charging fees to offset costs</li> <li>○ Public/private partners/sponsors</li> </ul> </li> <li>▪ Meals and light refreshments</li> <li>▪ Training objectives</li> </ul>	<ul style="list-style-type: none"> <li>▪ GAO 2008 Appropriations Law Forum, Panel materials on No-Cost Contracts, <i>available at</i> <a href="http://www.gao.gov/special.pubs/appforum2008">http://www.gao.gov/special.pubs/appforum2008</a>.</li> <li>▪ GAO 2006 Appropriations Law Forum, Panel materials on Meetings &amp; Conferences—Public/Private Partnerships, <i>available at</i> <a href="http://www.gao.gov/special.pubs/appforum2006">http://www.gao.gov/special.pubs/appforum2006</a>.</li> <li>▪ B-308968, Nov. 27, 2007 (NIH no-cost contract for event planning services).</li> <li>▪ B-306663, Jan. 4, 2006 (using contractor, on behalf of agency, to collect fees from conference participants to offset costs of agency-hosted conference).</li> <li>▪ GAO 2005 Appropriations Law Forum, Panel materials on Meals and Refreshments (“Food Tree”), <i>available at</i> <a href="http://www.gao.gov/special.pubs/appforum2005/appofunds/index.html">http://www.gao.gov/special.pubs/appforum2005/appofunds/index.html</a>.</li> <li>▪ B-310023, Apr. 17, 2008, <i>citing, inter alia</i>, 31 U.S.C. § 1345 (food at meetings, conventions, and other form of assemblage or gathering).</li> <li>▪ 31 U.S.C. § 1345 (restricting use of appropriations “for travel, transportation, and subsistence expenses for a meeting”).</li> <li>▪ B-300826, Mar. 3, 2005 (<i>inter alia</i>, Government Employees Training Act, 5 U.S.C. § 4109, authority to provide meals and light refreshments if necessary to achieve training program objectives).</li> <li>▪ Government Employees Training Act, 5 U.S.C. §§ 4109, 4110 (using appropriations for expenses of training and attendance at meetings).</li> </ul>

Situation or Expense	Appropriations Law Concern	GAO Resources and Relevant Statutes
Entertainment	<ul style="list-style-type: none"> <li>▪ Personal expenses</li> <li>▪ Often requires specific statutory authority</li> <li>▪ Must balance agency benefit against personal benefit</li> </ul>	<ul style="list-style-type: none"> <li>▪ GAO, <i>Principles of Federal Appropriations Law</i>, vol. 2, chap. 4, pt. C, § 5, 3<sup>rd</sup> ed., GAO-04-261SP (Washington, D.C.: Jan. 2004), available at <a href="http://www.gao.gov/legal/index.html">http://www.gao.gov/legal/index.html</a>.</li> </ul>
Food & “Working Lunches”	<ul style="list-style-type: none"> <li>▪ Personal expenses</li> <li>▪ Necessary expense analysis</li> <li>▪ Often requires specific statutory authority</li> <li>▪ Must balance agency benefit against personal benefit</li> </ul>	<ul style="list-style-type: none"> <li>▪ GAO 2005 Appropriations Law Forum, Panel materials on Meals and Light Refreshments (“Food Tree”), available at <a href="http://www.gao.gov/special.pubs/afforum2005/approfunds/index.html">www.gao.gov/special.pubs/afforum2005/approfunds/index.html</a>.</li> </ul>
Gifts & Awards	<ul style="list-style-type: none"> <li>▪ Personal expenses</li> <li>▪ Often require specific statutory authority</li> </ul>	<ul style="list-style-type: none"> <li>▪ GAO, <i>Principles of Federal Appropriations Law</i>, vol. 2, chap. 4, pt. C, § 8, 3<sup>rd</sup> ed., GAO-04-261SP (Washington, D.C.: Jan. 2004), available at <a href="http://www.gao.gov/legal/index.html">http://www.gao.gov/legal/index.html</a>.</li> </ul>
Holiday & Greeting Cards	<ul style="list-style-type: none"> <li>▪ Often a personal expense</li> </ul>	<ul style="list-style-type: none"> <li>▪ B-247563.4, Dec. 11, 1996 (Department of Veterans Affairs holiday greeting cards).</li> </ul>
Insurance Policies	<ul style="list-style-type: none"> <li>▪ Federal government generally self-insures</li> <li>▪ Personal expenses</li> </ul>	<ul style="list-style-type: none"> <li>▪ B-309715, Sept. 25, 2007 (accident insurance for NTSB employees traveling on official business).</li> <li>▪ Arts and Artifacts Indemnity Act, 20 U.S.C. §§ 971-977 (indemnity agreements to cover part of the value of private works of art lent to the government that suffer loss or damage while on exhibit).</li> </ul>

<p>Lobbying, Polling, Publicity or Propaganda</p>	<ul style="list-style-type: none"> <li>▪ Government-wide prohibitions</li> <li>▪ Purpose violation</li> </ul>	<ul style="list-style-type: none"> <li>▪ Annual government-wide Appropriations Act restrictions, see, e.g., Pub. L. No. 110-161, Div. D, Title VII, § 703, 121 Stat. at 2019 (Dec. 26, 2007).</li> <li>▪ B-305349, Dec. 20, 2005, <i>citing</i> 5 U.S.C. § 3107, 18 U.S.C. § 1913 (SSA use of private polling service).</li> <li>▪ 5 U.S.C. § 3107 (publicity experts).</li> <li>▪ 31 U.S.C. § 1352 (lobbying with grant funds).</li> <li>▪ 18 U.S.C. § 1913 (grassroots lobbying).</li> <li>▪ B-305368, Sept. 30, 2005 (prohibition on publicity or propaganda and Education Department contract with Armstrong Williams).</li> <li>▪ B-304228, Sept. 30, 2005, (Department of Education video news release and media analysis and prohibition on publicity or propaganda).</li> <li>▪ GAO, <i>Principles of Federal Appropriations Law: Annual Update of the Third Edition</i>, at 4-16 through 4-31, GAO-08-450SP (Washington, D.C.: March 2008), available at <a href="http://www.gao.gov/legal/redbook.html">http://www.gao.gov/legal/redbook.html</a>.</li> <li>▪ Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Pub. L. No. 110-417, § 1056, 122 Stat. 4356, 4610 (Oct. 14, 2008) (enacts, as permanent law, a ban on DOD use of appropriated funds “for publicity or propaganda purposes within the United States not otherwise specifically authorized by law”).</li> </ul>
<p>Office Redecorating</p>	<ul style="list-style-type: none"> <li>▪ Amount limitation</li> <li>▪ Choice of decorations is sometimes an issue</li> </ul>	<ul style="list-style-type: none"> <li>▪ Annual government-wide limitation: see, e.g., Pub. L. No. 110-161, Div. D, Title VII, § 713, 121 Stat. at 2022 (Dec. 26, 2007).</li> <li>▪ 64 Comp. Gen. 796 (1985) (Tax Court purchase of paintings and other art objects for judges' offices and chambers).</li> </ul>

<p>Official Reception &amp; Representation Funds (OR&amp;R)</p>	<ul style="list-style-type: none"> <li>▪ Agency-specific amount limitations often found in agency's appropriation</li> <li>▪ For a mix of business and social purposes</li> </ul>	<ul style="list-style-type: none"> <li>▪ 61 Comp. Gen. 260 (1982) (receptions in Custis-Lee Mansion hosted by Secretary of the Interior and his wife).</li> <li>▪ 69 Comp. Gen. 242 (1990), <i>citing</i> 10 U.S.C. § 127 (DOD use of emergency/extraordinary expense fund for official representation expenses).</li> <li>▪ 10 U.S.C. § 127 (for any "emergency or extraordinary expense" of DOD).</li> <li>▪ 68 Comp. Gen. 638 (1989), <i>citing</i> 22 U.S.C. § 4085 (State Department rental of formal eveningwear).</li> <li>▪ 22 U.S.C. § 4085 (official receptions and representational expenses of the State Department).</li> </ul>
<p>Parking, Commuting, &amp; Home-to-Work Transportation,</p>	<ul style="list-style-type: none"> <li>▪ Personal expense</li> <li>▪ Often requires specific statutory authority</li> </ul>	<ul style="list-style-type: none"> <li>▪ B-307918, Dec. 20, 2006 (NOAA may not reimburse employees for mileage traveled between home and office during on-call emergencies outside of normal office hours).</li> <li>▪ 31 U.S.C. § 1344(a)(1) (restricting home-to-work transportation).</li> <li>▪ 72 Comp. Gen. 139 (1993) (Bureau of the Mint may lease employee parking to avoid impairing agency operations).</li> <li>▪ B-305864, Jan. 5, 2006 (Capitol Police could not provide shuttle bus service between agency offices and parking lot for the sole purpose of facilitating employee commutes).</li> <li>▪ 72 Comp. Gen. 225, 227 (1993) and B-261729, Apr. 1, 1996, <i>citing</i> 5 U.S.C. § 5536 (subsidizing employee commuting costs to and from work).</li> <li>▪ 5 U.S.C. § 5536 (restrictions on additional pay or allowances for employees and military members).</li> <li>▪ B-291208, Apr. 9, 2003, <i>citing</i> 26 U.S.C. § 132(f) (reimbursing parking fees for employees with disabilities).</li> <li>▪ 26 U.S.C. § 132(f) (transit pass benefit program).</li> </ul>

<p>Public/Private Partnerships</p>	<ul style="list-style-type: none"> <li>▪ Augmentation issues</li> <li>▪ Acceptance of gratuitous / voluntary services</li> </ul>	<ul style="list-style-type: none"> <li>▪ GAO 2006 Appropriations Law Forum, Panel materials on Meetings &amp; Conferences—Public/Private Partnerships, <i>available at</i> <a href="http://www.gao.gov/special.pubs/appforum2006">http://www.gao.gov/special.pubs/appforum2006</a>.</li> <li>▪ GAO 2008 Appropriations Law Forum, Panel materials on No-Cost Contracts, <i>available at</i> <a href="http://www.gao.gov/special.pubs/appforum2008">http://www.gao.gov/special.pubs/appforum2008</a>.</li> </ul>
<p>Seasonal or Holiday Decorations</p>	<ul style="list-style-type: none"> <li>▪ Constitutional Issues</li> <li>▪ Necessary expense analysis</li> <li>▪ Common / public areas</li> </ul>	<ul style="list-style-type: none"> <li>▪ 67 Comp. Gen. 87 (1987) (seasonal decorations consistent with work-related objectives, not constitutionally inappropriate, and not primarily for the personal convenience/satisfaction of a government employee).</li> <li>▪ 60 Comp. Gen. 580 (1981) (decorative plants for general office use to improve productivity and morale).</li> </ul>





## **A-87669, JULY 23, 1937, 17 COMP. GEN. 55**

INSURANCE - PRIVATE PROPERTY LOANED FOR EXHIBITION PURPOSES - APPROPRIATION AVAILABILITY THE COST OF INSURING PRIVATE PROPERTY TEMPORARILY ENTRUSTED TO THE GOVERNMENT FOR EXHIBITION PURPOSES IN CONNECTION WITH THE CHARLES CARROLL OF CARROLLTON BICENTENARY CELEBRATION, MAY BE PAID FROM THE APPROPRIATION FOR THE BICENTENARY COMMISSION, NOTWITHSTANDING THE GENERAL POLICY OF THE GOVERNMENT NOT TO CARRY INSURANCE ON ITS PROPERTY.

ACTING COMPTROLLER GENERAL ELLIOTT TO SENATOR MILLARD E. TYDINGS, JULY 23, 1937:

I HAVE YOUR LETTER OF JULY 15, 1937, REQUESTING, ON BEHALF OF THE CHAIRMAN OF THE CHARLES CARROLL OF CARROLLTON BICENTENARY COMMISSION, DECISION WHETHER PORTRAITS, FURNITURE, AND OTHER ITEMS LOANED TO THE COMMISSION FOR EXHIBITION PURPOSES IN CONNECTION WITH THE BICENTENARY CELEBRATION MAY BE INSURED.

PUBLIC RESOLUTION NO. 106 OF JUNE 15, 1936, 49 STAT. 1517, PROVIDES:

THAT THE PRESIDENT OF THE UNITED STATES BE, AND HE IS HEREBY, AUTHORIZED TO APPOINT A BODY OF FIVE PERSONS, TO BE DESIGNATED "THE CHARLES CARROLL OF CARROLLTON BICENTENARY COMMISSION," THIS COMMISSION TO BE CHARGED BY HIM WITH THE WORK OF MAKING ADEQUATE PREPARATIONS FOR A NATIONAL CELEBRATION OF THE BICENTENARY OF THE BIRTH OF CHARLES CARROLL OF CARROLLTON. THERE IS HEREBY AUTHORIZED TO BE APPROPRIATED, OUT OF ANY MONEYS IN THE TREASURY NOT OTHERWISE APPROPRIATED, A SUM NOT TO EXCEED \$12,500, OR THE NECESSARY PART THEREOF, TO CARRY OUT THE PROVISIONS OF THIS RESOLUTION.

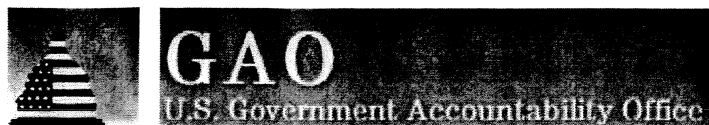
THE APPROPRIATION FOR THIS CELEBRATION WAS INCLUDED IN THE FIRST DEFICIENCY APPROPRIATION ACT, FISCAL YEAR 1937, APPROVED FEBRUARY 9, 1937, PUBLIC, NO. 4, IN THE FOLLOWING LANGUAGE:

CHARLES CARROLL OF CARROLLTON BICENTENARY COMMISSION

FOR EVERY EXPENDITURE REQUISITE FOR AND INCIDENT TO THE PERFORMANCE OF THE DUTIES OF THE CHARLES CARROLL OF CARROLLTON BICENTENARY COMMISSION IN CARRYING INTO EFFECT THE PROVISIONS OF PUBLIC RESOLUTION NUMBERED 106, SEVENTY-FOURTH CONGRESS, APPROVED JUNE 15, 1936, INCLUDING PERSONAL SERVICES IN THE DISTRICT OF COLUMBIA AND ELSEWHERE; TRAVEL EXPENSES AND SUBSISTENCE AT NOT TO EXCEED \$5 PER DAY; ERECTION OF MARKERS AND MEMORIALS; POSTAGE, PRINTING AND BINDING, SERVICES, OFFICE SUPPLIES AND EQUIPMENT, PAGEANTRY, CARTOGRAPHIC MAPS AND PUBLICATIONS AND THEIR DISTRIBUTION, PROMOTION, AND STIMULATION OF SCHOOL ACTIVITIES THROUGH AND BY MEANS OF ESSAY AND PUBLIC-SPEAKING CONTESTS, AND BY OTHER METHODS, COOPERATION WITH THE STATE OF MARYLAND AND PATRIOTIC SOCIETIES; FISCAL YEAR 1937, TO REMAIN AVAILABLE DURING THE FISCAL YEAR 1938, \$12,500.

IT IS THE GENERAL POLICY OF THE FEDERAL GOVERNMENT NOT TO CARRY INSURANCE UPON ITS PROPERTY. HOWEVER, IT HAS BEEN HELD THAT WHERE PRIVATELY OWNED PROPERTY IS TEMPORARILY ENTRUSTED TO THE CUSTODY OF THE GOVERNMENT FOR PUBLIC PURPOSES, THE COST OF INSURING SUCH PROPERTY MAY BE PAID FROM APPLICABLE APPROPRIATIONS. 8 COMP. GEN. 19.

ACCORDINGLY, THIS OFFICE WILL NOT BE REQUIRED TO OBJECT TO THE PAYMENT, UNDER THE APPROPRIATION FOR THE EXPENSES OF THE COMMISSION, OF THE COST OF INSURANCE UPON PRIVATELY OWNED EXHIBITS LOANED TO THE COMMISSION.



## **B-7067, MARCH 20, 1940, 19 COMP. GEN. 798**

INSURANCE - TORT LIABILITY - PURCHASE BY GOVERNMENT AGENCIES FUNDS OF A GOVERNMENT AGENCY MAY NOT BE EXPENDED, IN THE ABSENCE OF STATUTORY AUTHORITY, TO PURCHASE INSURANCE TO COVER ITS POSSIBLE TORT LIABILITY.

ACTING COMPTROLLER GENERAL ELLIOTT TO THE FEDERAL HOUSING ADMINISTRATOR, MARCH 20, 1940:

REFERENCE IS MADE TO YOUR LETTER OF JANUARY 16, 1940, AS FOLLOWS:

UNDER DATE OF NOVEMBER 30, 1939, WE REQUESTED YOUR RULING ON CERTAIN QUESTIONS IN CONNECTION WITH THE OWNERSHIP BY THE ADMINISTRATOR OF PROPERTIES CONVEYED TO HIM FOLLOWING DEFAULT UPON CONTRACTS OF INSURANCE UNDER SECTION 207. IN THAT LETTER WE GENERALLY DESCRIBED THE TYPE OF PROPERTY INVOLVED.

WE NOW PRESENT THE QUESTION WHETHER OR NOT THE ADMINISTRATOR CAN EXPEND MONEY OUT OF THE HOUSING FUND TO PROCURE INSURANCE AGAINST HIS TORT LIABILITY AS OWNER OF SUCH PROPERTY.

IN A LETTER DATED JANUARY 10, THE ATTORNEY GENERAL HAS STATED THAT "IT IS NOT AT ALL IMPROBABLE THE SUPREME COURT WOULD HOLD SUCH LIABILITY TO EXIST, FOLLOWING THE SAME REASONING USED IN KEIFER AND KEIFER V. R.F.C., 306 U.S. 381.' HE HAS REFERRED ALSO TO THE OPINION OF THE ATTORNEY GENERAL OF JANUARY 28, 1938, REGARDING PROBABLE TORT LIABILITY OF THE UNITED STATES HOUSING AUTHORITY AND ITS RIGHT TO PROCURE INSURANCE OR TO SET UP INSURANCE RESERVES TO PROTECT AGAINST SUCH LIABILITY. IN THE LAST PARAGRAPH OF THAT OPINION, THE ATTORNEY GENERAL RULED THAT "THE LIABILITY OF THE AUTHORITY CANNOT DEFINITELY BE DETERMINED EXCEPT BY JUDICIAL DECISION OR AMENDMENT OF THE ACT; SO THAT IF INSURANCE SHOULD BE TAKEN OUT TO PROTECT AGAINST LIABILITY FOR TORT AND THE AUTHORITY SHOULD BE JUDICIALLY HELD IMMUNE, THE INSURANCE WOULD HAVE BEEN AGAINST A LIABILITY NONEXISTENT IN FACT. INSURANCE, HOWEVER, ALWAYS IS AGAINST RISKS; AND IF THOSE UNDER CONSIDERATION ARE NOT INSURED JUDGMENTS MIGHT BE RECOVERED AGAINST THE AUTHORITY IN AMOUNTS GREATLY IN EXCESS OF THE COST OF INSURANCE.' IT WAS ACCORDINGLY HELD THAT THE HOUSING AUTHORITY COULD PROTECT ITSELF AGAINST SUCH RISKS BY THE PROCURING OF INSURANCE OR THE SETTING UP OF SUCH INSURANCE RESERVES.

THE CITED CASE OF KEIFER AND KEIFER V. R.F.C. WAS DECIDED FEBRUARY 27, 1939. ITS HOLDING SEEMS TO HAVE BEEN BASED MAINLY UPON GENERAL WORDING IN THE ACT ESTABLISHING THE DEFENDANT CORPORATION WHICH PERMITTED IT "TO SUE OR BE SUED.' SIMILAR WORDING APPEARS IN THE NATIONAL HOUSING ACT, UNDER WHICH THIS ADMINISTRATION OPERATES (SECTION 1, TITLE I).

IT WOULD SEEM OBVIOUS, THEREFORE, THAT THE ADMINISTRATOR AS OWNER OF PROPERTIES CONVEYED TO HIM IS SUBJECT TO THE SAME POSSIBLE RISK REFERRED TO IN THE ATTORNEY GENERAL'S OPINION WITH RESPECT TO THE UNITED STATES HOUSING AUTHORITY.

YOUR OPINION IS REQUESTED, THEREFORE, UPON THE QUESTION WHETHER PAYMENTS FOR INSURANCE PREMIUMS TO PROTECT AGAINST SUCH RISK ARE PROPER.

IN THE ATTORNEY GENERAL'S OPINION RELATING TO THE UNITED STATES HOUSING AUTHORITY, 39 OP. ATTY. GEN.---, OP. NO. 64, TO WHICH YOU REFER, IT WAS SAID:

CONSIDERING ALL THE FUNCTIONS, POWERS, AND DUTIES OF THE AUTHORITY, AND THE TREND OF COURT DECISIONS INVOLVING OTHER GOVERNMENT-OWNED CORPORATIONS, I AM OF THE OPINION THAT IT IS POSSIBLE AND NOT IMPROBABLE THAT THE HOUSING AUTHORITY MAY BE HELD LIABLE FOR DAMAGES OR LOSS OCCASIONED BY THE NEGLIGENCE OF ITS AGENTS OR EMPLOYEES. I AM ALSO OF THE OPINION THAT SECTION 13 (D), WHICH PROVIDES THAT "THE AUTHORITY MAY PROCURE INSURANCE AGAINST ANY LOSS IN CONNECTION WITH ITS PROPERTY AND OTHER ASSETS (INCLUDING MORTGAGES)," IS BROAD ENOUGH TO AUTHORIZE THE PROCUREMENT OF INSURANCE TO PROTECT THE AUTHORITY AGAINST LOSSES OF THE NATURE REFERRED TO IN YOUR LETTER.

THESE CONCLUSIONS PRESENT THIS PROBLEM: AS STATED BY THE GENERAL COUNSEL FOR THE HOUSING AUTHORITY IN HIS MEMORANDUM TRANSMITTED WITH YOUR LETTER, THE LIABILITY OF THE AUTHORITY CANNOT DEFINITELY BE DETERMINED EXCEPT BY JUDICIAL DECISION OR AMENDMENT OF THE ACT; SO THAT IF INSURANCE SHOULD BE TAKEN OUT TO PROTECT AGAINST LIABILITY FOR TORT AND THE AUTHORITY SHOULD BE JUDICIALLY HELD IMMUNE, THE INSURANCE WOULD HAVE BEEN AGAINST A LIABILITY NONEXISTENT IN FACT. INSURANCE, HOWEVER, ALWAYS IS AGAINST RISKS; AND IF THOSE UNDER CONSIDERATION ARE NOT INSURED JUDGMENTS MIGHT BE RECOVERED AGAINST THE AUTHORITY IN AMOUNTS GREATLY IN EXCESS OF THE COST OF INSURANCE. UNDER THE CIRCUMSTANCES AND UNTIL THE LIABILITY OF THE AUTHORITY IS DETERMINED JUDICIALLY OR BY AN AMENDMENT TO THE ACT, IT IS MY OPINION THAT IT MAY PROTECT ITSELF AGAINST SUCH RISKS BY THE PROCUREMENT OF INSURANCE OR THE SETTING UP OF INSURANCE RESERVES. ( ITALICS SUPPLIED.)

THE OPINION THAT THE SAID AUTHORITY WAS AUTHORIZED TO PROCURE SUCH INSURANCE APPEARS TO BE BASED, NOT ON THE RIGHT TO SUE AND BE SUED, OR THE POSSIBLE LIABILITY OF THE AUTHORITY FOR NEGLIGENCE, BUT ON SECTION 13 (D) OF THE UNITED STATES HOUSING ACT (50 STAT. 888, 895) WHICH PROVIDES THAT "THE AUTHORITY MAY PROCURE INSURANCE AGAINST ANY LOSS IN CONNECTION WITH ITS PROPERTY AND OTHER ASSETS (INCLUDING MORTGAGES)." THE ATTORNEY GENERAL'S VIEW THAT THE HOUSING AUTHORITY PROBABLY WOULD BE LIABLE FOR NEGLIGENCE IS SUPPORTED TO SOME EXTENT, BY THE CASE OF KEIFER AND KEIFER V. R.F.C., 306 U.S. 381, WHEREIN IT WAS HELD, IN EFFECT, THAT THE LIABILITY OF A GOVERNMENT CORPORATION EMPOWERED GENERALLY "TO SUE AND BE SUED" IS NOT CONFINED TO SUITS SOUNDING ONLY IN CONTRACT. ALSO SEE THE RECENT CASE OF FEDERAL HOUSING ADMINISTRATION V. RUTH BURR, NO. 354, OCTOBER TERM, 1939, DECIDED FEBRUARY 12, 1940, WHEREIN THE SUPREME COURT HELD THAT THE FEDERAL HOUSING ADMINISTRATION WAS SUBJECT TO GARNISHMENT FOR MONEYS DUE TO AN EMPLOYEE. THE DETERMINING FACTOR IN THESE LATTER CASES APPEARS TO HAVE BEEN THE CONGRESSIONAL AUTHORIZATION "TO SUE AND BE SUED." BUT, AS IS INDICATED BY THE ATTORNEY GENERAL'S OPINION, SUPRA, THE FACT OF LIABILITY IS NOT DETERMINATIVE OF WHETHER INSURANCE AGAINST SUCH LIABILITY MAY BE PROCURED. THE DETERMINING QUESTION IS: ASSUMING THE FEDERAL HOUSING ADMINISTRATION IS LIABLE IN TORT, HAS IT AUTHORITY TO PROCURE INSURANCE AGAINST SUCH LIABILITY?

SECTION 1, TITLE I, OF THE NATIONAL HOUSING ACT, AS AMENDED, PROVIDES THAT "1THE ADMINISTRATOR \* \* \* MAY MAKE SUCH EXPENDITURES \* \* \* AS ARE NECESSARY TO CARRY OUT THE PROVISIONS OF THIS TITLE AND TITLES II AND III, WITHOUT REGARD TO ANY OTHER PROVISIONS OF LAW GOVERNING THE EXPENDITURE OF PUBLIC FUNDS.' SECTION 207 (F), TITLE II, CREATES A "HOUSING FUND" TO BE USED AS A REVOLVING FUND FOR CARRYING OUT THE PROVISIONS OF SECTION 207, AND SECTION 207 (L) PROVIDES, IN PART, AS FOLLOWS:

NOTWITHSTANDING ANY OTHER PROVISIONS OF LAW RELATING TO THE ACQUISITION, HANDLING, OR DISPOSAL OF REAL AND OTHER PROPERTY BY THE UNITED STATES, THE ADMINISTRATOR SHALL ALSO HAVE POWER, FOR THE PROTECTION OF THE INTERESTS OF THE HOUSING FUND, TO PAY OUT THE HOUSING FUND ALL EXPENSES OR CHARGES IN CONNECTION WITH, AND TO DEAL WITH, COMPLETE, RECONSTRUCT, RENT, RENOVATE, MODERNIZE, INSURE, MAKE CONTRACTS FOR THE MANAGEMENT OF, OR ESTABLISH SUITABLE AGENCIES FOR THE MANAGEMENT OF, OR SELL FOR CASH OR CREDIT OR LEASE IN HIS DISCRETION, ANY PROPERTY ACQUIRED BY HIM UNDER THIS SECTION; \* \* \*

IT IS A SETTLED POLICY OF THE UNITED STATES TO ASSUME ITS OWN RISKS AND THE ESTABLISHED RULE IS THAT, UNLESS EXPRESSLY PROVIDED BY STATUTE, FUNDS FOR THE SUPPORT OF GOVERNMENT ACTIVITIES ARE NOT CONSIDERED APPLICABLE GENERALLY FOR THE PURCHASE OF INSURANCE TO COVER LOSS OR DAMAGE TO GOVERNMENT PROPERTY. 13 COMP. DEC. 779; 14 ID. 836; 23 ID. 269; ID. 297; 4 COMP. GEN. 690; 7 ID. 105; AND 17 ID. 55. IT IS NOT SUFFICIENT THAT THERE IS NO LAW SPECIFICALLY PROVIDING THAT THE UNITED STATES SHALL NOT INSURE ITS PROPERTY AGAINST LOSS, BUT RATHER THAT THERE IS SOME LAW WHICH SPECIFICALLY AUTHORIZES IT. 14 COMP. DEC. 836. THE BASIC PRINCIPLE OF FIRE, TORNADO, OR OTHER SIMILAR INSURANCE IS THE LESSENING OF THE BURDEN OF INDIVIDUAL LOSSES BY WIDER DISTRIBUTION THEREOF, AND IT IS DIFFICULT TO CONCEIVE OF A PERSON, CORPORATION, OR LEGAL ENTITY BETTER PREPARED TO CARRY INSURANCE OR SUSTAIN A LOSS THAN THE UNITED STATES GOVERNMENT. TO THIS POLICY OF THE GOVERNMENT TO ASSUME ITS OWN RISKS NO MATERIAL DISTINCTION IS APPARENT BETWEEN ASSUMPTION OF RISK OF PROPERTY DAMAGE AND ASSUMPTION OF RISK OF TORT LIABILITY. THE POLICY OF THE UNITED STATES IN THIS RESPECT RELATES TO THE RISK AND NOT TO THE NATURE OF THE RISK.

I FIND NO PROVISION IN THE NATIONAL HOUSING ACT, AS AMENDED, AUTHORIZING YOU GENERALLY, SPECIFICALLY, OR BY IMPLICATION, TO PROCURE INSURANCE OF THE KIND IN QUESTION. SECTION 1, TITLE I, AUTHORIZES YOU TO MAKE SUCH EXPENDITURES AS ARE NECESSARY TO CARRY OUT THE PROVISIONS OF THE ACT AND IN DECISION OF OCTOBER 29, 1936, A-80873, YOU WERE INFORMED THAT THIS OFFICE WOULD NOT OBJECT TO THE USE OF THE FUNDS INVOLVED TO PAY PREMIUMS ON HAZARD INSURANCE PROCURED ON PROPERTY ACQUIRED BY YOU. THAT DECISION WAS BASED ON YOUR DETERMINATION THAT SUCH INSURANCE, ON THE PROPERTY, WAS NECESSARY TO CARRY OUT THE PROVISIONS OF TITLE II OF THE ACT. IT IS NOTED, IN THIS CONNECTION, THE ACT HAS SINCE BEEN AMENDED AND NOW SPECIFICALLY PROVIDES IN SECTION 207, TITLE II, THAT YOU MAY INSURE PROPERTY ACQUIRED THEREUNDER. HOWEVER, THE SAID ACT CONTAINS NO SPECIFIC AUTHORITY FOR PROCURING INSURANCE AGAINST YOUR POSSIBLE TORT LIABILITY AS OWNER OF SUCH PROPERTY, AND IT HAS NOT BEEN SHOWN, NEITHER IS IT APPARENT, THAT THE PROCUREMENT OF SUCH INSURANCE IS NECESSARY TO CARRY OUT THE PROVISIONS OF THE NATIONAL HOUSING ACT, AS AMENDED.





## **B-15700, APRIL 4, 1941, 20 COMP. GEN. 601**

MAIDS AND COOKS FOR NAVY NURSES' QUARTERS - APPROPRIATION AVAILABILITY IN THE ABSENCE OF SPECIFIC STATUTORY PROVISION THEREFOR, NAVY NURSES OCCUPYING PUBLIC QUARTERS MAY NOT BE FURNISHED SERVICES OF MAIDS, COOKS, ETC., FREE OF CHARGE IN VIEW OF THE INHIBITION OF SECTION 1765, REVISED STATUTES, AGAINST PAYMENT OF ADDITIONAL COMPENSATION "IN ANY FORM WHATEVER."

ACTING COMPTROLLER GENERAL ELLIOTT TO THE SECRETARY OF THE NAVY, APRIL 4, 1941:

I HAVE YOUR LETTER OF MARCH 20, 1941, AS FOLLOWS:

THE NAVY DEPARTMENT HAS UNDER CONSIDERATION THE QUESTION AS TO WHETHER THE CURRENT APPROPRIATION FOR " GENERAL EXPENSES, MARINE CORPS" IS PROPERLY AVAILABLE FOR EXPENDITURE FOR SUPPLYING NECESSARY MAID, COOK, AND PERSONAL SERVICES OTHER THAN JANITOR SERVICES FOR THE NEW NAVY NURSES' QUARTERS, MARINE BARRACKS, QUANTICO, VA.

THE APPROPRIATION " GENERAL EXPENSES, MARINE CORPS" FOR THE CURRENT FISCAL YEAR, AS CONTAINED IN THE NAVAL APPROPRIATION ACT, APPROVED JUNE 11, 1940 ( PUB., NO. 588), IS IN TERMS AVAILABLE " FOR \* \* \* PERSONAL AND OTHER SERVICES, AND FOR OTHER INCIDENTAL EXPENSES FOR THE MARINE CORPS NOT OTHERWISE PROVIDED FOR."

THE OLD NAVY NURSES' QUARTERS AT THE MARINE BARRACKS, QUANTICO, VA., WERE SMALL, CONSISTING APPROXIMATELY OF SIX ROOMS, WHEREAS THE NEW NAVY NURSES' QUARTERS AT THAT PLACE INCLUDE A LARGE LIVING ROOM, DINING ROOM, KITCHEN, BASEMENT, FIRST AND SECOND FLOOR CORRIDORS, AND FOURTEEN NURSES' ROOMS. THE NURSES OCCUPYING THE OLD NURSES' QUARTERS WERE FURNISHED JANITOR SERVICES, BUT MAID, COOK, AND PERSONAL SERVICES OTHER THAN JANITOR WERE FURNISHED BY THE NURSES THEMSELVES.

DUE TO THE MUCH GREATER SIZE OF THE BUILDING COMPRISING THE NEW NAVY NURSES' QUARTERS AS COMPARED WITH THE OLD BUILDING USED FOR THAT PURPOSE AT THE MARINE BARRACKS, QUANTICO, VA., THE NEED FOR SUPPLYING NECESSARY MAID AND OTHER PERSONAL SERVICES IN ADDITION TO JANITOR SERVICES FOR THE NEW QUARTERS IS APPARENT. HOWEVER, THE NAVY DEPARTMENT IS IN DOUBT AS TO WHETHER THE APPROPRIATION " GENERAL EXPENSES, MARINE CORPS" IS LEGALLY AVAILABLE TO MEET EXPENSES FOR THE FURNISHINGS OF OTHER THAN JANITOR SERVICES FOR THE NEW NAVY NURSES'S QUARTERS.

THE NEW NAVY NURSES' QUARTERS, AS WELL AS THE POST SICK QUARTERS, AT THE MARINE BARRACKS, QUANTICO, VA., ARE A PART OF THE PUBLIC WORKS AT THAT PLACE AND, AS SUCH, ARE FOR MAINTENANCE BY THE MARINE CORPS UNDER THE PROVISIONS OF ARTICLES 484-5 AND 557, U.S. NAVY REGULATIONS, 1920, AS AMENDED. IT IS THEREFORE ESSENTIAL THAT THE MARINE CORPS PROVIDE FOR THE UPKEEP AND OPERATION OF THE NEW NAVY NURSES' QUARTERS, SUPPLYING SUCH MAID, JANITOR, OR OTHER SERVICES AS MAY BE NECESSARY TO KEEP THE QUARTERS COMFORTABLY HABITABLE AT ALL TIMES.

YOUR DECISION IS REQUESTED AS TO WHETHER THE APPROPRIATION " GENERAL EXPENSES, MARINE CORPS" IS LEGALLY AVAILABLE FOR EXPENDITURE FOR SUPPLYING NECESSARY MAID, COOK, AND PERSONAL SERVICES OTHER THAN JANITOR SERVICES FOR THE NEW NAVY NURSES QUARTERS, MARINE BARRACKS, QUANTICO, VA.

SECTION 13 OF THE JOINT SERVICE PAY ACT OF JUNE 10, 1922, 42 STAT. 631, PRESCRIBES THE

PAY OF FEMALE NURSES OF THE ARMY AND NAVY AND, ALSO, PRESCRIBES THAT THEIR ALLOWANCES FOR SUBSISTENCE AND RENTAL OF QUARTERS SHALL BE THE SAME AS THOSE OF OFFICERS RECEIVING THE PAY OF THE FIRST PERIOD, EXCEPT THAT THE APPROPRIATION FOR THE FISCAL YEAR 1941 (AND PRIOR YEARS) UNDER " SUBSISTENCE OF NAVAL PERSONNEL" PROVIDES FOR "SUBSISTENCE IN KIND AT HOSPITALS AND ON BOARD SHIP IN LIEU OF SUBSISTENCE ALLOWANCE OF FEMALE NURSES.' SECTION 1765, REVISED STATUTES, PROVIDES:

NO OFFICER IN ANY BRANCH OF THE PUBLIC SERVICE, OR ANY OTHER PERSON WHOSE SALARY, PAY, OR EMOLUMENTS ARE FIXED BY LAW OR REGULATIONS, SHALL RECEIVE ANY ADDITIONAL PAY, EXTRA ALLOWANCE, OR COMPENSATION, IN ANY FORM WHATEVER, FOR THE DISBURSEMENT OF PUBLIC MONEY, OR FOR ANY OTHER SERVICE OR DUTY WHATEVER, UNLESS THE SAME IS AUTHORIZED BY LAW, AND THE APPROPRIATION THEREFOR EXPLICITLY STATES THAT IT IS FOR SUCH ADDITIONAL PAY, EXTRA ALLOWANCE, OR COMPENSATION.

IT WOULD APPEAR FROM YOUR SUBMISSION THAT PUBLIC QUARTERS HAVE BEEN AND WILL CONTINUE TO BE FURNISHED THE NURSES IN QUESTION AND THAT THEY HAVE BEEN FURNISHED THE NECESSARY JANITOR SERVICE IN CONNECTION THEREWITH. PROVIDE AT THIS TIME AND WITHOUT FURTHER AUTHORIZATION FROM THE CONGRESS MAID SERVICE, COOKS, AND OTHER PERSONAL SERVICES (NOT OTHERWISE DESCRIBED) IN ADDITION TO THE QUARTERS WOULD BE IN CONTRAVENTION OF SECTION 1765, REVISED STATUTES.

THE PROVISION IN THE APPROPRIATION GENERAL EXPENSES, MARINE CORPS, 1941, FOR PERSONAL SERVICES RELATES TO THE PERSONAL SERVICES OTHERWISE AUTHORIZED BY LAW. IT DOES NOT OVERCOME THE PROHIBITION IN SECTION 1765, NOR DOES IT ADD ANYTHING TO SECTION 13 OF THE JOINT SERVICE PAY ACT PROVIDING COMPENSATION AND ALLOWANCES TO NAVY NURSES. IT MUST BE HELD, THEREFORE, THAT THE APPROPRIATION IN QUESTION IS NOT AVAILABLE FOR FURNISHING FREE OF CHARGE SERVICES OF MAIDS, COOKS, ETC., TO NAVY NURSES AT QUANTICO, VA. ...END :





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

DEC 17 1975

B-162111

The Honorable William L. Scott  
United States Senate

Dear Senator Scott:

Further reference is made to your letters of July 1, 1975, and October 30, 1975, concerning the use of Selective Service System (SSS) funds to pay an employee, Mr. Carroll C. Holden, to drive Mr. John D. Dewhurst, former Deputy Director of SSS, between his residence and the building at which he worked.

Enclosed is a copy of our summary of information concerning the facts of this matter, which was submitted to Senator Proxmire on April 1, 1975, and thereafter presented to the Director of SSS. As described in detail therein, Mr. Holden received overtime compensation for driving Mr. Dewhurst to and from work in Mr. Dewhurst's private car. Mr. Dewhurst resigned, effective April 28, 1975.

As stated in our August 14 letter to you, we had requested a report from SSS concerning this matter. We were subsequently advised that the agency had no formal comments to offer. However, it is noted that in a May 2, 1975, congressional hearing, the Director of SSS testified that when the chauffeuring services being provided to Mr. Dewhurst came to his attention, he took immediate action to terminate the practice. (Hearings before the Senate Appropriations Committee, 94th Cong., 1st Sess., on Department of Housing and Urban Development and Certain Independent Agencies Appropriations for Fiscal Year 1976 (Part 2), at 958.) Also, we have been informally advised by SSS that steps have been taken to prevent future occurrences of this nature.

As to what action, if any, should be taken against Mr. Dewhurst, we note first that 31 U.S.C. § 638a(c)(2) (1970), which prohibits the use of government vehicles for transportation of government employees between their homes and places of work, is inapplicable. In the instant case, Mr. Dewhurst's own car was used for such transportation and no unauthorized use of a government vehicle was involved.

With respect to the particular facts here involved, Mr. Dewhurst's essentially unilateral use of a Government employee as a chauffeur for home-to-work travel was never officially sanctioned. In fact, as noted previously, the agency head has expressed his disapproval in this instance.

This use of a Government employee to perform unauthorized services for the private benefit of another employee at Government expense may well be a violation of 5 U.S.C. § 3103 (1970) as well as Civil Service regulations governing ethical standards of conduct for employees. See 5 C.F.R. 735.205. Section 3103 of title 5 provides:

"An individual may be employed in the civil service in an Executive department at the seat of Government only for services actually rendered in connection with and for the purposes of the appropriation from which he is paid. An individual who violates this section shall be removed from the service."

However, as the penalty for violation of 5 U.S.C. § 3103 is removal from Government employment, and Mr. Dewhurst has not been a Government employee since April 27, 1975, it is our view that no further action is required.

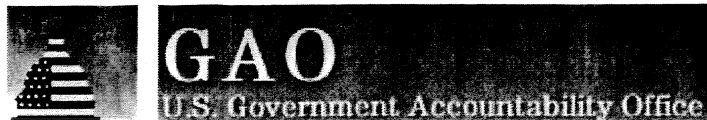
Moreover, as we noted in our report to the Senate Committee on Appropriations on "How Passenger Sedans in the Federal Government are Used and Managed," (B-158712, September 6, 1974), use of Government-paid chauffeurs as well as Government-owned automobiles by high ranking officials for home to work travel is a common practice in a large number of agencies. The justification advanced for this practice is the apparent acquiescence by the Congress which regularly appropriates funds for limousines without imposing limits on the discretion of the agencies in determining what uses constitute "official business." The intent of the Congress in this area is quite uncertain, and we have, therefore, never sought recovery against the officials involved in this practice. It therefore would not seem appropriate to proceed against Mr. Dewhurst who used a Government chauffeur to drive his own car.

Sincerely yours,

H.F. KELLER

Deputy Comptroller General  
of the United States

Enclosure



## **B-202057, JULY 8, 1981, 60 COMP.GEN. 580**

FUNDS - IMPREST - AVAILABILITY - PLANTS, ART OBJECTS, ETC. PURCHASES REGULATION RESTRICTING PURCHASE OF PERSONAL CONVENIENCE ITEMS DOES NOT PROHIBIT PURCHASE OF DECORATIVE PLANTS, ETC., FOR GENERAL OFFICE USE, WHEN A NEED FOR SUCH ITEMS IS DETERMINED BY AGENCY OFFICIAL AND DECORATIONS ARE PERMANENT ADDITIONS TO OFFICE DECOR AND RESULT IN IMPROVED PRODUCTIVITY AND MORALE. DETERMINATION OF NECESSITY AND APPROPRIATENESS IS FOR AGENCY OFFICIAL AND FACT THAT OFFICES IN QUESTION OCCUPY LEASED SPACE IN PRIVATELY OWNED BUILDING IS IRRELEVANT TO DETERMINATION WHETHER DECORATING EXPENSES WERE PROPER. COMPATIBILITY WITH AGENCY MISSION IS STANDARD TO BE USED.

MATTER OF: PURCHASE OF DECORATIVE ITEMS WITH IMPREST FUNDS, JULY 8, 1981:

THIS IS AN ADVANCE DECISION TO JOSEPHINE MONTOYA, AUTHORIZED CERTIFYING OFFICER OF THE BUREAU OF INDIAN AFFAIRS (BIA), CONCERNING THE PROPRIETY OF CERTIFYING A RECONSTRUCTED REPLENISHMENT VOUCHER IN FAVOR OF VERNON TSOODLE. MR. TSOODLE IS THE CASHIER AT THE ANDARKO AREA OFFICE OF THE BIA, AND IN SEPTEMBER 1977, HE MADE \$194.51 IN IMPREST CASH DISBURSEMENTS FOR PLANTS, VASES AND HANDICRAFT ITEMS WHICH WERE USED TO DECORATE THE ANDARKO AREA OFFICE. RELYING ON 41 C.F.R. 101-26.103-2(1980), QUOTED IN FULL BELOW, THE CERTIFYING OFFICER HAS DENIED CERTIFICATION. WE DISAGREE WITH THE MORE RESTRICTIVE INTERPRETATION OF THE REGULATIONS, AND THE VOUCHER TO REIMBURSE THE IMPREST FUND MAY BE CERTIFIED FOR PAYMENT.

THE REGULATION GOVERNING PURCHASES OF ART OBJECTS, PLANTS, ETC., FOR GOVERNMENT OFFICES IS FOUND AT 41 C.F.R. 101-26.103-2. IT READS AS FOLLOWS:

GOVERNMENT FUNDS MAY BE EXPENDED FOR PICTURES, OBJECTS OF ART, PLANTS, OR FLOWERS (BOTH ARTIFICIAL AND REAL), OR ANY OTHER SIMILAR TYPE ITEMS WHEN SUCH ITEMS ARE INCLUDED IN A PLAN FOR THE DECORATION OF FEDERAL BUILDINGS APPROVED BY THE AGENCY RESPONSIBLE FOR THE DESIGN AND CONSTRUCTION OF FEDERAL BUILDINGS APPROVED BY THE AGENCY RESPONSIBLE FOR THE DESIGN AND CONSTRUCTION. DETERMINATIONS AS TO THE NEED FOR PURCHASING SUCH ITEMS FOR USE IN SPACE ASSIGNED TO ANY AGENCY ARE JUDGMENTS RESERVED TO THE AGENCY. DETERMINATION WITH RESPECT TO PUBLIC SPACE SUCH AS CORRIDORS AND LOBBIES ARE RESERVED TO THE AGENCY RESPONSIBLE FOR OPERATION OF THE BUILDING. EXCEPT AS OTHERWISE AUTHORIZED BY LAW, GOVERNMENT FUNDS SHALL NOT BE EXPENDED FOR PICTURES, OBJECTS OF ART, PLANTS, FLOWERS (BOTH ARTIFICIAL AND REAL), OR ANY OTHER SIMILAR TYPE ITEMS INTENDED SOLELY FOR THE PERSONAL CONVENIENCE OR TO SATISFY THE PERSONAL DESIRE OF AN OFFICIAL OR EMPLOYEE. THESE ITEMS FALL INTO THE CATEGORY OF "LUXURY ITEMS" SINCE THEY DO NOT CONTRIBUTE TO THE FULFILLMENTS OF MISSIONS NORMALLY ASSIGNED TO FEDERAL AGENCIES.

ACCORDING TO ITS SUBMISSION, BIA IS SATISFIED THAT THERE WAS A NEED FOR THE ITEMS, ESPECIALLY IN WINDOWLESS OFFICES AS DESCRIBED BY THE AREA DIRECTOR, AND THAT THE PURCHASES WERE NOT FOR THE PERSONAL CONVENIENCE OF INDIVIDUAL EMPLOYEES. HOWEVER, THE LETTER IMPLIES THAT THE OTHER REQUIREMENTS OF THE REGULATION WERE NOT MET. THE ANDARKO AREA OFFICE

OCCUPIES LEASED SPACE IN A PRIVATELY OWNED BUILDING AND, THEREFORE, NO PLAN COULD HAVE EXISTED FOR THE DECORATION OF THE ENTIRE BUILDING, BUT ONLY FOR SPACE OCCUPIED BY BIA. SECONDLY, THE AGENCY RESPONSIBLE FOR DESIGN AND CONSTRUCTION OF THE BUILDING COULD NOT HAVE APPROVED THE PURCHASES, SINCE THE BUILDING WAS PRIVATELY OWNED.

WE HAVE NEVER BEFORE CONSTRUED THIS REGULATION, BUT IT SEEMS OBVIOUS TO US THAT THE FIRST SENTENCE IN THE QUOTED SECTION APPLIES TO NEW FEDERAL CONSTRUCTION AND TO MAJOR RENOVATIONS OF EXISTING FEDERAL BUILDINGS. THE SECOND SENTENCE, HOWEVER, LEAVES DETERMINATIONS AS TO THE NEED TO PURCHASE SUCH ITEMS IN "SPACE ASSIGNED TO ANY AGENCY" TO THE DISCRETION OF THE OCCUPYING AGENCY. IT SEEMS CLEAR THAT THIS SENTENCE CONTRASTS EXISTING SPACE, INCLUDING LEASED SPACE, WITH NEWLY CONSTRUCTED OR RENOVATED SPACE AND DOES NOT REQUIRE REFERENCE TO AN AGENCY RESPONSIBLE FOR DESIGN AND CONSTRUCTION.

WE HAVE TRADITIONALLY ALLOWED SUCH IMPROVEMENTS WHERE THEY WOULD CONTRIBUTE TO A PLEASANT WORKING ATMOSPHERE, THUS IMPROVING MORALE AND EFFICIENCY. 51 COMP.GEN. 797(1972); B-178225, APRIL 11, 1973; B-148562, JUNE 12, 1962. THE REGULATION IS IN ACCORD WITH OUR VIEW, PROVIDING THAT PERSONAL CONVENIENCE ITEMS ARE CATEGORICALLY INCONSISTENT WITH AGENCY MISSIONS, BUT THAT OTHER DECORATIONS MAY, IN APPROPRIATE CIRCUMSTANCES, BE COMPATIBLE WITH WORK RELATED OBJECTIVES. SUCH EXPENDITURES HAVE BEEN DISALLOWED BY THIS OFFICE ONLY WHERE THEY WERE PERSONAL IN NATURE (B-187246, JUNE 15, 1977) OR WHERE THE DECORATIONS WERE SEASONAL AND NOT FOR PERMANENT USE (52 COMP.GEN. 504(1972)).

THUS, EXPENDITURES FOR DECORATIVE ITEMS ARE AUTHORIZED WHEN THEIR PURCHASE IS CONSISTENT WITH WORK RELATED OBJECTIVES AND THE AGENCY MISSION, AND THE DECISION AS TO NECESSITY RESTS WITHIN THE AGENCY'S DISCRETION PURSUANT TO THE REGULATION'S TERMS.

SINCE THIS KIND OF EXPENDITURE COULD BE SUBJECT TO ABUSE, WE SUGGEST THAT SOME UNIFORM GUIDANCE ON COSTS AND TYPES OF APPROVED DECORATIONS BE OFFERED TO BIA CASHIERS WHO MAY BE ASKED TO MAKE DISBURSEMENTS FOR OFFICE DECORATIONS IN THE FUTURE. NEVERTHELESS, WE HAVE NO BASIS TO OBJECT TO THESE DISBURSEMENTS ON THE BASIS OF THE INFORMATION PROVIDED, AND THE VOUCHER, IF OTHERWISE CORRECT, MAY BE CERTIFIED FOR PAYMENT TO REIMBURSE THE IMPREST FUND.



## **B-206173, FEBRUARY 23, 1982, 61 COMP.GEN. 260**

ENTERTAINMENT - APPROPRIATION AVAILABILITY - SPECIFIC STATUTORY AUTHORIZATION REQUIREMENT FUNDS APPROPRIATED TO THE DEPT. OF THE INTERIOR FOR SALARIES AND EXPENSES MAY NOT BE USED TO PAY FOR ANY PORTION OF THE EXPENSES OF A BREAKFAST GIVEN BY THE WIFE OF THE SECRETARY OF THE INTERIOR FOR THE WIVES OF HIGH- LEVEL GOVERNMENT OFFICIALS, OR FOR A CHRISTMAS PARTY GIVEN BY THE SECRETARY OF THE INTERIOR FOR HIGH-LEVEL GOVERNMENT OFFICIALS AND THEIR GUESTS. ENTERTAINMENT EXPENSES, UNLESS SPECIFICALLY AUTHORIZED BY STATUTE, ARE NOT PROPERLY CHARGEABLE TO APPROPRIATED FUNDS. 43 COMP.GEN. 305 AND 47 ID. 657. DONATIONS - PRIVATE FUNDS - USAGE - CONFERENCES, ENTERTAINMENT, ETC. - OFFICIAL AGENCY PURPOSE REQUIREMENT FUNDS DONATED TO THE COOPERATING ASSOCIATION FUND OF THE NATIONAL PARK SERVICE MAY BE USED TO FUND A BREAKFAST GIVEN BY THE WIFE OF THE SECRETARY OF THE INTERIOR FOR THE WIVES OF HIGH-LEVEL GOVERNMENT OFFICIALS AND A CHRISTMAS PARTY GIVEN BY THE SECRETARY OF THE INTERIOR FOR HIGH-LEVEL GOVERNMENT OFFICIALS AND THEIR GUESTS ONLY IF THE SECRETARY SUSTAINS THE BURDEN OF SHOWING THAT THE RECEPTIONS WERE GIVEN IN CONNECTION WITH OR TO FURTHER OFFICIAL PARK SERVICE PURPOSES. IN THIS INSTANCE, FROM THE INFORMATION PROVIDED, THE PARTIES APPEAR TO BE PRIMARILY SOCIAL IN NATURE. APPROPRIATIONS - INTERIOR DEPARTMENT - AVAILABILITY - OFFICIAL RECEPTION AND REPRESENTATION EXPENSE FUND - AGENCY DISCRETION - CHRISTMAS PARTY TO THE EXTENT FUNDS ARE AVAILABLE IN THE DEPT. OF INTERIOR'S OFFICIAL RECEPTION AND REPRESENTATION FUND, THEY MAY BE APPLIED TO THE COSTS INCURRED FOR A CHRISTMAS PARTY GIVEN BY THE SECRETARY OF THE INTERIOR AND TO REIMBURSE ANY AMOUNTS ALREADY SPENT FROM SALARY AND EXPENSE ACCOUNTS AND FROM DONATED FUNDS FOR THAT PURPOSE. UNLIKE THE CHRISTMAS PARTY, WHICH WAS ATTENDED BY GOVERNMENT OFFICIALS AND THEIR GUESTS, THE USE OF THE FUND FOR A BREAKFAST GIVEN BY THE WIFE OF THE SECRETARY OF THE INTERIOR FOR THE WIVES OF HIGH-LEVEL GOVERNMENT OFFICIALS WOULD BE INAPPROPRIATE BECAUSE THE BREAKFAST WAS HOSTED AND ATTENDED ENTIRELY BY PRIVATE PERSONS. THE AMOUNT OF ANY SHORTFALL FOR EXPENSES ATTRIBUTABLE TO THE CHRISTMAS PARTY, AS WELL AS THE EXPENSES OF THE BREAKFAST, MUST BE PAID BY THE OFFICIALS WHO AUTHORIZED THE EXPENDITURES.

MATTER OF: DEPARTMENT OF THE INTERIOR - FUNDING OF RECEPTIONS AT ARLINGTON HOUSE, FEBRUARY 23, 1982:

THIS RESPONDS TO A REQUEST FROM THE HOUSE SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS OF THE COMMITTEE ON INTERIOR AND INSULAR AFFAIRS AND THE HOUSE ENVIRONMENT, ENERGY, AND NATURAL RESOURCES SUBCOMMITTEE OF THE COMMITTEE ON GOVERNMENT OPERATIONS CONCERNING THE FUNDING OF TWO RECEPTIONS HELD AT ARLINGTON HOUSE (ALSO KNOWN AS THE CUSTIS-LEE MANSION). THE RECEPTIONS WERE HOSTED BY THE SECRETARY OF THE INTERIOR, JAMES G. WATT, AND HIS WIFE IN DECEMBER 1981. WE CONCLUDE THAT THE USE OF APPROPRIATED FUNDS, OTHER THAN THE SECRETARY OF THE INTERIOR'S DISCRETIONARY FUND FOR OFFICIAL RECEPTION AND REPRESENTATION EXPENSES (DISCRETIONARY FUND), IS UNAUTHORIZED. WE CONCLUDE FURTHER THAT USE OF THE COOPERATING ASSOCIATION FUND OF THE NATIONAL PARK SERVICE, A FUND

CONSISTING ENTIRELY OF MONIES DONATED TO FURTHER OFFICIAL AGENCY PURPOSES, WAS ALSO IMPROPER. ACCORDINGLY, THE RELEVANT APPROPRIATION ACCOUNTS AND THE COOPERATING ASSOCIATION FUND SHOULD BE REIMBURSED FOR ANY EXPENDITURE DIRECTLY ATTRIBUTABLE TO THESE RECEPTIONS.

ON DECEMBER 14, 1981, A BREAKFAST WAS HELD AT ARLINGTON HOUSE HOSTED BY THE WIFE OF THE SECRETARY OF THE INTERIOR. ATTENDING THIS BREAKFAST WERE THE WIVES OF THE OTHER CABINET MEMBERS AND THE WIVES OF SEVERAL ASSISTANTS TO THE PRESIDENT. THE EXACT PURPOSE OF THIS BREAKFAST HAS NOT BEEN SPECIFIED BY THE DEPARTMENT. INFORMATION DEVELOPED BY OUR AUDIT STAFF SHOWS THAT THE TOTAL ESTIMATED COST OF THE BREAKFAST WAS \$1,921. OF THIS TOTAL AMOUNT, \$1,148.10 CONSTITUTED CATERING EXPENSES, \$325 WAS FOR TABLE NAME CARDS, ESCORT CARDS, AND MENU CARDS, \$48 WAS FOR SIX PLACARDS ADVISING THE PUBLIC THAT ARLINGTON HOUSE WAS TEMPORARILY CLOSED FOR MRS. WATT'S BREAKFAST, AND \$400 CONSTITUTED THE LABOR COSTS OF EIGHT NATIONAL PARK SERVICE EMPLOYEES WHO WORKED A TOTAL OF 31 HOURS. THE SERVICES OF THE EIGHT EMPLOYEES DURING THESE 31 HOURS WERE APPARENTLY DEVOTED EXCLUSIVELY TO TASKS ASSOCIATED WITH THE BREAKFAST.

THE OTHER RECEPTION, HOSTED BY THE SECRETARY AND HIS WIFE, WAS HELD ON THE EVENING OF DECEMBER 17, 1981. THE HEADING ON THE GUEST LIST OBTAINED FROM THE DEPARTMENT OF THE INTERIOR READS "ARLINGTON HOUSE CHRISTMAS PARTY." APPROXIMATELY 220 PERSONS ATTENDED THE CHRISTMAS PARTY, 62 OF WHOM WERE HIGH-RANKING INTERIOR OFFICIALS. THE OTHER GUESTS WERE CABINET MEMBERS AND THEIR SPOUSES, MEMBERS OF THE WHITE HOUSE STAFF AND THEIR SPOUSES OR GUESTS, OTHER SENIOR OFFICIALS OF THE EXECUTIVE BRANCH WITH SPOUSES OF GUESTS AND SPOUSES OR GUESTS OF THE INTERIOR OFFICIALS.

OUR AUDIT STAFF DETERMINED THAT THE TOTAL ESTIMATED COST OF THE CHRISTMAS PARTY WAS \$6,921.20. OF THIS TOTAL AMOUNT, \$2,732.86 CONSTITUTED CATERING EXPENSES, \$2,325 WAS FOR THE RENTING OF A TENT WHICH WAS ERECTED IN FRONT OF ARLINGTON HOUSE AND WHICH WAS WHERE THE RECEPTION WAS PRIMARILY HELD, \$55.96 WAS FOR THE PURCHASE OF REFUSE RECEPTACLES, \$7.38 WAS FOR THE PURCHASE OF COAT CHECK TICKETS, AND \$1,800 CONSTITUTED THE LABOR COSTS OF 20 EMPLOYEES OF THE NATIONAL PARK SERVICE WORKING A TOTAL OF 135 HOURS, ALL OF WHICH WAS OVERTIME ASSOCIATED WITH THE PARTY.

OUR AUDIT STAFF HAS DETERMINED THAT THE LABOR COST OF BOTH THESE EVENTS HAVE BEEN CHARGED INITIALLY TO APPROPRIATED FUNDS OF THE NATIONAL PARK SERVICE, ALTHOUGH IT IS APPARENTLY THE INTENT OF THE DEPARTMENT TO REIMBURSE THESE COSTS FROM THE SECRETARY'S DISCRETIONARY FUND OR FROM THE COOPERATING ASSOCIATION FUND. ADDITIONALLY, THE OTHER MAJOR ITEMS SUCH AS THE CATERING EXPENSES, THE COST OF THE TENT, AND THE COSTS OF THE INVITATIONS AND CARDS, HAVE BEEN, OR ARE INTENDED TO BE, CHARGED TO THE COOPERATING ASSOCIATION FUND. OTHER INCIDENTAL EXPENSES WERE PAID FROM THE IMPREST FUND OF THE NATIONAL PARK SERVICE. THE PARK SERVICE APPARENTLY INTENDS TO REIMBURSE THE IMPREST FUND FOR THE EXPENDITURES FROM THE COOPERATING ASSOCIATION FUND.

BY LETTER DATED FEBRUARY 8, 1982, WE REQUESTED THE VIEWS OF THE DEPARTMENT OF INTERIOR AS TO THE PROPRIETY OF THE USE OF APPROPRIATED FUNDS TO PAY THE SALARIES OF THE EMPLOYEES WHO PROVIDED SERVICES AT THE TWO EVENTS UNDER DISCUSSION HERE, THE PROPRIETY OF USING COOPERATING

ASSOCIATION FUNDS IN SUPPORT OF THESE VENTS, AND THE POSSIBLE USE OF THE SECRETARY'S DISCRETIONARY FUND FOR OFFICIAL RECEPTION AND REPRESENTATION EXPENSES FOR THESE PURPOSES. ALTHOUGH THE DEPARTMENT DID NOT RESPOND DIRECTLY TO OUR REQUEST, WE HAVE BEEN PROVIDED A COPY OF THE DEPARTMENT'S FEBRUARY 16 LETTER TO CONGRESSMAN MARKEY ADDRESSING THESE ISSUES.

THAT LETTER STATES:

THE EXPENSES FOR THE EVENTS WILL BE FUNDED BY THE SECRETARY'S OFFICIAL RECEPTION AND REPRESENTATION EXPENSES FUND WHICH IS AUTHORIZED IN THE DEPARTMENT'S APPROPRIATION ACT AND THE NATIONAL PARK SERVICES' DIRECTOR'S DISCRETIONARY FUND.

(THE LATTER FUND IS DESCRIBED BY THE DEPARTMENT AS CONSISTING SOLELY OF DONATIONS FROM COOPERATING ASSOCIATIONS.)

THE LETTER ALSO STATES:

THE NPS DIRECTOR'S DISCRETIONARY FUND WAS EARMARKED (FOR THESE EVENTS) AT THE PLANNING STAGE BECAUSE THE DEPARTMENT'S APPROPRIATION ACT HAD NOT BEEN APPROVED AT THE TIME AND, THEREFORE, RESOURCES WERE NOT READILY AVAILABLE. NOW THAT THE ACT HAS BEEN APPROVED, IT IS THE INTENT OF THE SECRETARY TO USE A PORTION OF HIS OFFICIAL RECEPTION AND REPRESENTATION EXPENSES FUND TO FUND THE TWO EVENTS.

THE LETTER DOES NOT SPECIFICALLY ADDRESS THE QUESTION OF THE RELATIONSHIP, IF ANY, BETWEEN THE USE OF DONATED COOPERATING ASSOCIATION FUND AMOUNTS IN THESE CIRCUMSTANCES AND THE MISSION OF THE NATIONAL PARK SERVICE. IT DOES, HOWEVER, STATE THAT:

\* \* \* THE GUESTS' VISITS TO THE HOUSE WERE DESIGNED TO ACQUAINT THEM WITH THE HISTORIC SIGNIFICANCE OF THE HOUSE AND TO ENHANCE THEIR FURTHER UNDERSTANDING AND APPRECIATION OF THE SECRETARY'S OBJECTIVES CONCERNING THE NPS'S ROLE IN HISTORIC PRESERVATION.

THE ARLINGTON HOUSE PROVIDED A SETTING MORE CONDUCTIVE TO SOCIAL GATHERINGS THAN WOULD HAVE THE INTERIOR BUILDING.

FINALLY, CONCERNING RESTRICTIONS ON THE USE OF THE COOPERATING ASSOCIATION FUND, THE LETTER STATES:

THERE ARE NO SPECIFIED USES IN THE DIRECTOR'S DISCRETIONARY FUND BY THE OFFICE OF THE SECRETARY. \* \* \*

THE USE OF APPROPRIATED FUNDS TO PAY FOR THE WAGES OF EMPLOYEES EARNED WHILE WORKING AT THE BREAKFAST HELD ON DECEMBER 14, AND THE DECEMBER 17 CHRISTMAS PARTY, OR FOR ANY OTHER EXPENSES DIRECTLY ATTRIBUTABLE TO THESE TWO FUNCTIONS, CONSTITUTED AN UNAUTHORIZED EXPENDITURE OF THESE FUNDS. HAVE CONSISTENTLY HELD THAT ENTERTAINMENT EXPENSES, UNLESS SPECIFICALLY AUTHORIZED BY STATUTE, ARE NOT PROPERLY CHARGEABLE TO APPROPRIATED FUNDS. SEE 43 COMP.GEN. 305, 306(1963). ENTERTAINMENT EXPENSES ARE NOT SPECIFICALLY AUTHORIZED IN INTERIOR'S CURRENT APPROPRIATION. SEE DEPARTMENT OF THE INTERIOR AND RELATED AGENCIES APPROPRIATION ACT, 1982, PUB. L. NO. 97-100, 95 STAT. 1391 (1981).

ITEMS SUCH AS THE FURNISHING OF MEALS OR REFRESHMENTS AS WELL AS THE

PURCHASE OF EQUIPMENT TO BE USED IN THE PREPARATION OF REFRESHMENTS ARE CONSIDERED ENTERTAINMENT EXPENSES. 47 COMP.GEN. 657, 658(1968). LIKEWISE, ALL LABOR COSTS DIRECTLY ATTRIBUTABLE TO THE FURNISHING OF MEALS OR REFRESHMENTS OR ANY OTHER SIMILAR ACTIVITY SHOULD BE CONSIDERED ENTERTAINMENT EXPENSES. WE PERCEIVE NO DISTINCTION BETWEEN THE EXPENSES INCURRED BY INTERIOR FOR THE BREAKFAST AND THE CHRISTMAS PARTY, INCLUDING THE LABOR COSTS OF THE INTERIOR EMPLOYEES WHO PROVIDED SUPPORT SERVICES, AND OTHER TYPES OF EXPENSES WHICH WE HAVE PREVIOUSLY DETERMINED TO BE ENTERTAINMENT EXPENSES. FOR EXAMPLE, WE HAVE CONSIDERED THE SERVING OF COFFEE OR OTHER REFRESHMENTS AT MEETINGS OR THE PROVIDING OF DINNER AT ANNUAL RECOGNITION CEREMONIES AS PROHIBITED ENTERTAINMENT EXPENSES. COMP.GEN., SUPRA; 43 COMP.GEN. 305, SUPRA. WE CONCLUDE, THEREFORE, THAT THE EXPENDITURE OF APPROPRIATED FUNDS FOR EXPENSES DIRECTLY ATTRIBUTABLE TO THESE TWO AFFAIRS WAS NOT AUTHORIZED AND THAT APPROPRIATE REIMBURSEMENT TO THESE APPROPRIATIONS SHOULD BE MADE.

UNLIKE APPROPRIATED FUNDS NOT SPECIFICALLY MADE AVAILABLE FOR ENTERTAINMENT PURPOSES, THERE IS NO ABSOLUTE PROHIBITION AGAINST THE USE OF DONATED FUNDS FOR ENTERTAINMENT PURPOSES. RATHER, WE HAVE HELD THAT DONATED FUNDS MAY BE SPENT ON ENTERTAINMENT WHERE SUCH EXPENSES ARE IN FURTHERANCE OF OFFICIAL AGENCY PURPOSES. B-142538, FEBRUARY 8, 1961. THIS DECISION TO THE NATIONAL SCIENCE FOUNDATION CONCLUDED THAT EXPENSES FOR FOOD AND ENTERTAINMENT FOR LUNCHEONS AND DINNERS INCIDENT TO A CONFERENCE FOR THE INTERCHANGE OF SCIENTIFIC INFORMATION AMONG FOREIGN AND UNITED STATES SCIENTISTS APPEARED TO BE PROPER CHARGES TO A TRUST FUND SIMILAR TO THE COOPERATING ASSOCIATION FUND. THE DECISION ALSO STATED THAT IN DECIDING WHETHER A PARTICULAR EXPENSE IS IN FURTHERANCE OF OFFICIAL AGENCY PURPOSES, GREAT WEIGHT WILL BE GIVEN TO AN ADMINISTRATIVE DETERMINATION TO THAT EFFECT. THE ADMINISTRATIVE DETERMINATION WAS CHARACTERIZED AS ONE WHICH, BASED ON THE FACTS, "MUST REASONABLY JUSTIFY THE CONCLUSION NOT ONLY THAT THE ENTERTAINMENT WILL FURTHER A PURPOSE OF THE FOUNDATION BUT THAT THE FOUNDATION'S FUNCTIONS COULD NOT BE ACCOMPLISHED AS SATISFACTORILY OR AS EFFECTIVELY FROM THE GOVERNMENT'S STANDPOINT WITHOUT SUCH EXPENDITURES." FINALLY, THE DECISION CAUTIONED THAT THE USE OF DONATED FUNDS FOR ENTERTAINMENT, THE PURPOSE OF WHICH IS "TO CULTIVATE CORDIAL RELATIONS, MANIFEST GOOD WILL, OR TO RECIPROCATATE IN KIND HOSPITALITY EXTENDED BY OTHERS" WOULD BE QUESTIONABLE.

IN A SIMILAR CASE, WE PERMITTED THE FOUNDATION TO USE ITS DONATED FUNDS TO PAY FOR REFRESHMENTS OF PERSONS PARTICIPATING IN PANEL DISCUSSIONS SPONSORED BY THE FOUNDATION. 46 COMP.GEN. 379(1966). WE ALSO PERMITTED THE NATIONAL CREDIT UNION ADMINISTRATION TO USE DONATED FUNDS TO PAY FOR ENTERTAINMENT EXPENSES INCURRED IN HOSTING MEMBERS OF THE NATIONAL CREDIT UNION BOARD WHERE PROTOCOL REQUIRED THAT THE ADMINISTRATION INCUR THOSE EXPENSES. B-170938, OCTOBER 30, 1972.

OUR POSITION ON THIS ISSUE WAS CLARIFIED IN A 1980 LETTER TO SENATOR PROXMIRE SPECIFICALLY CONCERNING THE USE OF THE COOPERATING ASSOCIATION FUND OF THE NATIONAL PARK SERVICE. B-195492, MARCH 18, 1980. WE STATED THAT WHILE AN AGENCY'S DETERMINATION OF WHETHER A PARTICULAR EXPENSE WAS JUSTIFIED WOULD BE ACCORDED GREAT WEIGHT, AGENCIES DO NOT "HAVE BLANKET AUTHORITY TO USE (DONATED) FUNDS FOR PERSONAL PURPOSES; EACH



AGENCY MUST JUSTIFY ITS USE OF (DONATED) FUNDS AS BEING INCIDENT TO THE TERMS \* \* \* " OF THE STATUTORY AUTHORITY PERMITTING ACCEPTANCE OF SAID DONATIONS. WENT ON TO STATE THAT "(THE BURDEN IS ON THE (AGENCY) TO SHOW THAT ITS \* \* \* EXPENDITURES WERE TO CARRY OUT (AUTHORIZED STATUTORY) PURPOSES." THE LETTER CONCLUDED BY POINTING OUT THAT A NUMBER OF PAST EXPENDITURES FROM THE FUND FOR ENTERTAINMENT HAD BEEN JUSTIFIED BY THE DEPARTMENT ON THE BASIS OF AN OVERBROAD INTERPRETATION OF THE 1961 NATIONAL SCIENCE FOUNDATION CASE.

IN THIS CASE, THE USE OF THE COOPERATING ASSOCIATION FUND TO PAY FOR CERTAIN COSTS ATTRIBUTABLE TO THE BREAKFAST AND TO THE CHRISTMAS PARTY IS CONTEMPLATED BY THE DEPARTMENT'S FEBRUARY 16 LETTER. THAT USE OF THESE FUNDS WILL BE NECESSARY IS DEMONSTRATED BY THE FACT THAT THE SECRETARY'S DISCRETIONARY FUND HAS ONLY \$4500 REMAINING IN IT FOR THE CURRENT FISCAL YEAR, SUBSTANTIALLY LESS THAN THE COST OF THE TWO EVENTS.

TO DETERMINE WHETHER THESE EXPENDITURES ARE AUTHORIZED, IT IS NECESSARY TO REFER TO THE PURPOSE OF THIS FUND. AS REQUIRED BY 16 U.S.C. 6, THE FUND MUST BE USED "FOR THE PURPOSE OF THE NATIONAL PARK AND MONUMENT SYSTEM." THE FUNDAMENTAL PURPOSE OF THE NATIONAL PARK AND MONUMENT SYSTEM AS DESCRIBED IN 16 U.S.C. 1 IS TO:

(CONSERVE THE SCENERY AND THE NATURAL AND HISTORIC OBJECTS AND THE WILD LIFE THEREIN AND TO PROVIDE FOR THE ENJOYMENT OF THE SAME IN SUCH MANNER AND BY SUCH MEANS AS WILL LEAVE THEM UNIMPAIRED FOR THE ENJOYMENT OF FUTURE GENERATIONS.

A DOCUMENT ENTITLED "NATIONAL PARK SERVICE DONATIONS POLICY" SUBMITTED WITH ONE OF THE CONGRESSIONAL REQUESTS IN THIS CASE PROVIDES GUIDANCE ON THE KIND OF EXPENDITURES FROM THE COOPERATING ASSOCIATION FUND WHICH MAY REASONABLY BE CONSIDERED AS BEING IN FURTHERANCE OF PARK SERVICE PURPOSES. THE POLICY STATES:

\* \* \* DISBURSEMENTS FROM THIS FUND MUST BE FOR PROJECTS DIRECTLY RELATED TO NATIONAL PARK SERVICE ADMINISTRATION; SUPPORT WILL NOT BE PROVIDED FOR PROJECTS THAT ARE INITIATED OUTSIDE OF THE SERVICE AND UNRELATED TO THE MISSION OF THE NATIONAL PARK SERVICE. \* \* \*

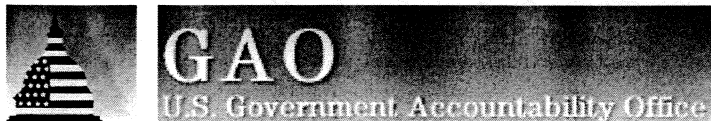
THE POLICY PROVIDES AS FOLLOWS CONCERNING EXPENDITURES FOR ENTERTAINMENT:

\* \* \* IN ACCORDANCE WITH THE COMPTROLLER GENERAL'S DECISION OF FEBRUARY 8, 1961, ENTERTAINMENT EXPENDITURES \* \* \* ARE RESTRICTED TO THOSE OCCASIONS WHEN THE ENTERTAINMENT WILL FURTHER THE PURPOSES OF NPS AND THAT SUCH PURPOSES COULD NOT BE SERVED AS SATISFACTORILY OR AS EFFECTIVELY WITHOUT SUCH EXPENDITURES. (ONE USE OF THE FUND WHICH IS INCONSISTENT WITH THE COMPTROLLER GENERAL DECISION IS THE EXPENDITURE FOR COFFEE OR OTHER REFRESHMENTS FOR MEETINGS ATTENDED SOLELY OR MOSTLY BY SERVICE OR OTHER GOVERNMENT EMPLOYEES.) APPLYING THE RULES ENUNCIATED BY OUR DECISIONS AND ADOPTED BY THE NATIONAL PARK SERVICE DONATIONS POLICY TO THE FACTS OF THE TWO QUESTIONED EVENTS COMPELS THE CONCLUSION THAT THE EVENTS WERE CLEARLY UNRELATED TO THE FURTHERANCE OF THE PARK SERVICE'S MISSION. NEITHER THE BREAKFAST NOR THE PARTY WAS ASSOCIATED WITH ANY RELATED GOVERNMENT CONFERENCE OR OTHER MEETING, AS HAS USUALLY BEEN THE CASE IN PRIOR CASES IN WHICH WE SANCTIONED THE

USE OF DONATED FUNDS FOR ENTERTAINMENT PURPOSES. IN FACT, NO PARK SERVICE OFFICIALS ATTENDED THE BREAKFAST AND ONLY A SMALL PERCENTAGE OF THE GUESTS AT THE CHRISTMAS PARTY WERE FROM THE PARK SERVICE. THE ONLY JUSTIFICATION ADVANCED BY THE DEPARTMENT TO LINK THE TWO EVENTS TO OFFICIAL PARK SERVICE PURPOSES IS THE STATEMENT IN ITS FEBRUARY 16 LETTER THAT DURING THE COURSE OF THE TWO RECEPTIONS, GUESTS WERE FREE TO TOUR THE HOUSE, AND THUS COULD BECOME ACQUAINTED WITH ITS HISTORIC SIGNIFICANCE AND THE SECRETARY'S OBJECTIVE CONCERNING HISTORIC PRESERVATION. IN OUR VIEW, THIS LINK WITH OFFICIAL PURPOSES IS TOO TENUOUS TO JUSTIFY THE USE OF DONATED FUNDS. THE AVAILABILITY OF TOURS OF THE BUILDING OR GENERAL DISCUSSIONS OF HISTORIC PRESERVATION OBJECTIVES DOES NOT CHANGE THE BASICALLY SOCIAL NATURE OF BOTH GATHERINGS, AS CHARACTERIZED BY THE DEPARTMENT ITSELF IN ITS FEBRUARY 16 LETTER. IN THAT LETTER, THE DEPARTMENT OFFERS AS JUSTIFICATION FOR THE USE OF ARLINGTON HOUSE RATHER THAN THE INTERIOR HEADQUARTERS BUILDING THAT THE FORMER IS "MORE CONDUCTIVE TO SOCIAL GATHERINGS." MOREOVER, SO FAR AS WE ARE AWARE, NO FINDING WAS MADE DETAILING "WHY THE PURPOSES OF THE NPS COULD NOT BE SERVED AS SATISFACTORILY OR AS EFFECTIVELY WITHOUT SUCH EXPENDITURE," AS REQUIRED BY THE DONATIONS POLICY.

AS STATED IN THE DEPARTMENT'S FEBRUARY 16 LETTER, THE 1981 DEPARTMENT OF INTERIOR APPROPRIATION ACT PROVIDES THE OFFICE OF THE SECRETARY WITH NOT TO EXCEED \$5,000 FOR OFFICIAL RECEPTION AND REPRESENTATION EXPENSES. WHILE QUESTIONS COULD BE RAISED ABOUT THE USE OF THIS FUND AS WELL, AGENCY HEADS HAVE TRADITIONALLY BEEN ACCORDED A GREAT DEAL OF DISCRETION BY THE CONGRESS IN THE EXPENDITURE OF THIS TYPE OF FUND. WE WILL NOT OBJECT TO THE USE OF THIS FUND FOR EXPENSES RELATED TO THE CHRISTMAS PARTY. UNLIKE THE CHRISTMAS PARTY, WHICH WAS ATTENDED BY GOVERNMENT OFFICIALS AND THEIR GUESTS, THE USE OF THE DISCRETIONARY FUND FOR THE BREAKFAST, WHICH WAS HOSTED AND ATTENDED ENTIRELY BY PRIVATE PERSONS, WOULD BE INAPPROPRIATE.

ACCORDINGLY, TO THE EXTENT FUNDS ARE AVAILABLE IN THE OFFICIAL RECEPTION AND REPRESENTATION FUND, THEY MAY BE APPLIED TO THE COSTS INCURRED FOR THE CHRISTMAS PARTY, INCLUDING THE LABOR COSTS FOR INTERIOR EMPLOYEES WHO WORKED AT THAT EVENT. THE AMOUNT OF ANY SHORTFALL FOR EXPENSES ATTRIBUTABLE TO THE CHRISTMAS PARTY, AS WELL AS THE EXPENSES OF THE BREAKFAST, MUST BE PAID BY THE INTERIOR OFFICIALS WHO AUTHORIZED THE EXPENDITURES.



## **B-210555, JUNE 3, 1983, 62 COMP.GEN. 438**

VEHICLES - GOVERNMENT - HOME TO WORK TRANSPORTATION - GOVERNMENT EMPLOYEES - PROHIBITION GAO DISAGREES WITH THE LEGAL DETERMINATIONS OF OFFICIALS OF THE DEPARTMENTS OF STATE AND DEFENSE THAT IT IS PROPER UNDER 31 U.S.C. 1344(B) FOR AGENCY OFFICIALS AND EMPLOYEES (OTHER THAN THE SECRETARIES OF THOSE DEPARTMENTS, THE SECRETARIES OF THE ARMY, NAVY, AND AIR FORCE, AND THOSE PERSONS WHO HAVE BEEN PROPERLY APPOINTED OR HAVE PROPERLY SUCCEEDED TO THE HEADS OF FOREIGN SERVICE POSTS) TO RECEIVE TRANSPORTATION BETWEEN THEIR HOME AND PLACES OF EMPLOYMENT USING GOVERNMENT VEHICLES AND DRIVERS. GAO CONSTRUES 31 U.S.C. 1344(B) TO GENERALLY PROHIBIT THE PROVISION OF SUCH TRANSPORTATION TO AGENCY OFFICIALS AND EMPLOYEES UNLESS THERE IS SPECIFIC STATUTORY AUTHORITY TO DO SO. VEHICLES - GOVERNMENT - HOME TO WORK TRANSPORTATION - GOVERNMENT EMPLOYEES - PROHIBITION - EXEMPTIONS GAO DISAGREES WITH THE LEGAL ADVISOR OF THE DEPARTMENT OF STATE AND THE GENERAL COUNSEL OF THE DEFENSE DEPARTMENT WHO HAVE INTERPRETED THE PHRASE "HEADS OF EXECUTIVE DEPARTMENTS," CONTAINED IN 31 U.S.C. 1344(B)(2), TO BE SYNONYMOUS WITH THE PHRASE "PRINCIPAL OFFICERS OF EXECUTIVE DEPARTMENTS." CONGRESS HAS STATUTORILY DEFINED THE "HEADS" OF THE EXECUTIVE DEPARTMENTS REFERRED TO IN 31 U.S.C. 1344(B)(2) (INCLUDING THE DEPARTMENTS OF STATE AND DEFENSE) TO BE THE SECRETARIES OF THOSE DEPARTMENTS. VEHICLES - GOVERNMENT - HOME TO WORK TRANSPORTATION - GOVERNMENT EMPLOYEES - PROHIBITION - EXEMPTIONS GAO DISAGREES WITH THE STATE DEPARTMENT'S LEGAL ADVISOR AND THE GENERAL COUNSEL OF THE DEFENSE DEPARTMENT WHO HAVE CONSTRUED THE PHRASE "PRINCIPAL DIPLOMATIC AND CONSULAR OFFICIALS," CONTAINED IN 31 U.S.C. 1344(B)(3), TO INCLUDE THOSE HIGH RANKING OFFICIALS WHOSE DUTIES REQUIRE FREQUENT OFFICIAL CONTACT ON A DIPLOMATIC LEVEL WITH HIGH RANKING OFFICIALS OF FOREIGN GOVERNMENTS. GAO CONSTRUES 31 U.S.C. 1344(B)(3) TO ONLY INCLUDE THOSE PERSONS WHO HAVE BEEN PROPERLY APPOINTED OR HAVE PROPERLY SUCCEEDED, TO HEAD A FOREIGN DIPLOMATIC, CONSULAR, OR OTHER FOREIGN SERVICE POST, AS AN AMBASSADOR, MINISTER, CHARGE D'AFFAIRES, OR OTHER SIMILAR PRINCIPAL DIPLOMATIC OR CONSULAR OFFICIAL. VEHICLES - GOVERNMENT - OFFICE USE DETERMINATION - ADMINISTRATIVE DISCRETION THE STATE DEPARTMENT'S RELIANCE ON THE GAO DECISION IN 54 , COMP.GEN. 855 (1975) TO SUPPORT THE PROPOSITION THAT THE USE OF GOVERNMENT VEHICLES FOR HOME-TO-WORK TRANSPORTATION OF GOVERNMENT OFFICIALS AND EMPLOYEES LIES SOLELY WITHIN THE ADMINISTRATIVE DISCRETION OF THE HEAD OF THE AGENCY WAS BASED ON SOME OVERLY BROAD DICTA IN THAT AND SEVERAL PREVIOUS DECISIONS. READ IN CONTEXT, GAO DECISIONS, INCLUDING THE ONE CITED BY THE STATE DEPARTMENT'S LEGAL ADVISOR, ONLY AUTHORIZE THE EXERCISE OF ADMINISTRATIVE DISCRETION TO PROVIDE HOME-TO-WORK TRANSPORTATION FOR GOVERNMENT OFFICIALS AND EMPLOYEES ON A TEMPORARY BASIS WHEN (1) THERE IS A CLEAR AND PRESENT DANGER TO GOVERNMENT EMPLOYEES OR AN EMERGENCY THREATENS THE PERFORMANCE OF VITAL GOVERNMENT FUNCTIONS, OR (2) SUCH TRANSPORTATION IS INCIDENT TO OTHERWISE AUTHORIZED USE OF THE VEHICLES INVOLVED. VEHICLES - GOVERNMENT - HOME TO WORK TRANSPORTATION - GOVERNMENT EMPLOYEES - MISUSE OF VEHICLES - LIABILITY OF EMPLOYEES BECAUSE SO MANY AGENCIES HAVE RELIED ON APPARENT ACQUIESCENCE BY THE CONGRESS DURING THE APPROPRIATIONS PROCESS WHEN FUNDS FOR PASSENGER VEHICLES WERE APPROPRIATED WITHOUT IMPOSING ANY LIMITS ON AN AGENCY'S DISCRETION TO DETERMINE THE SCOPE OF "OFFICIAL BUSINESS," AND BECAUSE DICTA IN GAO'S OWN DECISIONS MAY HAVE CONTRIBUTED TO THE IMPRESSION THAT USE OF CARS FOR HOME-TO-WORK TRANSPORTATION WAS A MATTER OF AGENCY DISCRETION, GAO DOES NOT THINK IT APPROPRIATE TO SEEK RECOVERY FOR PAST MISUSE OF VEHICLES (EXCEPT FOR THOSE FEW AGENCIES WHOSE USE OF VEHICLES WAS RESTRICTED BY SPECIFIC CONGRESSIONAL

ENACTMENTS). THIS DECISION IS INTENDED TO APPLY PROSPECTIVELY ONLY. MOREOVER, GAO WILL NOT QUESTION SUCH CONTINUED USE OF VEHICLES TO TRANSPORT HEADS OF NON-CABINET AGENCIES AND THE RESPECTIVE SECONDS-IN-COMMAND OF BOTH CABINET AND NON CABINET AGENCIES UNTIL THE CLOSE OF THIS CONGRESS.

MATTER OF: USE OF GOVERNMENT VEHICLES FOR TRANSPORTATION BETWEEN HOME AND WORK, JUNE 3, 1983:

WE HAVE BEEN ASKED BY THE CHAIRMAN OF THE HOUSE COMMITTEE ON GOVERNMENT OPERATIONS TO REVIEW A DEPARTMENT OF STATE, JULY 12, 1982 LEGAL MEMORANDUM AND AN EARLIER DEPARTMENT OF DEFENSE LEGAL OPINION WHICH INTERPRET THE EXEMPTIONS IN 31 U.S.C. 1344(B) (FORMERLY 31 U.S.C. 638AC)(2)) FROM THE PROHIBITION IN 31 U.S.C. 1344(A) AGAINST USING APPROPRIATED FUNDS TO TRANSPORT GOVERNMENT OFFICIALS BETWEEN THEIR HOMES AND PLACES OF EMPLOYMENT. RELYING ON THESE INTERPRETATIONS, THE DEPARTMENT OF STATE HAS EXPANDED ITS INTERNAL LIST OF OFFICIALS FOR WHOM SUCH TRANSPORTATION IS AUTHORIZED. THE CHAIRMAN SEEKS OUR OPINION ON WHETHER THAT ACTION IS IN ACCORDANCE WITH THE MEANING AND INTENT OF THE LAW. AS EXPLAINED BELOW, IT IS OUR OPINION THAT THE DETERMINATION OF THE STATE DEPARTMENT (AND THAT OF THE GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE, LEGAL OPINION NO. 2, OCTOBER 12, 1953, UPON WHICH THE STATE DEPARTMENT ACTION IS BASED) IS NOT IN ACCORDANCE WITH THE LAW.

NOTWITHSTANDING THESE CONCLUSIONS, WE RECOGNIZE THAT THE USE OF GOVERNMENT-OWNED OR LEASED AUTOMOBILES BY HIGH RANKING OFFICIALS FOR TRAVEL BETWEEN HOME AND WORK HAS BEEN A COMMON PRACTICE FOR MANY YEARS IN A LARGE NUMBER OF AGENCIES. (SEE, FOR EXAMPLE, OUR REPORT TO THE SENATE COMMITTEE ON APPROPRIATIONS ON "HOW PASSENGER SEDANS IN THE FEDERAL GOVERNMENT ARE USED AND MANAGED," B-158712, SEPTEMBER 6, 1974.) THE JUSTIFICATION ADVANCED FOR THIS PRACTICE IS THE APPARENT ACQUIESCENCE BY THE CONGRESS WHICH REGULARLY APPROPRIATES FUNDS FOR LIMOUSINES AND OTHER PASSENGER AUTOMOBILES KNOWING, IN MANY INSTANCES, THE USES TO WHICH THEY WILL BE PUT BUT NOT IMPOSING LIMITS ON THE DISCRETION OF THE AGENCIES IN DETERMINING WHAT USES CONSTITUTE "OFFICIAL BUSINESS."

IN ADDITION, THE GENERAL ACCOUNTING OFFICE (GAO) MAY, ITSELF, HAVE CONTRIBUTED TO SOME OF THE CONFUSION. AS WE STUDIED OUR PAST DECISIONS IN ORDER TO RESPOND TO THE CHAIRMAN'S REQUEST, WE RECOGNIZED THAT IN SOME INSTANCES, WE MAY HAVE USED OVERLY BROAD LANGUAGE WHICH IMPLIED EXCEPTIONS TO THE STATUTORY PROHIBITION WE DID NOT INTEND. (THIS WILL BE DISCUSSED IN MORE DETAIL LATER.) FOR THESE REASONS, WE DO NOT THINK THAT IT IS APPROPRIATE TO SEEK RECOVERY FROM ANY OFFICIALS WHO HAVE BENEFITED FROM HOME-TO-WORK TRANSPORTATION TO DATE. OUR INTERPRETATION OF THE LAW IS INTENDED TO APPLY PROSPECTIVELY ONLY.

FINALLY, WE NOTE THAT THE GAO HAS MADE SEVERAL LEGISLATIVE RECOMMENDATIONS TO THE CONGRESS OVER A PERIOD OF YEARS TO CLARIFY ITS INTENT ABOUT THE SCOPE OF THE PROHIBITION. AMONG OTHER THINGS, WE SUGGESTED THAT THE CONGRESS CONSIDER EXPANDING THE PRESENT EXEMPTION TO INCLUDE THE HEADS OF ALL AGENCIES AND PERHAPS THEIR PRINCIPAL DEPUTIES. THIS DECISION, THEREFORE, NEED NOT BE CONSIDERED EFFECTIVE WITH RESPECT TO AGENCY HEADS AND THEIR PRINCIPAL DEPUTIES UNTIL THE END OF THE PRESENT CONGRESS IN ORDER TO ALLOW THE CONGRESS SUFFICIENT TIME TO CONSIDER OUR SUGGESTIONS. (THIS DOES NOT, OF COURSE, INCLUDE ANY AGENCY WHOSE USE OF MOTOR VEHICLES HAS BEEN THE SUBJECT OF A SPECIFIC CONGRESSIONAL RESTRICTION.)

#### THE LAW

SECTION 1344 OF TITLE 31 OF THE U.S.C. STATES:

(A) EXCEPT AS SPECIFICALLY PROVIDED BY LAW, AN APPROPRIATION MAY BE EXPENDED TO MAINTAIN, OPERATE, AND REPAIR PASSENGER MOTOR VEHICLES OR AIRCRAFT OF THE UNITED STATES GOVERNMENT THAT ARE USED ONLY FOR AN OFFICIAL PURPOSE. AN OFFICIAL PURPOSE DOES NOT INCLUDE TRANSPORTING OFFICERS OR EMPLOYEES OF THE GOVERNMENT BETWEEN THEIR DOMICILES AND PLACES OF EMPLOYMENT EXCEPT--

(1) MEDICAL OFFICERS ON OUT-PATIENT MEDICAL SERVICE; AND

(2) OFFICERS OR EMPLOYEES PERFORMING FIELD WORK REQUIRING TRANSPORTATION BETWEEN THEIR DOMICILES AND PLACES OF EMPLOYMENT WHEN THE TRANSPORTATION IS APPROVED BY THE HEAD OF THE AGENCY.

(B) THIS SECTION DOES NOT APPLY TO A MOTOR VEHICLE OR AIRCRAFT FOR THE OFFICIAL USE OF-- (1) THE PRESIDENT; (2) THE HEADS OF EXECUTIVE DEPARTMENTS LISTED IN SECTION 101 OF TITLE 5; OR (3) PRINCIPAL DIPLOMATIC AND CONSULAR OFFICIALS.

SINCE VEHICLES MAY NOT BE OPERATED WITH APPROPRIATED FUNDS EXCEPT FOR AN "OFFICIAL PURPOSE" AND THE TERM "OFFICIAL PURPOSE" DOES NOT INCLUDE TRANSPORTATION BETWEEN HOME AND WORK (EXCEPT AS OTHERWISE SPECIFICALLY PROVIDED), WE REGARD SUBSECTION (A), ABOVE, AS CONSTITUTING A CLEAR PROHIBITION WHICH CANNOT BE WAIVED OR MODIFIED BY AGENCY HEADS THROUGH REGULATIONS OR OTHERWISE.

WHILE THE LAW DOES NOT SPECIFICALLY INCLUDE THE EMPLOYMENT OF CHAUFFEURS AS PART OF THE PROHIBITION IN SUBSECTION (A), GAO HAS INTERPRETED THIS SECTION, IN CONJUNCTION WITH OTHER PROVISIONS OF LAW, AS AUTHORIZING SUCH EMPLOYMENT ONLY WHEN THE OFFICIALS BEING DRIVEN ARE EXEMPTED BY SUBSECTION (B) FROM THE PROHIBITION.  
B-150989, APRIL 17, 1963.

#### THE STATE DEPARTMENT DETERMINATION

AFTER RESEARCHING AND CONSIDERING THE PROVISIONS OF SECTION 1344, THE STATE DEPARTMENT'S LEGAL ADVISOR INFORMED THE STATE DEPARTMENT'S UNDER SECRETARY FOR MANAGEMENT (IN A MEMORANDUM DATED JULY 12, 1982) THAT THERE IS "NO LEGAL IMPEDIMENT" TO AUTHORIZING THE STATE DEPARTMENT'S UNDER SECRETARIES AND COUNSELOR TO USE GOVERNMENT VEHICLES AND DRIVERS FOR TRANSPORTATION BETWEEN THEIR HOMES AND PLACES OF EMPLOYMENT. (PREVIOUS TO THAT OPINION, THE STATE DEPARTMENT HAD RESTRICTED SUCH TRANSPORTATION TO THE SECRETARY AND DEPUTY SECRETARY.) THE LEGAL ADVISOR FOUNDED HIS DETERMINATION UPON SEVERAL BASES.

FOR HIS FIRST BASIS, THE LEGAL ADVISOR RELIED UPON AN OCTOBER 12, 1953 OPINION BY THE GENERAL COUNSEL OF THE DEFENSE DEPARTMENT WHICH CONCLUDED THAT THE PHRASE "HEADS OF EXECUTIVE DEPARTMENTS" CONTAINED IN 31 U.S.C. 1344(B)(2) (THEN REFERRED TO AS SECTION 16(A)(C)(2) OF THE ACT OF AUGUST 2, 1946, 60 STAT. 810) "IS NOT LIMITED TO CABINET OFFICERS OR SECRETARIES OF EXECUTIVE DEPARTMENTS, BUT INCLUDES ALSO THE PRINCIPAL OFFICIALS OF EXECUTIVE DEPARTMENTS APPOINTED BY THE PRESIDENT WITH THE ADVICE AND CONSENT OF THE SENATE." APPLYING THE DOD GENERAL COUNSEL'S CONCLUSION, THE STATE DEPARTMENT'S LEGAL ADVISOR FOUND THAT THE SECRETARY, DEPUTY SECRETARY, UNDER SECRETARIES, AND COUNSELOR (WHOM HE REFERS TO AS THE "SEVENTH FLOOR PRINCIPALS") MAY BE REGARDED AS "HEADS OF DEPARTMENTS" FOR THE PURPOSES OF SECTION 1344(B)(2), AND ARE THEREFORE ELIGIBLE TO USE GOVERNMENT VEHICLES AND DRIVERS FOR HOME-TO WORK TRANSPORTATION.

SECONDLY, THE LEGAL ADVISOR DETERMINED THAT HOME-TO-WORK TRANSPORTATION FOR THE SEVENTH FLOOR PRINCIPALS IS ALSO AUTHORIZED BASED UPON HIS CONSTRUCTION OF THE EXEMPTION IN SECTION 1344(B)(3) FOR "PRINCIPAL DIPLOMATIC AND CONSULAR OFFICIALS." THE LEGAL ADVISOR STATED IN HIS MEMORANDUM THAT THE SEVENTH FLOOR PRINCIPALS "ALL SHARE IN DISCHARGE OF THE SECRETARY'S DIPLOMATIC RESPONSIBILITIES IN MUCH THE SAME WAY AS AMBASSADORS ABROAD; AND THE (STATE) DEPARTMENT \* \* \* IS UNIQUELY QUALIFIED TO DETERMINE WHAT DIPLOMATIC FUNCTIONS ARE AND WHO PERFORMS THEM." IN HIS INTERPRETATION, THE RESTRICTION ON HOME-TO-WORK TRANSPORTATION IN SECTION 1344(A) WOULD NOT APPLY TO THE SEVENTH FLOOR PRINCIPALS BECAUSE THEY ARE ALL "PRINCIPAL DIPLOMATIC \* \* \* OFFICIALS."

FOR HIS FINAL BASIS, THE LEGAL ADVISOR CITED OUR DECISION IN 54 COMP.GEN. 855 (1975). THAT DECISION, ACCORDING TO THE LEGAL ADVISOR, "HOLDS THAT WHERE THERE IS A CLEAR AND PRESENT DANGER, USE OF GOVERNMENT VEHICLES TO TRANSPORT EMPLOYEES TO AND FROM HOME IS NOT PROSCRIBED." THE LEGAL ADVISOR ALSO QUOTED THE FOLLOWING PASSAGE FROM THAT DECISION:

IN THIS REGARD WE HAVE LONG HELD THAT USE OF A GOVERNMENT VEHICLE DOES NOT VIOLATE THE INTENT OF THE CITED STATUTE WHERE SUCH USE IS DEEMED TO BE IN THE INTEREST OF THE

GOVERNMENT. WE HAVE FURTHER HELD THAT THE CONTROL OVER THE USE OF GOVERNMENT VEHICLES IS PRIMARILY A MATTER OF ADMINISTRATIVE DISCRETION, TO BE EXERCISED BY THE AGENCY CONCERNED WITHIN THE FRAMEWORK OF APPLICABLE LAWS. 25 COMP.GEN. 844 (1946). 54 COMP.GEN. AT 857. BASED UPON THAT PASSAGE, THE LEGAL ADVISOR CONCLUDED THAT GAO'S DECISIONS SUPPORT THE PROPOSITION THAT HOME-TO-WORK TRANSPORTATION IS PERMISSIBLE WHENEVER THERE IS AN ADMINISTRATIVE DETERMINATION BY THE HEAD OF THE AGENCY THAT THIS WOULD BE IN THE INTEREST OF THE GOVERNMENT, AND NOT MERELY FOR THE PERSONAL CONVENIENCE OF THE EMPLOYEE OR OFFICIAL CONCERNED.

THE LEGAL ADVISOR THEN REFERRED TO THE FOREIGN AFFAIRS MANUAL (FAM) TO DEMONSTRATE THAT THE SECRETARY, DEPUTY SECRETARY, UNDER SECRETARIES AND COUNSELOR "SHARE IN DISCHARGING THE SUBSTANTIVE RESPONSIBILITIES OF THE SECRETARY, AND HAVE BEEN PLACED BY LAW IN THE ORDER OF SUCCESSION TO BE ACTING SECRETARY OF STATE. ACCORDING TO THE LEGAL ADVISOR, THOSE OFFICIALS "CONSTITUTE A MANAGEMENT GROUP-- THE SEVENTH FLOOR PRINCIPALS." THE LEGAL ADVISOR NOTED THAT THOSE OFFICIALS HAVE "HEAVY AFTER HOURS OFFICIAL REPRESENTATION RESPONSIBILITIES AND A HEAVY LOAD OF OTHER OFFICIAL RESPONSIBILITIES WHICH REQUIRES VIRTUALLY AROUND THE CLOCK ACCESSIBILITY \* \* \* ." THE LEGAL ADVISOR CONCLUDED THAT THESE CONSIDERATIONS "WOULD SUPPORT AN ADMINISTRATIVE DETERMINATION THAT IT IS IN THE INTEREST OF THE UNITED STATES, NOT PERSONAL CONVENIENCE," TO PROVIDE HOME-TO-WORK TRANSPORTATION FOR THE SEVENTH FLOOR PRINCIPALS. HIS OPINION, SUCH A DETERMINATION WOULD SATISFY THE REQUIREMENTS OF GAO'S DECISIONS.

#### DISCUSSION

WE DISAGREE WITH THE ANALYSIS AND CONCLUSIONS OF THE LEGAL ADVISOR. WITH REGARD TO THE LEGAL ADVISOR'S FIRST BASIS, WE HAVE REVIEWED THE OCTOBER 12, 1953 LEGAL OPINION NO. 2 OF THE GENERAL COUNSEL OF THE DOD, UPON WHICH THE LEGAL ADVISOR RELIED. (WE HAVE BEEN INFORMALLY ADVISED THAT DOD HAS NEVER OVERTURNED OR MODIFIED THAT OPINION ALTHOUGH, AS A MATTER OF INTERNAL POLICY IT HAS, OVER A PERIOD OF YEARS, CURTAILED THE USE OF GOVERNMENT VEHICLES FOR SUCH TRANSPORTATION.) WE DO NOT AGREE WITH THE DOD GENERAL COUNSEL'S CONCLUSION THAT THE EXEMPTION IN SUBSECTION 1344(B)(2) FOR "THE HEADS OF EXECUTIVE DEPARTMENTS LISTED IN SECTION 101 OF TITLE 5" INCLUDES THE "PRINCIPAL OFFICERS OF EXECUTIVE DEPARTMENTS APPOINTED BY THE PRESIDENT WITH THE ADVICE AND CONSENT OF THE SENATE." THE TERM "HEADS" OF EXECUTIVE DEPARTMENTS IS NOT SYNONYMOUS WITH THE TERM "PRINCIPAL : OFFICERS," PARTICULARLY WHEN THE "HEAD" OF EACH OF THE 13 "EXECUTIVE DEPARTMENTS" LISTED IN SECTION 101 OF TITLE 5 IS EXPLICITLY DESIGNATED IN OTHER STATUTORY PROVISIONS. FOR EXAMPLE, 10 U.S.C. 133 PROVIDES THAT "(THERE IS A SECRETARY OF DEFENSE, WHO IS THE HEAD OF THE DEPARTMENT OF DEFENSE \* \* \* ." /1/ IN 22 U.S.C. 2651, IT IS PROVIDED THAT "(THERE SHALL BE AT THE SEAT OF GOVERNMENT AN EXECUTIVE DEPARTMENT TO BE KNOWN AS THE DEPARTMENT OF STATE, AND A SECRETARY OF STATE, WHO SHALL BE THE HEAD THEREOF." (THE STATE DEPARTMENT'S OWN REGULATIONS PROVIDE THAT THE SECRETARY OF STATE "IS THE HEAD OF THE DEPARTMENT OF STATE." 1 FAM 110 (JUNE 18, 1976).) SIMILAR DESIGNATIONS OF THE "HEAD" OF EACH OF THE OTHER "EXECUTIVE DEPARTMENTS" MAY ALSO BE FOUND IN THE UNITED STATES CODE. 49 U.S.C. 1652 (TRANSPORTATION); 42 U.S.C. 3532 (HOUSING AND URBAN DEVELOPMENT); 29 U.S.C. 551 (LABOR); 15 U.S.C. 1501 (COMMERCE); 43 U.S.C. 1451 (INTERIOR); 31 U.S.C. 301 (TREASURY); 42 U.S.C. 7131 (ENERGY); 42 U.S.C. 3501 NOTE, AS AMENDED BY 20 U.S.C. 3508 (HEALTH AND HUMAN SERVICES); 28 U.S.C. 503 (JUSTICE); 7 U.S.C. 2202 (AGRICULTURE); 20 U.S.C. 3411 (EDUCATION). THEREFORE, WE CONSTRUCT SUBSECTION (B)(2) OF SECTION 1344 TO REFER STRICTLY TO THOSE OFFICERS WHO ARE APPOINTED (OR WHO DULY SUCCEED) TO THE POSITIONS DESIGNATED BY LAW TO BE "THE HEADS OF EXECUTIVE DEPARTMENTS" AS LISTED IN 5 U.S.C. 101.

MOREOVER, THE LEGISLATIVE HISTORY UPON WHICH THE GENERAL COUNSEL RELIED DOES NOT SUPPORT HIS CONCLUSIONS. FOR EXAMPLE, THE GENERAL COUNSEL CITED THE ACT OF MARCH 3, 1873, 17 STAT. 485, 486, AND THE DEBATE ON THAT ACT IN THE CONGRESSIONAL GLOBE, 42D CONG., 3RD SESS. 2104 (1873), FOR THE PROPOSITION THAT "WHEN CONGRESS WANTED TO LIMIT THE EXPRESSION (HEADS OF EXECUTIVE DEPARTMENTS) SPECIFICALLY TO CABINET OFFICERS, IT DID SO IN PRECISE TERMS AND ADDED AFTER 'HEADS OF EXECUTIVE DEPARTMENTS' THE QUALIFICATION 'WHO ARE MEMBERS OF THE PRESIDENT'S CABINET.'" HOWEVER, OUR EXAMINATION OF THE CITED ACT AND DEBATES FAILED TO REVEAL THE USE OF

EITHER PHRASE IN THE ACT OR THE LEGISLATIVE DEBATES. ON THE CONTRARY, FROM OUR EXAMINATION, IT APPEARS THAT THE ACT AND THE DEBATES ON IT EXPLICITLY AND REPEATEDLY DISTINGUISH BETWEEN THE HEADS OF THE EXECUTIVE DEPARTMENTS, AND THE "PERSONS NEXT IN RANK TO THE HEADS OF DEPARTMENTS." SEE CONG. GLOBE, 42D CONG., 3RD SESS. 2100-2105 (1873); ACT OF MARCH 3, 1873, 17 STAT. 485, 486.

AS HIS SECOND BASIS FOR CONCLUDING THAT THE "SEVENTH FLOOR PRINCIPALS" MAY BE AUTHORIZED TO RECEIVE HOME-TO-WORK TRANSPORTATION, THE STATE DEPARTMENT LEGAL ADVISOR CONSTRUED SUBSECTION (B)(3) OF SECTION 1344 (WHICH EXEMPTS "PRINCIPAL DIPLOMATIC AND CONSULAR OFFICIALS" FROM THE RESTRICTIONS ON HOME-TO-WORK TRANSPORTATION) TO INCLUDE THE "PRINCIPAL OFFICERS OF THIS (STATE) DEPARTMENT." ACCORDING TO THE LEGAL ADVISOR, THE "PRINCIPAL OFFICERS" OF THE STATE DEPARTMENT ARE THE SEVENTH FLOOR PRINCIPALS. WE DO NOT CONCUR IN THAT CONSTRUCTION OF SUBSECTION 1344(B)(3). FOR SIMILAR REASONS WE ALSO DISAGREE WITH THE DOD GENERAL COUNSEL WHO CONCLUDED IN HIS 1953 OPINION (AS CITED AND RELIED UPON BY THE STATE DEPARTMENT LEGAL ADVISOR) THAT THE PHRASE "PRINCIPAL DIPLOMATIC AND CONSULAR OFFICIALS" INCLUDES "THOSE PRINCIPAL OFFICERS OF THE GOVERNMENT WHOSE DUTIES REQUIRE FREQUENT OFFICIAL CONTACT UPON A DIPLOMATIC LEVEL WITH RANKING OFFICERS AND REPRESENTATIVES OF FOREIGN GOVERNMENTS." ALTHOUGH THE CONGRESS HAS NOT DEFINED THE TERM "PRINCIPAL DIPLOMATIC AND CONSULAR OFFICIALS" AS USED IN SECTION 1344, IT HAS DEFINED "PRINCIPAL OFFICER" AS THAT TERM IS USED IN THE CONTEXT OF PERFORMING DIPLOMATIC OR CONSULAR DUTIES. IN 22 U.S.C. 3902, IT IS PROVIDED THAT THE TERM "PRINCIPAL OFFICER" MEANS "THE OFFICER IN CHARGE OF A DIPLOMATIC MISSION, CONSULAR MISSION \* \* \* , OR OTHER FOREIGN SERVICE POST." CONSISTENT WITH THAT STATUTE, THE STATE DEPARTMENT'S FOREIGN AFFAIRS MANUAL ALSO DEFINES A "PRINCIPAL OFFICER" TO MEAN THE PERSON WHO "IS IN CHARGE OF AN EMBASSY, A LEGATION, OR OTHER DIPLOMATIC MISSION, A CONSULATE GENERAL OR CONSULATE OF THE UNITED STATES, OR A U.S. INTERESTS SECTION." 2 F.A.M. 041(I) (OCTOBER 11, 1977). SEE ALSO 3 F.A.M. 030 (NOV. 27, 1967) (SIMILAR DEFINITION OF "PRINCIPAL OFFICER"). OUR READING OF THESE STATUTORY AND REGULATORY DEFINITIONS, IN CONJUNCTION WITH THE PLAIN MEANING OF SUBSECTION (B)(3) OF SECTION 1344 LEADS US TO CONCLUDE THAT NEITHER THE LEGAL ADVISOR'S DEFINITION, NOR THAT OF THE DOD GENERAL COUNSEL, IS CORRECT. IN OUR VIEW THE TERM "PRINCIPAL DIPLOMATIC AND CONSULAR OFFICIALS" ONLY ENCOMPASSES THOSE INDIVIDUALS WHO ARE PROPERLY DESIGNATED (OR SUCCEEDED) TO HEAD A FOREIGN DIPLOMATIC, CONSULAR OR OTHER SIMILAR FOREIGN SERVICE POST.

FURTHERMORE, EXAMINATION OF THE ORIGINAL ENACTMENT WHICH WAS LATER CODIFIED AS SECTION 1344 BY PUB. L. NO. 97-258, 96 STAT. 877 (1982) ALSO SUPPORTS THE CONCLUSION THAT THE CONGRESS INTENDED TO LIMIT THE MEANING OF THE PHRASE "PRINCIPAL DIPLOMATIC AND CONSULAR OFFICIALS" TO THE OFFICERS IN CHARGE OF FOREIGN POSTS. SECTION 16(A)(C)(2) OF THE ACT OF AUGUST 2, 1946, CHAP. 744, 60 STAT. 810-811 PROVIDED, IN PERTINENT PART:

THE LIMITATIONS OF THIS PARAGRAPH (NOW CONTAINED IN SECTION 1344(A)) SHALL NOT APPLY TO ANY MOTOR VEHICLES OR AIRCRAFT FOR OFFICIAL USE OF THE PRESIDENT, THE HEADS OF THE EXECUTIVE DEPARTMENTS ENUMERATED IN 5 U.S.C. 1, AMBASSADORS, MINISTERS, CHARGES D'AFFAIRES, AND OTHER PRINCIPAL DIPLOMATIC AND CONSULAR OFFICIALS. AS THE UNDERLINED LANGUAGE MAKES CLEAR, CONGRESS INTENDED THE TERM "PRINCIPAL DIPLOMATIC AND CONSULAR OFFICIALS" TO INCLUDE AMBASSADORS, MINISTERS, CHARGES D'AFFAIRES AND OTHER SIMILAR OFFICIALS. THE CODIFICATION OF TITLE 31 WAS NOT INTENDED TO MAKE ANY SUBSTANTIVE CHANGES IN THE LAW. SEE H.R. REP. NO. 97-651, 97TH CONG., 2D SESS. 69 (1982). COMPARE ALSO, 2 F.A.M. 041(I), 043 (OCTOBER 11, 1977) (PRINCIPAL OFFICERS ARE AMBASSADORS, MINISTERS, CHARGES D'AFFAIRES, AND OTHER SIMILAR OFFICERS WHO ARE IN CHARGE OF FOREIGN SERVICE POSTS; EACH SUCH PERSON IS THE "PRINCIPAL DIPLOMATIC REPRESENTATIVE OF THE UNITED STATES \* \* \* TO THE GOVERNMENT TO WHICH HE IS ACCREDITED"). THEREFORE, WE CONCLUDE THAT THE SEVEN FLOOR PRINCIPALS ARE NOT "PRINCIPAL DIPLOMATIC AND CONSULAR OFFICIALS" WHO MAY LEGALLY RECEIVE HOME-TO-WORK TRANSPORTATION.

IN ARGUING THE THIRD BASIS FOR HIS DETERMINATION, THE LEGAL ADVISOR RELIED SPECIFICALLY ON OUR DECISION IN 54 COMP.GEN. 855 (1975). THAT CASE CONCERNED THE PROVISION OF HOME-TO-WORK TRANSPORTATION FOR DOD EMPLOYEES WHO WERE STATIONED

IN A FOREIGN COUNTRY WHERE, ACCORDING TO THE DOD SUBMISSION, THERE WAS SERIOUS DANGER TO THE EMPLOYEES BECAUSE OF TERRORIST ACTIVITIES. AS THE LEGAL ADVISOR INITIALLY ACKNOWLEDGED, OUR DECISION IN THAT CASE HOLDS THAT WHERE THERE IS A "CLEAR AND PRESENT DANGER" TO GOVERNMENT EMPLOYEES AND THE FURNISHING OF HOME-TO-WORK TRANSPORTATION IN GOVERNMENT VEHICLES WILL AFFORD PROTECTION NOT OTHERWISE AVAILABLE, THEN THE PROVISION OF SUCH TRANSPORTATION IS WITHIN THE EXERCISE OF SOUND ADMINISTRATIVE DISCRETION. 54 COMP.GEN.AT 858.

THE LEGAL ADVISOR THEN QUOTES THE SECOND PASSAGE FROM THE DECISION (SET FORTH EARLIER) WHICH, AS THE REFERENCE INDICATES, WAS TAKEN FROM 25 COMP.GEN. 844 (1946). THAT PASSAGE HAS BEEN REPEATED A NUMBER OF TIMES AS DICTA IN OTHER COMPTROLLER GENERAL DECISIONS. (SEE, FOR EXAMPLE, B-181212, AUGUST 15, 1974, OR B-178342, MAY 8, 1973.) STANDING ALONE, IT CERTAINLY IMPLIES THAT WHAT CONSTITUTES OFFICIAL BUSINESS IS A DETERMINATION THAT LIES WITHIN THE DISCRETION OF THE AGENCY HEAD, AND IT IS NOT SURPRISING THAT MANY AGENCIES CHOSE TO ACT ON THAT ASSUMPTION. HOWEVER, ALL DECISIONS MUST BE READ IN CONTEXT. THE SEMINAL DECISION, 25 COMP.GEN. 844 (1946), DENIED A CLAIM FOR CAB FARE BETWEEN AN EMPLOYEE'S HOME AND THE GARAGE WHERE A GOVERNMENT CAR WAS STORED, PRIOR TO BEGINNING OFFICIAL TRAVEL, ON THE GENERAL PRINCIPLE THAT AN EMPLOYEE MUST BEAR HIS OWN COMMUTING EXPENSES. THE DECISION THEN SAID, IN PASSING, THAT IF AN AGENCY DECIDED THAT IT WAS MORE ADVANTAGEOUS TO THE GOVERNMENT FOR OFFICIAL TRAVEL TO START FROM AN EMPLOYEE'S HOME RATHER THAN FROM HIS PLACE OF BUSINESS OR, PRESUMABLY, FROM THE GARAGE, "(SUCH USE OF A GOVERNMENT AUTOMOBILE IS WITHIN THE MEANING OF 'OFFICIAL PURPOSES' AS USED IN THE ACT."

DEPUTY ASSISTANT ATTORNEY GENERAL LEON ULMAN, DEPARTMENT OF JUSTICE, WROTE A MEMORANDUM OPINION ON THIS TOPIC FOR THE COUNSEL TO THE PRESIDENT ON AUGUST 27, 1979. AFTER QUOTING THE ABOVE-MENTIONED GENERALIZATION ABOUT ADMINISTRATIVE DISCRETION TO AUTHORIZE HOME-TO-WORK TRANSPORTATION, ULMAN CONCLUDED:

BUT THIS SWEEPING LANGUAGE HAS BEEN APPLIED NARROWLY BY BOTH THE COMPTROLLER GENERAL AND THIS DEPARTMENT \* \* \*. WE ARE AWARE OF NOTHING THAT SUPPORTS A BROAD APPLICATION OF THE EXCEPTION IMPLIED BY THE COMPTROLLER GENERAL. THAT EXCEPTION MAY BE UTILIZED ONLY WHEN THERE IS NO DOUBT THAT THE TRANSPORTATION IS NECESSARY TO FURTHER AN OFFICIAL PURPOSE OF THE GOVERNMENT. AS WE VIEW IT, ONLY TWO TRULY EXCEPTIONAL SITUATIONS EXIST: (1) WHERE THERE IS GOOD CAUSE TO BELIEVE THAT THE PHYSICAL SAFETY OF THE OFFICIAL REQUIRES HIS PROTECTION, AND (2) WHERE THE GOVERNMENT TEMPORARILY WOULD BE DEPRIVED OF ESSENTIAL SERVICES UNLESS OFFICIAL TRANSPORTATION IS PROVIDED TO ENABLE THE OFFICER TO GET TO WORK. BOTH CATEGORIES MUST BE CONFINED TO UNUSUAL FACTUAL CIRCUMSTANCES.

MOREOVER, EVEN UNDER THE CIRCUMSTANCES DISCUSSED IN THE TERRORIST ACTIVITIES CASE RELIED ON BY THE STATE DEPARTMENT LEGAL ADVISOR, WE POINTED OUT THAT SECTION 1344 DOES NOT EXPRESSLY AUTHORIZE EITHER THE EXERCISE OF SUCH DISCRETION OR THE PROVISION OF SUCH TRANSPORTATION. THEN STATED:

\* \* \* THE BROAD SCOPE OF THE PROHIBITION IN (WHAT IS NOW SECTION 1344), AS WELL AS THE EXISTENCE OF SPECIFIC STATUTORY EXCEPTIONS THERETO, STRONGLY SUGGESTS THAT SPECIFIC LEGISLATIVE AUTHORITY FOR SUCH USE OF VEHICLES SHOULD BE SOUGHT AT THE EARLIEST POSSIBLE TIME, AND THAT THE EXERCISE OF ADMINISTRATIVE DISCRETION IN THE INTERIM SHOULD BE RESERVED FOR THE MOST ESSENTIAL CASES. 54 COMP.GEN.AT 858 (FOOTNOTE OMITTED). THUS, IT WAS THE NEED TO PROTECT GOVERNMENT EMPLOYEES FROM A CLEAR AND PRESENT DANGER (NOT SIMPLY AN ADMINISTRATIVE DETERMINATION OF THE GOVERNMENT'S INTEREST) WHICH LED US TO AUTHORIZE THE INTERIM PROVISION OF HOME-TO-WORK TRANSPORTATION UNTIL SPECIFIC LEGISLATIVE AUTHORITY FOR SUCH TRANSPORTATION COULD BE OBTAINED.

SUBSEQUENT COMPTROLLER GENERAL'S DECISIONS HAVE NOT RELIED UPON AN ADMINISTRATIVE DETERMINATION OF THE GOVERNMENT'S INTERESTS AS THE SOLE BASIS FOR EITHER APPROVING OR DISAPPROVING HOME-TO-WORK TRANSPORTATION. /2/ WE HAVE, HOWEVER, SOMEWHAT BROADENED THE CONCEPT OF AN EMERGENCY SITUATION TO INCLUDE TEMPORARY BUS SERVICE FOR ESSENTIAL EMPLOYEES DURING A PUBLIC TRANSPORTATION STRIKE. 54 COMP.GEN. 1066 (1975). CF. 60 ID. 420 (1981).



THERE IS ONE OTHER NARROW EXCEPTION TO THE PROHIBITION WHICH SHOULD BE MENTIONED. WHEN PROVISION OF HOME-TO-WORK TRANSPORTATION TO GOVERNMENT EMPLOYEES HAS BEEN INCIDENT TO OTHERWISE AUTHORIZED USE OF THE VEHICLES INVOLVED, I.E., WAS PROVIDED ON A "SPACE AVAILABLE" BASIS, AND DID NOT RESULT IN ADDITIONAL EXPENSE TO THE GOVERNMENT, WE HAVE RAISED NO OBJECTION. SEE, E.G., B-195073, NOVEMBER 21, 1979, IN WHICH ADDITIONAL EMPLOYEES WERE AUTHORIZED TO GO HOME WITH AN EMPLOYEE WHO WAS ON FIELD DUTY AND THEREFORE WAS EXEMPT FROM THE PROHIBITION.

UNLESS ONE OF THESE EXCEPTIONS OUTLINED ABOVE APPLIES, AGENCIES MAY NOT PROPERLY EXERCISE ADMINISTRATIVE DISCRETION TO PROVIDE HOME-TO-WORK TRANSPORTATION FOR THEIR OFFICERS AND EMPLOYEES, UNLESS OTHERWISE PROVIDED BY STATUTE. (SEE E.G., 10 U.S.C. 2633 FOR AN EXAMPLE OF A STATUTORY EXEMPTION FOR EMPLOYEES ON MILITARY INSTALLATIONS AND WAR PLANTS UNDER SPECIFIED CIRCUMSTANCES.)

#### CONCLUSION

IN LIGHT OF THE FOREGOING, WE CONCLUDE THAT, UNLESS ONE OF THE EXCEPTIONS OUTLINED ABOVE APPLIES, THE DEPUTY SECRETARY OF STATE, THE UNDER SECRETARIES, AND THE COUNSELOR MAY NOT BE AUTHORIZED UNDER 31 U.S.C. 1344(B) TO USE GOVERNMENT VEHICLES OR DRIVERS FOR TRANSPORTATION BETWEEN THEIR HOMES AND PLACES OF EMPLOYMENT, NOR MAY ANY OTHER OFFICIAL OR EMPLOYEE OF THE DEPARTMENTS OF STATE AND DEFENSE (OTHER THAN THE SECRETARIES OF THOSE TWO DEPARTMENTS, AND THE SECRETARIES OF THE ARMY, NAVY, AND AIR FORCE) BE SO AUTHORIZED UNDER THAT SUBSECTION, UNLESS THAT PERSON HAS BEEN PROPERLY APPOINTED (OR HAS SUCCEEDED) TO BE THE HEAD OF A FOREIGN DIPLOMATIC, CONSULAR, OR OTHER FOREIGN SERVICE POST AS AN AMBASSADOR, MINISTER, CHARGE D'AFFAIRES, OR ANOTHER SIMILAR PRINCIPAL DIPLOMATIC OR CONSULAR OFFICIAL.

/1/ THERE IS ONE STATUTORY EXCEPTION FOR THE DEPARTMENT OF DEFENSE. WHEN THE DEPARTMENT OF DEFENSE WAS CREATED BY THE NATIONAL SECURITY ACT AMENDMENTS OF 1949, PUB. L. NO. 81-216, 81ST CONG., 1ST SESS., 63 STAT. 578, 591-92 (1949), CONGRESS EXPRESSLY PROVIDED IN SUBSECTION 12(G) THAT, DESPITE THE CONSOLIDATION OF THE THREE MILITARY DEPARTMENTS INTO THE DOD, THE SECRETARIES OF THE ARMY, NAVY, AND AIR FORCE CONTINUE TO BE VESTED WITH THE STATUTORY AUTHORITY WHICH WAS VESTED IN THEM WHEN THEY ENJOYED THE STATUS OF SECRETARIES OF EXECUTIVE DEPARTMENTS, SEE E.G., S. REP. NO. 366, 81ST CONG. 25 (1949). THAT AUTHORITY IS TO BE EXERCISED SUBJECT TO THE DISCRETION AND CONTROL OF THE SECRETARY OF DEFENSE. ID. FOR THIS REASON, THE SECRETARIES OF THE ARMY, NAVY, AND AIR FORCE MAY ALSO BE REGARDED AS HEADS OF THE EXECUTIVE DEPARTMENTS, EVEN THOUGH THEIR RESPECTIVE AGENCIES ARE NOT LISTED IN 5 U.S.C. 101.

/2/ AN AUDIT REPORT WHICH WAS PRIMARILY CONCERNED WITH MISUSE OF FEDERAL EMPLOYEES AS PERSONAL AIDES TO FEDERAL OFFICIALS, GAO/FPCD-82 52 (B-207462, JULY 14, 1982) MAY HAVE CREATED A CONTRARY IMPRESSION. IT, TOO, QUOTED OUR 1975 DECISION, WITHOUT FULLY DESCRIBING THE LIMITED CONTEXT IN WHICH THE EXERCISE OF ADMINISTRATIVE DISCRETION MIGHT BE PERMISSIBLE. THE ERROR WAS INADVERTENT.





## **B-212634 October 12, 1983**

The Department of Interior's official reception and representation fund may be used to pay for costs incurred for a July 4 party hosted by the Secretary of the Interior at the Department for Interior employees and other invited guests.

The Honorable Mike Synar Chairman, Subcommittee on Environment, Energy, and Natural Resources Committee on Government Operations House of Representatives

Dear Mr. Chairman:

By letter dated August 2, 1983, you requested our views regarding the propriety of a reception hosted by the Secretary of the Interior at his office on July 4, 1983. We conclude that the Secretary was authorized to use his discretionary fund for official reception and representation expenses to pay for this party.

We have been informed by Interior officials that the Secretary invited approximately 800 people to his office for a party on the evening of July 4 to celebrate Independence Day. Among the invited guests was a select group of Interior employees and their families and/or friends, and congressmen and congressional staff aides and their families and/or friends. The guests were served hot dogs, soft drinks and an assortment of snack foods. Also, the guests were able to observe the traditional fireworks display on the Mall from the roof of the Interior Department.

The total cost of this party was \$3112.82. Of the total amount, \$1614.95 constituted the payroll costs of the 15 Interior employees who assisted in the preparation and the cleanup of the party. The remaining \$1497.87 spent included the cost of the food, kitchen supplies, chair rental and other items purchased for the party. We have been informed by our audit staff that this entire amount either was initially or subsequently charged against the Secretary's discretionary fund.

In 1983, the Office of the Secretary of the Interior has appropriated \$10,000 for official reception and representation expenses. Interior Department and Related Agencies, Appropriations for Fiscal Year 1983, Pub. L. No. 97-394, 96 Stat. 1880 (1982). In a previous decision, B-206173, February 23, 1982, we noted that "agency heads have traditionally been accorded a areas deal of discretion by the Congress in the expenditure of this type of fund." As such, any event which is hosted by an agency head and which relates to the function of the agency, can be funded from this type of account. Accordingly, we held that expenses attributable to an agency Christmas party which was hosted by the Secretary of the Interior were chargeable to the Secretary's discretionary account. Id.

We conclude that the July 4 party hosted by the Secretary of the Interior for Interior employees and other invited guests was properly chargeable to the Secretary's discretionary fund. This affair, hosted by the Secretary, was within the discretion accorded the Secretary with respect to the use of the Department's official reception and representation fund, in our view. Therefore, we will not object to the Secretary's use of his discretionary fund in this instance.

Sincerely yours,

Milton J. Socolar Comptroller General of the United States





## **B-217869, AUG 22, 1985, 64 COMP.GEN. 796**

APPROPRIATIONS - AVAILABILITY - ART OBJECTS GAO HAS NO OBJECTION TO PURCHASE BY U.S. TAX COURT OF PAINTINGS AND OTHER ART OBJECTS FOR INDIVIDUAL JUDGES' OFFICES AND CHAMBERS, PROVIDED THAT EACH PURCHASE "IS CONSISTENT WITH WORK-RELATED OBJECTIVES AND THE AGENCY MISSION, AND IS NOT PRIMARILY FOR THE PERSONAL CONVENIENCE OR PERSONAL SATISFACTION OF A GOVERNMENT OFFICER OR EMPLOYEE." 63 COMP.GEN. 110, 113 (1983). COURTS - TAX COURT OF UNITED STATES - REGULATIONS - PROCUREMENT U.S. TAX COURT ADVISED TO DEVELOP INTERNAL REGULATIONS GOVERNING PURCHASE OF DECORATIVE ITEMS FOR INDIVIDUAL JUDGES' OFFICES AND CHAMBERS WHICH PROVIDE ADEQUATE ADMINISTRATIVE CONTROLS TO ASSURE THAT PURCHASES ARE NOT MADE SOLELY TO PLEASE THE INDIVIDUAL JUDGES INVOLVED. PRESENT TAX COURT POLICY OF ALLOCATING FIXED SUM OF MONEY TO EACH JUDGE AND ALLOWING HIM OR HER TO SELECT THE OBJECTS TO BE PROCURED DOES NOT PROVIDE SUCH CONTROLS. COURTS - TAX COURT OF UNITED STATES - COURT OF RECORD STATUS OF PROCUREMENT U.S. TAX COURT, A LEGISLATIVE COURT OF RECORD, IS NOT BOUND BY GSA REGULATION ON PERSONAL CONVENIENCE ITEMS (41 C.F.R. 101-26.103-2) WHICH APPLIES ONLY TO EXECUTIVE BRANCH AGENCIES, NOR BY AN ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS REGULATION (TITLE VIII OF THE "GUIDE TO JUDICIARY POLICIES AND PROCEDURES") SINCE THE TAX COURT IS NOT PART OF THE JUDICIAL BRANCH. NEVERTHELESS, BOTH REGULATIONS, AS WELL AS GAO DECISIONS, CAN PROVIDE USEFUL GUIDANCE FOR TAX COURT IN DEVELOPING ITS OWN REGULATION ON THE EXPENDITURE OF ITS APPROPRIATIONS FOR ART OBJECTS.

MATTER OF: PURCHASE OF DECORATIVE ITEMS FOR INDIVIDUAL OFFICES AT THE UNITED STATES TAX COURT, AUGUST 22, 1985:

THIS IS IN RESPONSE TO A REQUEST FROM THE ADMINISTRATOR OF THE UNITED STATES TAX COURT, JOINED BY THE CHIEF JUDGE OF THE COURT, FOR A DECISION ON THE PROPRIETY OF THE USE OF APPROPRIATED FUNDS FOR THE PURCHASE OF ARTWORK AND OTHER DECORATIVE ITEMS FOR THE INDIVIDUAL OFFICES AND CHAMBERS OF "REGULAR" JUDGES AND SPECIAL TRIAL JUDGES OF THE TAX COURT. THE ADMINISTRATOR SEEKS GUIDANCE ON "THE APPROPRIATENESS OF THE COURT'S PRESENT POLICIES" AND ASKS FOR RULINGS ON FIVE SPECIFIC QUESTIONS. THE ANSWERS TO THESE QUESTIONS ARE PRESENTED BELOW, ROUGHLY IN THE ORDER SUBMITTED.

### **PRESENT POLICIES**

FROM THE INFORMATION SUBMITTED BY THE ADMINISTRATOR, IT APPEARS THAT THE TAX COURT HAS NEVER DEVELOPED INTERNAL REGULATIONS GOVERNING THE PURCHASE OF ARTWORK AND RELATED OBJECTS FOR INDIVIDUAL OFFICES AND CHAMBERS. INSTEAD, IT HAS RELIED PRIMARILY ON THE APPLICABLE FEDERAL PROPERTY MANAGEMENT REGULATION (ISSUED BY THE GENERAL SERVICES ADMINISTRATION (GSA) AND CODIFIED AT 41 C.F.R. SEC. 101-26.103-2), AND UNTIL OCTOBER OF 1984, ON A SIMILAR POLICY SET OUT IN TITLE VIII OF THE "GUIDE TO JUDICIARY POLICIES AND PROCEDURES," PUBLISHED BY THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS (A.O.).

THE ADMINISTRATOR POINTS OUT THAT THE A.O. CONSIDERABLY RELAXED ITS RESTRICTIONS ON THESE SORTS OF PURCHASES IN OCTOBER OF 1984, WHICH HE ATTRIBUTES TO THE INFLUENCE OF THREE GAO LEGAL DECISIONS. BECAUSE IT WAS NOT CLEAR THAT THE NEW A.O. POLICY WAS CONSISTENT WITH THE GAO DECISIONS, THE TAX COURT HAS NOT FOLLOWED THE A.O. POLICIES TO DATE. NEVERTHELESS, THE ADMINISTRATOR STATES THAT IT IS AT LEAST ARGUABLE THAT TAX COURT JUDGES SHOULD BE ALLOWED THE SAME LEEWAY SINCE THEIR STATUS IS SO SIMILAR IN MANY WAYS TO FEDERAL DISTRICT COURT JUDGES.

AT ANY RATE, BASED ON ITS INTERPRETATION OF THE GSA REGULATION, A JUDGES' COMMITTEE ON BUILDING AND COURT FACILITIES DECIDED TO ALLOCATE \$2,000 TO EACH JUDGE TO SPEND ON ARTWORK FOR HIS OR HER OFFICE AND CHAMBERS IN CONNECTION WITH THE MOVE INTO A NEW GOVERNMENT-OWNED TAX COURT BUILDING IN 1974. ALL SUBSEQUENTLY APPOINTED NEW JUDGES WERE ALSO ALLOCATED A MAXIMUM OF \$2,000 EACH FOR THIS PURPOSE. IN AUGUST OF 1984, THE JUDGES' COMMITTEE VOTED TO ALLOCATE EACH JUDGE AN ADDITIONAL \$2,000 EACH TO PURCHASE NEW ARTWORK. FINALLY, SPECIAL TRIAL JUDGES, WHO ARE APPOINTED BY THE CHIEF JUDGE OF THE TAX COURT, WERE ALLOCATED \$800 EACH TO DECORATE THEIR OFFICES IN A SEPARATE BUILDING LEASED BY THE GSA.

#### DISCUSSION

AS A PRELIMINARY MATTER, GAO HAS NO OBJECTION TO THE PURCHASE OF PAINTINGS AND OTHER OBJECTS OF ART FOR INDIVIDUAL JUDGES' OFFICES AND CHAMBERS, PROVIDED THAT EACH PURCHASE "IS CONSISTENT WITH WORK-RELATED OBJECTIVES AND THE AGENCY MISSION, AND IS NOT PRIMARILY FOR THE PERSONAL CONVENIENCE OR PERSONAL SATISFACTION OF A GOVERNMENT OFFICER OR EMPLOYEE." 63 COMP.GEN. 110, 113 (1983). SEE ALSO 60 COMP.GEN. 580, 582 (1981).

WE ASKED THE A.O. WHETHER THE PURCHASE OF DECORATIVE ITEMS FOR THE OFFICES AND CHAMBERS OF THE JUDGES UNDER ITS JURISDICTION WAS CONSISTENT WITH THE ABOVE-MENTIONED DECISIONS. THE ACTING DIRECTOR REPLIED:

IT IS THE POSITION OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS THAT THIS POLICY IS FULLY CONSISTENT WITH THE CITED DECISIONS \*\*\*. THE PURCHASE OF DECORATIVE ITEMS WOULD CONSTITUTE A PERMANENT FEATURE OF JUDICIAL OFFICE DECOR, RESULTING IN IMPROVED EFFICIENCY AND MORALE AND ADDING TO THE DIGNITY OF THE FEDERAL COURTS.

WE HAVE NO DIFFICULTY IN ACCEPTING THIS RATIONALE AND NOTE THAT THE JUSTIFICATION OFFERED MAY APPLY TO THE TAX COURT AS WELL. THERE IS ONE MAJOR DIFFERENCE. IT IS NOT RELATED TO A DIFFERENCE IN THE NECESSITY FOR THE ART OBJECTS, BUT RATHER TO THE PRESENCE OR ABSENCE OF ADMINISTRATIVE CONTROLS TO BE SURE THAT NO PURELY PERSONAL CONVENIENCE ITEMS ARE PURCHASED UNDER THIS AUTHORITY.

THE A.O. HAS A SET OF CAREFULLY CRAFTED REGULATIONS GOVERNING THE PURCHASE OF THESE AND OTHER ITEMS FROM THE FURNITURE AND FURNISHINGS APPROPRIATION. THE NUMBER OF DECORATIVE ITEMS FOR EACH OFFICE IS LIMITED TO FOUR, AT A COST OF NOT TO EXCEED \$200 FOR EACH ITEM, INCLUDING FRAMING. MOREOVER, NO FUNDS MAY BE EXPENDED TO PURCHASE "EXPENSIVE OR VALUABLE PIECES OF ART, NOR FOR ITEMS OF A PERSONAL NATURE SUCH AS FAMILY PORTRAITS." A SPECIAL FORM IS PRESCRIBED TO PROCURE THESE ITEMS, WHICH

MUST BE ACCOMPANIED BY A WRITTEN JUSTIFICATION, AND SUBMITTED TO THE PROCUREMENT AND PROPERTY MANAGEMENT BRANCH, ADMINISTRATIVE SERVICES DIVISION, WHERE THE APPROVAL AUTHORITY RESIDES.

IN CONTRAST (ALTHOUGH THE TAX COURT SUBMISSION DID NOT MAKE ITS PROCEDURES TOO CLEAR), IT APPEARS THAT A COMMITTEE OF JUDGES IS RESPONSIBLE FOR MAKING AN ALLOCATION OF FUNDS FOR THE PURCHASE OF ART ITEMS FOR TAX COURT JUDGES' OFFICES AND CHAMBERS, NOTWITHSTANDING THE FACT THAT THE JUDGES ON THE COMMITTEE HAVE AN OBVIOUS INTEREST IN THE OUTCOME. OF EQUAL CONCERN IS THE FACT THAT ONCE THE ALLOCATION IS MADE, THE INDIVIDUAL JUDGE IS PRESUMABLY FREE TO PURCHASE ANY ITEM HE FEELS IS SUITABLE, AS LONG AS HE DOES NOT EXCEED THE FUNDING CEILING. (THIS MAY ACCOUNT FOR THE SITUATION DESCRIBED BY THE ADMINISTRATOR, IN WHICH A \$2,000 PAINTING SELECTED BY A FORMER JUDGE IS LANGUISHING IN A BASEMENT STOREROOM BECAUSE NO ONE ELSE WANTED TO HANG IT ON HIS WALL.)

IN SUMMARY, IT IS NOT OUR FUNCTION TO TELL THE TAX COURT HOW TO WRITE ITS REGULATIONS BUT ONLY TO URGE THAT IT DEVELOP AND ADOPT SOME ADMINISTRATIVE CONTROLS TO ASSURE COMPLIANCE WITH GOVERNMENT POLICIES AND GAO DECISIONS ON THE PURCHASE OF DECORATIVE ITEMS.

QUESTIONS (1),(2),AND (3)

IN THE LIGHT OF THE ABOVE DISCUSSION, WE WOULD DISCOURAGE THE PRACTICE OF TURNING OVER SPECIFIC FUNDS TO INDIVIDUAL JUDGES, ALLOWING EACH JUDGE TO DECORATE HIS OR HER OWN SPACE WITHOUT SUBJECTING THESE ACTIONS TO ANY ADMINISTRATIVE REVIEW AS TO SUITABILITY AND NECESSITY. IN THIS CONNECTION, WE SEE NO SIGNIFICANT DISTINCTION BETWEEN THE JUDGES' OFFICE SPACE AND THE JUDGES' CHAMBERS. ALTHOUGH A LARGER NUMBER OF EMPLOYEES HAVE DESKS IN THE LATTER SPACE, IN BOTH CASES THE ROOMS ARE UNDER THE CONTROL OF AND SERVE THE NEEDS OF THE INDIVIDUAL JUDGE. IT IS ALSO IMMATERIAL WHETHER THE JUDGES ARE "NEWLY APPOINTED" OR HAVE SERVED FOR MANY YEARS, FOR PURPOSES OF AVOIDING THE APPEARANCE OF PURCHASES MADE SOLELY TO SATISFY THE PERSONAL WISHES OF AN INDIVIDUAL OFFICIAL. (SEE QUESTION 5 FOR A DISCUSSION OF AN OVERALL "PLAN FOR DECORATION OF FEDERAL BUILDINGS.") IN OTHER WORDS, THE REQUEST FOR A "LIGHTED GLOBE" IS NEITHER MORE NOR LESS OBJECTIONABLE BECAUSE IT CAME FROM A RELATIVELY NEW JUDGE RATHER THAN FROM AN "OLD TIMER." AGAIN, THE QUESTION MUST BE WHETHER THE PURCHASE SERVES THE AGENCY'S MISSION OR IS MADE SOLELY TO SATISFY THE WISHES OF THE INDIVIDUAL JUDGE.

QUESTIONS (4) AND (5)

WE ARE NOT AWARE OF ANY EXISTING REGULATIONS IN THE LEGISLATIVE BRANCH WHICH WOULD "GOVERN" THE TAX COURT IN ESTABLISHING ITS POLICIES ON PROPERTY MANAGEMENT.

THE TAX COURT SUBMISSION OFFERS, AS JUSTIFICATION FOR THE \$2,000 ALLOCATION FOR EACH REGULAR JUDGE AND THE \$800 ALLOCATION FOR EACH SPECIAL TRIAL JUDGE AT THE TIME OF THEIR RESPECTIVE MOVES INTO NEW BUILDINGS, THE AUTHORITY PROVIDED IN THE FIRST SENTENCE OF 41 C.F.R. SEC. 101-26.103-2, THE GSA FEDERAL PROPERTY MANAGEMENT REGULATION. THAT SENTENCE STATES:

GOVERNMENT FUNDS MAY BE EXPENDED FOR PICTURES, OBJECTS OF ART, PLANTS, OR FLOWERS (BOTH ARTIFICIAL AND REAL), OR ANY SIMILAR TYPE ITEMS WHEN

SUCH ITEMS ARE INCLUDED IN A PLAN FOR THE DECORATION OF FEDERAL BUILDINGS APPROVED BY THE AGENCY RESPONSIBLE FOR THE DESIGN AND CONSTRUCTION.

THE TAX COURT EVIDENTLY ASSUMED THAT IT, RATHER THAN GSA, WAS "THE AGENCY RESPONSIBLE FOR DESIGN AND CONSTRUCTION" OF THE BUILDINGS, AND THAT THE APPROVAL OF ITS JUDGES' COMMITTEE SATISFIED THE ABOVE REQUIREMENT. THINK THE COURT IS MISTAKEN. THIS FUNCTION HAS CLEARLY BEEN DELEGATED TO THE GSA. SEE 40 U.S.C. CHAPTER 10. ALTHOUGH WE CONCLUDE (SEE DISCUSSION, INFRA), THAT THIS PARTICULAR REGULATION IS NOT BINDING ON THE TAX COURT INSOFAR AS NO PUBLIC CORRIDORS OR LOBBIES ARE CONCERNED, WE OFFER TWO OBSERVATIONS ABOUT THE IMPACT OF THIS REGULATION ON AGENCIES TO WHICH IT APPLIES.

IN 60 COMP.GEN. 580 (1981), WE CONSTRUED THE "PLAN" REQUIREMENT OF THE REGULATION AS APPLYING ONLY TO NEW FEDERAL CONSTRUCTION OR TO MAJOR RENOVATIONS OF EXISTING FEDERAL BUILDINGS. IN CONTRAST, WE SAID, THE SECOND SENTENCE OF THE REGULATION WHICH APPLIES TO "SPACE ASSIGNED TO ANY AGENCY" REFERS TO EXISTING SPACE, INCLUDING LEASED SPACE. DETERMINATIONS AS TO THE NEED TO PURCHASE DECORATIVE ITEMS IN SUCH SPACE ARE LEFT TO THE DISCRETION OF THE OCCUPYING AGENCY.

AFTER RECEIVING THE TAX COURT SUBMISSION, WE CONSULTED INFORMALLY WITH KNOWLEDGEABLE OFFICIALS AT THE GSA ABOUT THE ABOVE DISTINCTION. WE WERE TOLD THAT AS "LANDLORDS," GSA HAS NO PARTICULAR CONCERN ABOUT THE MANNER IN WHICH ITS TENANTS DECORATE THEIR INDIVIDUALLY ASSIGNED SPACE, WHETHER THE BUILDING CONCERNED IS NEW OR HAS BEEN IN EXISTENCE FOR SOME TIME. (THE GSA WOULD, OF COURSE, BE CONCERNED IF ANY AGENCY'S DECORATING SCHEME INTRUDED INAPPROPRIATELY IN THE PUBLIC AREAS OF THE BUILDINGS.) MOREOVER, WE WERE TOLD, THE GSA HAS NOT DEVELOPED ITS OWN DECORATING PLAN FOR INDIVIDUALLY OCCUPIED SPACE NOR DOES IT GENERALLY REQUIRE THAT SUCH PLANS BE SUBMITTED BY ITS TENANTS FOR GSA REVIEW AND APPROVAL. NEVERTHELESS, THE REGULATION IS STILL ON THE BOOKS AND UNTIL MODIFIED BY THE GSA, EXECUTIVE DEPARTMENT AGENCIES SHOULD CONTINUE TO CONSULT WITH THE GSA BEFORE EMBARKING ON AN AMBITIOUS DECORATING EFFORT IN NEW BUILDINGS.

AS MENTIONED ABOVE, WE DO NOT THINK THAT THE GSA REGULATION IN QUESTION APPLIES TO THE TAX COURT, WHICH IS A LEGISLATIVE COURT OF RECORD SPECIFICALLY REMOVED FROM THE EXECUTIVE BRANCH OF THE GOVERNMENT BY SECTION 951 OF THE TAX REFORM ACT OF 1969, 26 U.S.C. SEC. 7441. THE AUTHORITY CITED FOR THE SUBPART IN WHICH THE ABOVE REGULATION APPEARS IS 40 U.S.C. SEC. 486(C), WHICH SPECIFICALLY LIMITS THE APPLICABILITY OF ITS POLICIES AND DIRECTIVES TO HEADS OF EXECUTIVE AGENCIES. THIS DOES NOT MEAN THAT NONE OF THE FEDERAL PROPERTY MANAGEMENT REGULATIONS HAVE ANY APPLICABILITY OUTSIDE THE EXECUTIVE BRANCH OF THE GOVERNMENT. THE FEDERAL PROPERTY AND ADMINISTRATIVE SERVICES ACT DEFINES THE TERM "FEDERAL AGENCY" TO APPLY BROADLY TO ALL THREE BRANCHES OF THE GOVERNMENT (WITH CERTAIN EXCEPTIONS NOT RELEVANT HERE). 40 U.S.C. SEC. 472(B). APPLICABILITY OF A PARTICULAR REGULATION TO THE TAX COURT DEPENDS, THEREFORE, ON WHETHER, BY ITS TERMS, IT PURPORTS TO BIND ALL "FEDERAL AGENCIES" OR ONLY "EXECUTIVE AGENCIES."

AS THE ADMINISTRATOR CORRECTLY SURMISED IN HIS SUBMISSION, REGULATIONS PROMULGATED BY THE A.O. ARE SIMILARLY NONBINDING SINCE THE TAX COURT IS



NOT A PART OF THE JUDICIAL BRANCH. NEVERTHELESS, IT IS QUITE APPROPRIATE TO FOLLOW THE A.O. REGULATIONS AS GUIDANCE TO THE EXTENT THE TAX COURT REGARDS THEM AS USEFUL. IN ANSWER TO THE ADMINISTRATOR'S SPECIFIC QUESTION, WHILE WE TAKE NO POSITION ON THE DETAILS OF THE A.O. REGULATIONS -- FOR EXAMPLE, ON THE AMOUNT AUTHORIZED FOR EXPENDITURE IN EACH OFFICE-- WE REGARD THE REGULATIONS AS SETTING FORTH "A PROPER, LAWFUL POLICY REGARDING THE EXPENDITURE OF AGENCY APPROPRIATIONS FOR ARTWORK."



**B-226011, B-226900, November 17, 1987**

**Appropriations/Financial Management**

**Appropriation Availability**

■ **Purpose Availability**

■ ■ **Necessary Expenses Rule**

Agency expenditure for seasonal decorations as necessary expenses may be properly payable where purchase is consistent with work-related objectives, agency or other applicable regulations, and the agency mission, and is not primarily for the personal convenience or satisfaction of a government employee. Agency must also determine that seasonal decorations are appropriate in light of constitutional considerations. GAO advises agencies to establish guidelines to prevent abuse in this area. 52 Comp. Gen. 504 (1973) is overruled and 60 Comp. Gen. 580 (1981) is modified to conform with this decision.

**Matter of: Department of State & General Services Administration—  
Seasonal Decorations**

This is in response to two separate requests from certifying officers from the Department of State and from the General Services Administration (GSA), for advance decisions regarding the propriety of certifying for payment vouchers for seasonal decorations. These cases provide us with an opportunity to redefine our position on the recurring issue of whether the cost of seasonal decorations for government offices is an expense properly payable from appropriated funds. These two requests are fundamentally similar and are briefly described below. For the reasons that follow, we conclude that appropriated funds may be used for seasonal office decorations.

**Background**

**B-226011**

The authorized certifying officer of the Financial Management Center in Bonn, West Germany for the Department of State asks our decision concerning the permissibility of certifying a reimbursement voucher for payment totaling \$65.00 for Christmas decorations for the Embassy. Previous State Department guidance issued to all diplomatic and consular posts concluded that expenditures for seasonal decorations were permissible necessary expenses based upon two basic justifications: (1) the need to represent the seasonal traditions and customs of the United States; and (2) the need to create a pleasant and dignified atmosphere for the officials or guests who frequent the posts for personal or professional business. The State Department guidance specifically limited such expenditures to public area decorating. Although the submission was not clear, it would appear that the State Department "Acquisition and Maintenance of Buildings Abroad" appropriation is the intended source of funds.

(67 Comp. Gen.)

B-226900

An authorized certifying officer for GSA asks our decision regarding the permissibility of certifying three vouchers for payment, representative of a large number of unpaid vouchers for various seasonal decorations, including poinsettias, menorah candelabra and Christmas trees. The justification implicit in this request is to provide a pleasant working atmosphere in federal office buildings. Expenditures are to be charged to the Federal Building Fund, Real Property Operations activity under the authority of 41 C.F.R. § 101-26.103-2 which approves the expenditure of funds for the decoration of federal buildings under a plan.

### Discussion

Neither of the agency functions represented here have appropriations which specifically provide funds for the purchase of seasonal decorations. Therefore, it is necessary in order to pay these expenses that they be determined to constitute necessary expenses for the agency in question. Our Office has viewed agency expenditures for decorative items to be necessary where the purchase is consistent with work-related objectives and the agency mission, and is not primarily for the personal convenience or personal satisfaction of a government employee. 64 Comp. Gen. 796 (1985) and 63 Comp. Gen. 110 (1983). Traditionally, we have allowed office decorations or improvements in public areas where they would contribute to a pleasant working atmosphere, thus improving morale and efficiency. 60 Comp. Gen. 580 (1981).

We have, however, objected to the purchase of decorations which are seasonal and not for permanent use. See 60 Comp. Gen. 580, *supra*. In 52 Comp. Gen. 504 (1973), we concluded that use of appropriated funds for purchasing seasonal decorations was not authorized. We informed the Bureau of Customs that providing Christmas decorations for government offices had no direct connection with, and was not essential to, the carrying out of the stated general purpose for which the funds were appropriated. We rejected the agency's argument that the seasonal decorations were similar to ordinary office improvements for permanent use.

We have reviewed our reasoning in these cases and now see no basis for continuing to follow our general prohibition against the use of appropriated funds for purchasing seasonal decorations. We think that if the same standards are used in judging the permissibility of expenditures for permanent office decorations as for seasonal decorations, it is difficult to explain why the result should turn on the relative life of the decoration. Therefore, agency expenditures for seasonal decorations as necessary expenses may be properly payable where the purchase is consistent with work-related objectives, agency or other applicable regulations, and the agency mission, and is not primarily for the personal convenience or satisfaction of a government employee.

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We think seasonal decorations of the kind described are not subject to the objections we still have to sending Christmas cards on behalf of certain agency officials at public expense. These are basically individual good will gestures and are not part of a general effort to improve the work environment. See 64 Comp. Gen. 382 (1985).

In the present cases most of the expenditures are, except for the prohibition for seasonal decorations, the type of expenditures we have allowed as being consistent with work-related objectives such as the improvement of morale and efficiency. However, the nature of some of these decorations raise possible constitutional issues which also must be addressed in determining the appropriateness of these expenditures. For example, GSA's request includes vouchers for menorah candelabra. We caution agencies to be sensitive to the possibility that the display of certain seasonal decorations which are primarily religious in character could be viewed as an endorsement of religion lacking any clearly secular purpose and might therefore be challenged as government conduct prohibited by the Establishment Clause of the First Amendment.

Even if the display of religious symbols was found by a court not to be constitutionally objectionable,<sup>1</sup> the purchase of such symbols with public funds may prove offensive to some employees or visitors to the agency. Agencies must be sensitive to the concerns in determining where the line must be drawn, beyond which the display of a seasonal decoration would be inappropriate.

We urge each agency to establish administrative guidelines to prevent abuse of its newly sanctioned discretion to purchase seasonal decorations. We think such guidelines should address issues such as: (1) the purchase of seasonal decorations for private office areas, (2) the purchase of religiously significant seasonal decorations, and (3) any other purchase which is inconsistent with the agency's primary authority to enhance the work environment.

In summary, vouchers for seasonal decorations may be paid if the concerned agency determines administratively that the costs in question are necessary expenses, and that such seasonal decorations are appropriate in light of the above concerns. Our decision in 52 Comp. Gen. 504 is hereby overruled and 60 Comp. Gen. 580 is modified to conform to the result in this case.

<sup>1</sup> See, e.g., *Lynch, Mayor of Pawtucket v. Donnelly*, 465 U.S. 668 (1984).

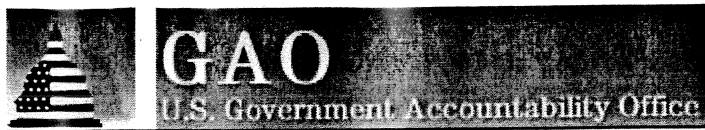
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## **B-231627, Feb 3, 1989, 68 Comp.Gen. 226**

Appropriations/Financial Management - Appropriation Availability - Purpose availability - Specific purpose restrictions - Entertainment/recreation A federal agency may not use operating appropriations to purchase or pay contractors for gifts, meals, or receptions for foreign and domestic participants in U.S. government-sponsored cooperative activities under international agreement. Official reception and representation funds are available for official entertainment but may not be used for entertainment in connection with an unauthorized activity.

### **HUD Gifts, Meals, and Entertainment Expenses:**

The Inspector General of the Department of Housing and Urban Development (HUD) has requested our opinion concerning the availability of HUD appropriations to pay for food, entertainment, and gift items provided by contractors in support of Stroyindustriya 1987, an international trade show for construction equipment and technology mounted in the Soviet Union, under the purported auspices of the U.S./U.S.S.R. bilateral agreement on Cooperation in the Field of Housing and Other Construction. In testimony and a separate legal opinion, B-229732, Dec. 22, 1988, GAO has stated its opinion that, although HUD had authority to engage in general activities in support of the bilateral agreement, the Department had no authority specifically to undertake sponsorship of the international trade show. Accordingly operating appropriations may not be used to pay for meals, gifts, and entertainment provided in connection with these unauthorized activities. Moreover, as explained below, even if the trade show were authorized, HUD may not use operating appropriations to pay for these expenses. Furthermore, funds from HUD's official reception and representation account, which could normally have been charged for official entertainment expenses, were not available for entertainment in connection with the unauthorized Stroyindustriya show.

### **BACKGROUND**

The Secretary is authorized under 12 U.S.C. Sec. 1701d-4 (1982) to participate in international conferences for the exchange of information beneficial to the mission of the Department. This section authorizes general activities in support of the bilateral Agreement on Housing and Other Construction (June 28, 1974, United States - Union of Soviet Socialist Republics, TIAS No. 7898). Related authority to conduct demonstration projects and other information generating activities is found in 12 U.S.C. 1701z-1 (1982). However, GAO testified in August 1988 that, in our opinion, HUD lacked authority under the cited sections to undertake trade promotion activities such as the Stroyindustriya exhibit. HUD Participation in the Moscow Trade Show, Hearings Before the Subcommittee on Employment and Housing of the House Committee on Government Operations, 100th Cong., 2d Sess., passim (1988) (Hearing).

Independent of the GAO testimony, and of our opinion that HUD's sponsorship of Stroyindustriya was unauthorized, the Department's Inspector General inquired about entertainment-type expenses claimed by three different contractors who provided trade promotion related services to HUD's Policy Development and Research division in fiscal years 1985, 1986 and 1987. The Inspector General's question was grounded in the well recognized rule of appropriations law that prohibits the use of appropriated funds for entertainment and gifts, unless specifically authorized. The Inspector General

questioned expenses totalling \$34,500. The expenses broke down as follows: \$5,500 from one contractor in fiscal years 1986 and 1987 for lunches served at meetings with potential Stroyindustriya exhibitors; \$4,000 from a second contractor in fiscal years 1985 and 1986 for food, entertainment, and gifts to Russian exhibit organizers and participants, and \$25,000 from a third contractor for an American sponsored reception held in Moscow during the Stroyindustriya exhibit in May 1987.

#### RESEARCH AND TECHNOLOGY APPROPRIATION

HUD receives an annual appropriation for "contracts, grants, and necessary expenses of programs of research and studies relating to housing and urban problems, not otherwise provided for, as authorized by title V of the Housing and Urban Development Act of 1970, as amended (12 U.S.C. Sec. 1701z-1 et seq ... ." Among other things, the Research and Technology appropriation is generally available for activities in support of the bilateral agreement.

Even if HUD were authorized to undertake sponsorship of the international trade show-- and we have concluded it was not-- the appropriation does not specifically authorize entertainment or permit the distribution of personal gifts to individuals. Previous decisions of this Office have consistently held that, absent specific authority, funds appropriated for government departments and agencies may not be used for such purposes. See, for example, 57 Comp.Gen. 385 (1978), 53 Comp.Gen. 770 (1974) (promotional items distributed as gifts at industry conferences), 57 Comp.Gen. 806 (1978) (meals for sequestered jurors), B-138081, Jan. 13, 1969 (breakfast served at Mexico City meeting between Chairman of the Securities Exchange Commission (SEC) and Canadian officials); and 5 Comp.Gen. 455 (1925) (entertainment of officials in foreign countries to facilitate arrangements for around the world flight), B-193661, Jan. 19, 1979 (reception for Hispanic leaders in connection with planning conference). Applying these principles to the instant case, HUD expenditures for gifts, meals, and entertainment in support of the bilateral agreement did not constitute a proper use of the Department's appropriation for Research and Technology.

The rationale underlying all of the above cases is that, although the government usually derives some indirect benefit from the expenditure for food, gifts, and entertainment, these expenses are essentially personal in nature. Ascertaining the residual value of the expense to the government typically would be impossible or at least very difficult. Even where this is possible, we are still of the opinion that the expense should not be allowed. First, we doubt that useful standards for permissible entertainment could be articulated for practical application. Moreover, because of the corollary personal benefit in allowing such expenditures, the probability of abuse is significantly higher than is acceptable.

There are some very limited exceptions to the personal expense rule. have, on infrequent occasions, held that a particular gift or entertainment expense was so closely related to program activities that the personal expense rule did not apply. In B-193769, Jan. 24, 1979, we allowed the distribution of specimen lava rocks to national park visitors as a way of preventing defacement of the natural park setting. B-199387, March 23, 1982, we approved providing small samples of ethnic food as a means of enhancing an agency's Equal Employment Opportunity (EEO) awareness program. Thus in these cases, the expenditure was essential to carrying out a legitimate program goal which would otherwise have been unfulfilled.

HUD asserts that the use of Research and Technology funds for the expenses in question was absolutely necessary to carry out the purposes for which the appropriation was made because there is an expected code of behavior in the conduct of international



business and diplomacy that requires the extension of hospitality and the exchange of gifts. Hearing at 82. This assertion, however, unsupported by proof of the actual necessity, is insufficient to justify an exception to the personal expense rule. Moreover, in this case, the trade show was not an authorized program goal of the Department.

#### APPROPRIATIONS FOR OFFICIAL RECEPTION AND REPRESENTATION EXPENSES

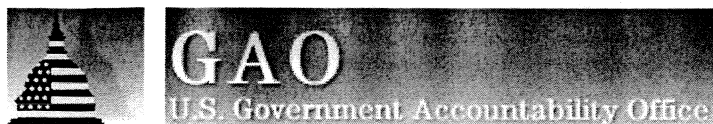
In addition to its Research and Technology appropriation, the Department also receives an appropriation for Management and Administration. This appropriation is available for "necessary administrative and nonadministrative expenses ... not otherwise provided for ... ." During fiscal years 1985, 1986 and 1987, this appropriation included an amount of "not to exceed \$4,000 for official reception and representation expenses ... ." Representation accounts provide the specific authority necessary to use government funds for entertainment and related expenses. Comp.Gen. 305 (1963).

HUD argues that the official reception account is available only for domestic activities when the Secretary receives visitors, normally at HUD headquarters, in his capacity as Secretary and that it is not available for his participation as co-chairman of an international committee. Hearing at 82-83. The Secretary of HUD serves as Co chairman of the U.S./U.S.S.R. Joint Committee on Cooperation in the Field of Housing and Other Construction by virtue of his position as the Secretary of Housing and Urban Development, the United States agency responsible for implementation of the agreement. We have not found any previous decision of this Office or any other authority which limits the use of official reception and representation funds based upon a distinction between domestic and international activities. Accordingly, the allowance for official reception and representation expenses would ordinarily be available for entertainment in connection with authorized activities under the bilateral agreement. Stroyindustriya, however, was not authorized.

An agency head's custodianship of an official reception and representation account traditionally entails "a great deal of discretion" as to expenditures. 61 Comp.Gen. 261 (1982). This does not mean, however that there are no limits on the proper expenditure of the fund. The appropriation act requires that entertainment be "official" in nature. our view, entertainment cannot be "official" if its primary purpose is to further an unauthorized activity.

We stress that our decision here is based on the assumption that all of the expenditures were in direct furtherance of Stroyindustriya, an unauthorized activity. The decision might be different if the expenditures were in connection with an authorized activity, whether under the bilateral agreement or otherwise. In that case, the expenditures could be for "official" purposes and the limited reception and representation funds available could be applied to them. However, we do not have sufficient information to determine whether the expenditures involved here can be justified on some other "official" basis.





## **B-235916, Aug 23, 1989, 68 Comp.Gen. 638**

Appropriations/Financial Management - Appropriation Availability Purpose availability - Representational funds - Foreign service personnel - Personal expenses/furnishings  
Appropriations/Financial Management - Appropriation Availability Purpose availability - Specific purpose restrictions - Personal expenses/furnishings The State Department may use representation funds to reimburse costs incurred by embassy officers in renting formal evening dress required of staff accompanying Ambassador in presenting his credentials to the Queen.

United States Embassy, London-- Use of Representation Funds for Reimbursement of Rental of Ceremonial Dress:

An authorized certifying officer of the Department of State, stationed at the American Embassy in London, has asked whether the Ambassador, as chief of mission of the Embassy, may use representation funds appropriated to the State Department and allotted to the Embassy to reimburse six Embassy officers the cost of renting ceremonial dress. Protocol required the officers to wear formal evening dress when they accompanied the Ambassador in presenting his credentials to the Queen, the head of state of the United Kingdom.

As explained below, we conclude that the Ambassador may reimburse such costs from representation funds.

### **BACKGROUND**

On May 17, 1989, the newly appointed United States Ambassador to the United Kingdom presented his credentials to the Queen as required by protocol. At the Ambassador's direction, the Embassy's eight most senior officers accompanied him. According to the certifying officer, the officers could not decline to attend the ceremony.

The officers wore formal evening dress in accordance with instructions of the Marshal of the Diplomatic Corps, Ambassadors Court, St. James Palace. The six male officers were obliged to rent their attire. The certifying officer notes that occasions requiring such attire are rare in the modern diplomatic world, and that most Foreign Service officers can have a long career without ever attending one.

The Congress appropriated about \$4.6 million to the State Department for "representation allowances" for fiscal year 1989. Pub. L. No. 100 459, 102 Stat. 2204 (1988). These funds are available to pay the expenses of the Department in providing proper representation of the United States and its interests. 22 U.S.C. Sec. 4085.

Under Department regulations, the appropriation for representation allowances is apportioned annually to embassies and other missions, and the chief of mission at each location is authorized to use his allotment, at his discretion, for any expenditure not specifically prohibited by law or regulation. See generally 3 Foreign Affairs Manual 340.

The Ambassador, as chief of mission of the Embassy in London, has instructed the certifying officer, subject to our approval, to certify payment from the Embassy's allotment of the costs incurred by the six Embassy officers in renting their evening dress.

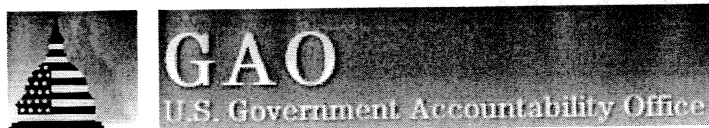
### **DISCUSSION**

As a general rule, we consider most items of apparel as the personal responsibility of the employee;

they are not provided at public expense, even when worn in the course of public business. See 67 Comp.Gen. 592, 593 (1988). However, in this instance, the State Department's appropriation for representation allowances provides the statutory authority for reimbursement of the apparel rental charges incurred by the six Embassy officials.

The purpose of a representation appropriation is to permit certain expenditures that the law may not otherwise allow. B-223678, June 5, 1989. That is not to say, however, that it is available to pay for the normal social obligations of individual officers and employees that, like other personal expenses, must be borne by the officer or employee. Cf. B-232165, June 14, 1989; B-223678 June 5, 1989. Rather, the Secretary of State may authorize the use of the Department's representation appropriation to pay only those expenses incurred in providing proper representation of the United States and its interests. 22 U.S.C. Sec. 4085.

Palace protocol required that those attending the credentials ceremony, an official diplomatic ceremony, wear formal evening attire. Appearing in other dress would, undoubtedly, have affronted the host country's etiquette, resulting in considerable embarrassment to the Ambassador and the United States. Consequently, we conclude that the costs of renting the evening attire is an appropriate use of State Department representation funds.



## **B-236816, Feb 8, 1990, 69 Comp.Gen. 242**

APPROPRIATIONS/FINANCIAL MANAGEMENT - Appropriation Availability - Purpose availability - Specific purpose restrictions - Entertainment/recreation U.S. Army School of the Americas may use official representation funds to pay for a change of command/incoming commander reception since the reception was an official function rather than a purely private social one and the use of official representation funds is consistent with Army regulations.

United States Army School of the Americas-- Use of Official Representation Funds:

The Finance and Accounting Officer at Fort Benning, Georgia, has asked that we render an advance decision regarding a voucher for \$956.50 requesting payment from official representation funds. The voucher covers the cost of catering services for a reception following the change of command at the U.S. Army School of the Americas (School) at Fort Benning. For the reasons discussed below, the voucher may be paid.

### **BACKGROUND**

In November 1988, the Public Affairs Officer at the School requested P10 program funds for a reception to follow the change of command scheduled for January 6, 1989. When the installation accountant denied its request on December 13, the School requested that the Secretary of the Army through the Office of General Counsel for Fiscal Law and Policy approve the use of official representation funds. Army Regulation 37-47, para. 2- 8(a), requires the Secretary's advance approval for the use of official representation funds for retirement and change of command ceremonies. Pending approval, the School sent invitations for the "Change of Command/Retirement Ceremony" and reception to follow.

On December 22, 1988, an official from the Office of General Counsel advised the School that its use of official representation funds for its change of command reception was unlikely to be approved. The official recommended that the School hold a reception for the new commander to meet with local dignitaries rather than a change of command reception. Under Army Regulation 37-47, para. 2-7(e), the Secretary of the Army need not approve the use of official representation funds for receptions for newly assigned commanders for the purpose of meeting with dignitaries, local government officials, and distinguished prominent and local citizens. The School renamed the reception despite its position that there was no difference between the recommended reception for the newly assigned commander and the change of command reception that it had already planned. The School did not retrieve the invitations, but announced at the ceremony that the reception was for the newly assigned commander.

On January 2, 1989, the Public Affairs Officer at the School submitted a voucher for \$956.50 requesting official representation funds to pay for the reception. The Finance and Accounting Officer at Fort Benning has refused to pay the claim, pending our advance decision. He contends that the reception was not a reception for the newly assigned commander requiring no approval, but, in actuality, a change of command reception for which advance approval was required and never obtained. He has requested that we decide whether official representation funds may be used to pay for the reception.

### **DISCUSSION**

Under 31 U.S.C. Sec. 1301(a), appropriated funds may be used only for authorized purposes. We have consistently held that absent legislative authority, appropriated funds are not available for entertainment on the ground that such a use may undermine the public's confidence in the integrity

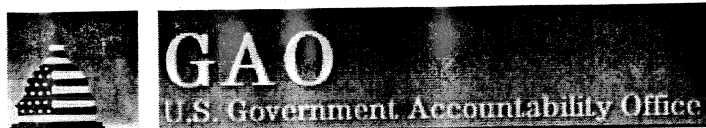
of those who spend its money. United States Trade Representative, B-223678, June 5, 1989. We have also recognized that Congress has made "official reception and representation" funds available to permit otherwise prohibited expenditures such as entertainment. Comp.Gen. 305, 306 (1963). Typically, some portion of the emergency and extraordinary expense fund that Congress annually provides for the Department of Defense pursuant to 10 U.S.C. Sec. 127 is set aside for official representation expenses.

Under our decisions and the applicable Army regulations, the School may use official representation funds to pay for the reception. Although we do not allow an agency unfettered discretion, we will not object to the use of official representation funds for official functions "characterized by a mixed ceremonial, social, and/or business purpose, and hosted in a formal sense by high level agency officials." U.S. Trade Representative, B-223678 at 4. Accordingly, we have approved the use of official representation funds for refreshments to enhance an agency's awards ceremony, see 65 Comp.Gen. 738, 740 (1986).

Like the other functions for which we have approved the use of official representation funds, the reception at issue here was not a purely private social event. Although initially envisioned as a change of command ceremony which we have observed is a traditional and appropriate function, 56 Comp.Gen. 81 (1976), the ceremony and reception satisfied all the prerequisites of an official reception for an incoming commander. envisioned by Army Regulation 37-47, para. 2 7(e), the reception was designed to promote existing relationships with Latin American military leaders and with the Fort Benning and Columbus communities. The Commandant of the School hosted the reception; the names of both the officer assuming command and the officer relinquishing command appeared on the invitation. The guests included Fort Benning officials, Latin American Military Attaches assigned to Washington, guest instructors and faculty members, and local dignitaries.

Although Army Regulation 37-47, para. 2-8(a) does not describe in detail how a reception for a newly assigned commander differs from a change of command reception for which Army Regulation 37-47, para. 2 8(a), requires advance approval, paragraph 2-7(e) of Army Regulation 37 47 specifically authorizes receptions sponsored for newly assigned commanders for the purpose of meeting with dignitaries, local government officials, and distinguished prominent and local citizens. The School's position that there was no difference between the change of command reception for which it sought approval and the recommended reception for the newly assigned commander suggests that its reception could be aptly characterized as either a change of command reception or a reception for the newly assigned commander (or both). Indeed, our review of the record indicates that the School had a reasonable basis in fact to characterize the reception as a reception for a newly assigned commander under Army Regulation 37-47, para. 2-7(e).

Accordingly, we have no objection to the School's decision to designate the reception as one for the newly assigned commander for which the use of official representation funds without advance approval is appropriate. The School may use official representation funds to pay the expenses associated with the reception.



## Subsidized Parking for Employees of U.S. Mint B-248247 March 15, 1993 72 Comp.Gen. 139

Appropriations/Financial Management Budget Process Invoices Parking fees Reimbursement Authority The Bureau of the Mint has authority to reimburse the General Services Administration for a line item charge for parking included in an invoice for the rental of office space. Appropriations/Financial Management Appropriation Availability Purpose availability Leases Parking fees The Bureau of the Mint, authorized by the General Services Administration (GSA) to acquire, by lease, employee parking at a commercial facility, may use appropriated funds to pay for the parking. GSA, however, is encouraged to scrutinize more closely agencies' requests for parking to ensure the parking is necessary to maintain efficient agency operations.

DECISION A certifying officer for the Bureau of the Mint has requested our opinion regarding the propriety of paying for employee parking in Washington, D.C. at two locations: the Mint's Third Street office, and in a commercial parking garage near the Mint's K Street office. For reasons discussed below, we conclude that the Mint may pay for the parking.

### BACKGROUND

The Mint's Third Street location is leased as office space from GSA. GSA's invoice for this space includes a separate line item charge for 6,900 square feet of parking space.

Generally, when an agency requires office space, it requests GSA to acquire the necessary accommodations, and the GSA Administrator will lease space under authority of the Federal Property and Administrative Services Act. See 40 U.S.C. Sec. 490(h)(1), which allows the Administrator to enter into lease agreements for periods not in excess of 20 years "on such terms as he deems to be in the interest of the United States and necessary for the accommodation of federal agencies . . . ." See also, e.g., 63 Comp. Gen. 270, 271 (1984). The agency will use its appropriated funds to reimburse GSA the costs of the space. The Treasury, Postal Service and General Government Appropriations Act for Fiscal Year 1993 provides that "[a]ppropriations available to any department or agency during the current fiscal year . . . , including maintenance or operating expenses, shall also be available for payment to the General Services Administration for charges for space and services. . . ." Pub. L. No. 102-393, Sec. 608, 106 Stat. 1729, 1767 (1992). The Mint's K Street lease does not include parking. In 1987, pursuant to Federal Property Management Regulation 101- 17.202.2, the Mint requested and received approval from GSA to lease eight parking spaces for employees permanently assigned to this location. Under that approval, the Mint leases three spaces in a nearby commercial garage and partially subsidizes the employee cost of parking there. According to the Mint, the three spaces are used by an executive employee, a graphic artist who works long hours and transports bulky materials, and a carpool.

The Federal Property and Administrative Services Act permits the GSA Administrator to delegate to the heads of other federal agencies any authority vested in the Administrator by the Act, and to designate and authorize any executive agency to perform for itself any function vested in the Administrator by the Act. 40 U.S.C. Sec. 486(d), (e). With regard to the lease of parking space, the Federal Property

Management Regulations promulgated by the Administrator provide that "[i]f no suitable government -controlled facilities are available, an agency may use its own procurement authority to acquire parking by service contract." 41 C.F.R. Sec. 101-17.202-2(a) (Temp. Reg. No. D-76), 56 Fed. Reg. 42173 (1991). In a July 9, 1992, letter to us, a GSA Associate General Counsel indicated that the effect of the regulation is to authorize the agency to perform for itself, using its own procurement authority, a function of the Administrator. See 40 U.S.C. Sec. 486(e).

## DISCUSSION

### Third Street

Parking at the Third Street location is leased from GSA as part of a lease for office space. In a 1976 decision, we concluded that agencies may use their appropriations to reimburse GSA for parking space acquired as part of an office space lease. In 55 Comp.Gen. 897 (1976), we advised the Veterans Administration (VA) that its appropriations were available to pay a charge assessed by GSA for parking spaces for VA employees. As we stated in that decision, one of the major purposes of the Public Buildings Amendments of 1972, Pub. L. No. 92-313, 86 Stat. 219, was the creation of the Federal Buildings Fund to finance real property management and related GSA activities. User charges assessed by GSA under 40 U.S.C. Sec. 400(j) help finance the fund. Since appropriations acts have routinely included the provision, noted above in section 608 of Pub. L. No. 102-393, that agency appropriations may be used to pay GSA charges, we found in 55 Comp. Gen. 897 that agency appropriations are available to pay GSA charges for leased space including parking space made available to agency employees.

### K Street

As a general proposition, commercial parking is considered a personal expense of the employee. See, e.g., 63 Comp.Gen. at 272, stating that "it is the employee's responsibility to furnish transportation to and from the place of employment or duty," and noting the general rule that federal employees "pay for their own parking in commercial facilities." Expenses considered personal in nature are not payable from appropriated funds absent specific statutory authority. 68 Comp.Gen. 502, 505 (1989).

GSA did not lease the three parking spaces at issue at the Mint's K Street location. Rather, the Mint requested authority from GSA to lease these spaces itself from a commercial facility.

GSA's Associate General Counsel stated in his July 9, 1992, letter that in the past, before granting an agency's request for such authority, GSA required the agency to certify that the parking was needed to employ and retain personnel and to avoid a significant impairment of agency operational efficiency. He indicated that although GSA no longer requires such certification, GSA, nevertheless, still endorses the significant impairment standard; noting that "GSA assumes that agencies themselves use the same standard before requesting parking space," he said that GSA defers to the agency's determination of significant impairment.

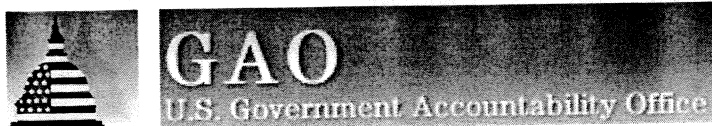
The Mint asserts, and GSA confirms, that the Mint acquired the three spaces at its K Street location in accordance with GSA's authorization. Although, as noted above, we start with the proposition that if an employee chooses to commute to work by private vehicle, the government is under no obligation to provide or subsidize the employee's parking (63 Comp.Gen. at 272), we have approved the use of appropriated funds for employee parking where an agency finds that such facilities are necessary to avoid a significant impairment of the agency's operating efficiency. 63 Comp.Gen. at 271; 55



Comp.Gen. 1197 (1976); 49 Comp.Gen. 476, 480 (1970). Accordingly, so long as the Mint has made the requisite finding, we will not object to the use of the Mint's appropriations to pay for this parking.

Nevertheless, in view of the broad authority granted agencies by temporary regulation No. D-76 amending 41 C.F.R. Sec. 101.17.202-2(a), we recommend that GSA review the use of this authority to pay for employee parking in commercial facilities. We suggest that as part of this review GSA examine whether agencies have implemented the regulation uniformly in accordance with GSA's intention and whether additional guidance to agencies is needed.





## **Matter of: Use of Appropriate Funds to Provide Financial Incentives to Employees for Commuting by Means Other Than Single-Occupant Vehicle File: B-250400 Date: May 28, 1993 72 Comp.Gen. 225**

Appropriations/Financial Management Appropriation Availability Purpose availability Travel expenses Public transportation system Miscellaneous Topics Transportation Public transportation systems Commuting expenses Discounts Federal agencies are required by section 118 of the Clean Air Act to comply with state regulations regarding the control of air pollution. 42 U.S.C. Sec. 7418(a). Section 118 provides the statutory basis for an agency's use of appropriated funds to comply with a state regulation under which employers are required to provide financial incentives to employees for commuting to work by means of public transportation, carpooling and vanpooling, bicycling, and walking.

### Decision

The General Counsel of the Department of the Treasury (Treasury) requested a decision concerning the availability of appropriated funds to provide financial incentives to employees to commute to work using means of transportation other than single-occupant vehicles. Under local air pollution abatement regulations adopted in the state of California, two bureaus of Treasury, the Internal Revenue Service (IRS) and the United States Customs Service (Customs), developed air pollution abatement plans that offer employees who commute to work by public transportation, carpools, vanpools, bicycle, and walking, a \$30 monthly subsidy. We conclude that if required by state or local air pollution control regulations, agencies may use appropriated funds for this purpose. 42 U.S.C. Sec. 7418(a).

### Background

The Clean Air Act (Act) provides the framework for federal air pollution control. 42 U.S.C. Secs. 7401-7671q. Subject to the Environmental Protection Agency's oversight and approval, the states have primary responsibility for implementation of clean air standards. In this regard, states are required by 42 U.S.C. Sec. 7410 to develop air pollution control abatement plans (State Implementation Plans (SIPs)), including transportation controls, and to adopt and enforce regulatory programs to attain and maintain federal air quality standards. See 42 U.S.C. Sec. 7511a. Section 118 of the Act provides that federal agencies "shall be subject to, and comply with" these plans. 42 U.S.C. Sec. 7418.

California state law authorizes state air pollution control districts to develop and adopt the SIP within their jurisdiction and, in so doing, enact rules and regulations designed to achieve state and federal air quality standards. Cal. Health & Safety Code Sec. 42300 (Deering 1986). The South Coast Air Quality Management District (SCAQMD) is the agency responsible for the South Coast Air Basin, where the IRS and Customs facilities at issue here are located.

On May 17, 1990, SCAQMD adopted Regulations XV. Regulation XV requires employers with more than 100 employees at a single worksite to take action to "reduce work-related trips in single occupancy vehicles" during heavily congested commuting periods. Rule 1501. It requires employers to submit a proposal, known as a trip reduction plan, for reducing the number of vehicles coming to the worksite. The plan must include specific incentives offered by the employer to achieve the target "average vehicle ridership" approved for the employer by SCAQMD. Rule 1503. Suggested incentives include financial incentives for ride-sharing or use of public transportation, establishment of carpool programs, subsidization of parking for carpools and vanpools, compressed workweeks, flexible work

hours, and work-at-home programs. *Id.* Employers' trip reduction plans must be approved by SCAQMD. An employer who fails to submit an acceptable plan is subject to fines and other penalties. *Id.*

Pursuant to trip reduction plans approved by SCAQMD, IRS is currently providing a \$30 monthly subsidy to employees who commute to work by means other than single-occupant vehicles. (Treasury advised us that SCAQMD disapproved trip reduction plans which did not include such financial incentives.) IRS points to specific statutory authority for an agency's use of appropriated funds to provide financial incentives to employees who use public transportation. [1] IRS is of the view that financial incentives for carpooling, vanpooling, bicycling, and walking, imposed pursuant to a state regulation, are authorized as a necessary expense of the Service.

In August 1991, based on discussions with SCAQMD representatives indicating that the inclusion of financial incentives was "virtually required" in order to obtain approval of its trip reduction plans, Customs submitted plans for two of its facilities which included financial incentives similar to those contained in the IRS plans. Subsequently, Customs' legal counsel took the position that providing these incentives to employees who commute using means other than public transportation is not an authorized use of appropriate funds. After Customs officials met with SCAQMD representatives and advised them of the legal issue concerning the availability of appropriated funds, SCAQMD approved the revised trip reduction plans pending resolution of this issue.

#### Analysis

As a general rule, agencies do not have authority to subsidize employees' costs of commuting to and from work. See generally 60 Comp.Gen. 420 (1981); 43 Comp.Gen. 131 (1963). Commuting is a personal expense, and personal expenses are not payable from appropriated funds absent specific statutory authority. [5] U.S.C. Sec. 5536 (1988); 68 Comp.Gen. 502, 505 (1989).

As IRS has recognized, current law provides agencies specific authority to subsidize their employees' use of public transportation as part of a state or local program that encourages transit use. Pub L. No. 101-509, Sec. 629, 104 Stat. 1478 (1990). See note 1, above. However, that authority expires by its own terms on December 31, 1993, and it does not address financial incentives at issue here for other forms of commuting, e.g., carpooling, vanpooling, bicycling, and walking. The question raised, then, is whether the Clean Air Act, which requires agencies to comply with state and local requirements, provides the authority necessary to use appropriated funds to pay employees' commuting expenses if a SIP (or implementing state or local regulations) requires employers to take action to reduce work-related trips in single-occupancy vehicles. We concluded that it does.

Section 118 of the Clean Air Act requires federal entities to comply with air pollution control and abatement regulations:

Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government . . . shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of air pollution in the same manner, and to the same extent as any nongovernmental entity. The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits and any other requirement whatsoever), (B) to any requirement to pay a fee or charge imposed by any State or local agency to defray the costs of its air pollution regulatory program, (C) to the exercise of any Federal, State, and local administrative authority, and (D) to any process and sanction, whether enforced in Federal, State or local courts or in any other manner. This subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law.

42. U.S.C. Sec. 7418(a).

In a situation analogous to that at issue here, we held that section 118 required Mather Air Force Base to pay fees imposed by the Air Pollution Control District, Sacramento County, California, for the operation of certain equipment, 58 Comp.Gen. 244 (1974). Referring to the statute's legislative history, we found that section 118 "was enacted primarily to subject Federal agencies and departments to all procedural and substantive requirements regarding air pollution control and abatement promulgated by State and local governmental units." *Id.* at 245. Similarly, in B-191747, June 6, 1978, we concluded that the National Oceanic and Atmospheric Administration could use its

appropriations to pay a civil penalty imposed on it by the Puget Sound Air Pollution Control Agency. We explained that "adoption of section 118 . . . removed the legal barriers to full Federal compliance with state air quality regulations . . . . In other words, the provisions of section 118 constitute a waiver of sovereign immunity, so Federal facilities and the person operating them must comply with all State and local air pollution requirements." See also 64 Comp.Gen. 813 (1985) (interpreting language of the Solid Waste Disposal Act similar to section 118); *Parola v. Weinberger*, 848 F.2d 956 (9th Cir. 1988), concurring with 64 Comp.Gen. 813.

In 1990, a federal district court in California addressed the same issue concerning fees, and held that section 118 requires federal facilities to pay fees imposed by SCAQMD. [2] *United States v. South Coast Air Quality Management District*, 748 F. Supp. 732 (C.D. Ca. 1990). The court found section 118 to be a broad waiver of sovereign immunity: "Words highlighting the breadth of the section include 'all'; 'any'; 'any requirements whatsoever'; and 'this subsection shall apply notwithstanding any immunity . . . under any law or rule of law.'" *Id.* at 738. In reaching its conclusion, the court applied a standard of interpretation articulated by the Supreme Court in *Hancock v. Train*, 426 U.S. 167 (1976). In that decision the Court stated that whether the federal government must comply with a state regulation requires a "clear and unambiguous" expression of congressional intent to waive immunity. *Id.* at 179. Applying that standard, the Hancock Court had found that an earlier version of section 118 constituted only a limited waiver of immunity. The California federal district court noted that subsequent to Hancock, the Congress, in 1977, had amended section 118 to overcome the deficiencies cited in Hancock and to establish a broad waiver of immunity. "The plain language of the statute reveals its expansiveness. In contrast to the language interpreted in Hancock, section 118 includes the words all and any which the Hancock court noted were missing from the 1970 version of section 118 of the Act." 748 F. Supp. at 738. See also *Id.* at 739, n.7, citing H.R. Rep. No. 294, 95th Cong., 1st Sess. 199 ("The new section . . . is intended to overturn the Hancock case and to express, with sufficient clarity, the committee's desire to subject Federal facilities to all Federal, State and local requirements."); S. Rep. No. 127, 95th Cong., 2d Sess. 58 (1977), reprinted in 1977 U.S. Code Cong. & Admin. News 1432 ("Federal facilities are subject to all of the provisions of State implementation plans.").

In response to the United States' argument that section 118 was ambiguous because it did not specifically list fees and taxes as requirements with which federal facilities must comply, the court stated:

There is no requirement that Congress express its immunity by means of a list approach. The language of section 118 indicates that it was Congress' intent to grant a broad waiver of sovereign immunity. Given this inclusive language, the assumption would be that Congress intended a waiver of all immunity absent any exclusions.

738 F. Supp. at 739

Similarly, we conclude that section 118 requires the IRS and Customs to offer the financial incentives at issue to employees at the affected locations. To interpret section 118 otherwise would frustrate the purpose of section 118. In this case, section 118 requires IRS and Customs to negotiate approved plans with SCAQMD for reducing ridership at the affected locations. According to the Treasury General Counsel, SCAQMD virtually requires that financial incentives be included as part of an approved plan, and only agreed to approve the Customs plan excluding financial incentives pending resolution of the question now before us. Since section 118 authorizes agencies to use appropriated funds in order to comply with state and local requirements, we conclude that Customs and IRS may offer financial incentives to their employees at the affected locations as incentives to reduce ridership. In the present case, we need not examine the limitations on a state or local government's authority to impose requirements on federal agencies. We would note, however, that any requirement imposed on federal agencies must generally be consistent with those imposed on other employers.

1. In 1990, Congress enacted legislation which authorizes federal agencies to "participate in any program established by a State or local government that encourages employees to use public transportation," including programs that "involve the sale of discounted transit passes or other incentives that reduce the cost to the employee of using public transportation." Pub. L. No. 101-509, Sec. 629, 104 Stat. 1478 (1990). (This legislation expires on December 31, 1993.) In B-243677; B-243675, May 13, 1991, we held that this legislation authorizes federal agencies to participate in a program adopted by the city of Los Angeles in which the agency pays a \$15 monthly subsidy to employees who use public transportation for commuting to and/or from work.

2. Subsequent to this court's decision, the Congress amended section 118 to specify that federal facilities must pay any "fee or charge imposed by any State or local agency to defray the costs of its air pollution regulatory program." Pub. L. No. 101-549, 104 Stat. 2399 (1990).



## **Matter of: Flexiplace-Mobile Work Site File: B-261729 Date: April 1, 1996**

Appropriated funds may not be expended for a bus, even though equipped with office equipment, whose primary purpose is to daily transport employees from present headquarters to relocated headquarters.

### **DECISION**

The Naval Air Systems Command (Command) has requested our opinion regarding the propriety of using appropriated funds for a mobile work site. The Command considers the mobile work site concept they have proposed to be consistent with federal flexiplace work arrangements encouraged by the President. We conclude that the expenditure would be improper.

In 1997, the Command will relocate from its current headquarters in Crystal City, Arlington, Virginia to St. Mary's County, Maryland. The Command is considering equipping a bus with computer workstations, telephones, and work surfaces to daily transport employees to the new headquarters from a pick-up point close to the present headquarters. An employee's day would commence when he boarded the bus. The return trip would start an hour and a half prior to the end of the work day with the employee's work day ending when he got off the bus at the pick-up point. The Command intends to screen employee workloads for suitability for the mobile work site.

The Command states that under the Federal Flexiplace Project, it will designate the bus an official workplace of the riders. The Command contends that the arrangement, therefore, would be consistent with statutory and case law prohibiting the use of appropriated funds to subsidize employee commuting expenses.

We disagree. The proposed arrangement was devised to reduce anticipated consequences of the longer commute the Command's employees will have when its headquarters are moved to St. Mary's County. In its June 6, 1995 request for our opinion, the Command explained the rationale for its proposal as follows: "It is anticipated that, unless alleviated, the Command will . . . experience decreased efficiency occasioned by loss of productivity, absenteeism, reduced morale, fatigue, and loss of highly skilled professionals, all resulting from substantially longer commutes to the new headquarters." The Command, under guise of a flexiplace arrangement, is proposing, simply, to accommodate its employees' commutes.

Commuting is a personal expense, and personal expenses are not payable from appropriated funds absent specific statutory authority. 5 U.S.C. Sec. 5536; 72 Comp.Gen. 225, 227 (1993). Specific guidelines for the use of appropriated funds to pay for transportation for official purposes is contained in section 1344(a)(1) of Title 31, U.S. Code, which provides:

"Funds available to a Federal agency, by appropriation or otherwise, may be expended by the Federal agency for the maintenance, operation, or repair of any passenger carrier only to the extent that such carrier is used to provide transportation for official purposes. Notwithstanding any other provision of law, transporting any individual other than the individuals listed in subsections (b) and (c) of this section between such individual's residence and such individual's place of employment is not transportation for an official purpose." [1]

Once the Command completes its move, the "place of employment" for its employees, within the meaning of section 1344(a)(1), will be in St. Mary's County, Maryland. All of the usual expenses incurred by an employee prior to his arrival at that location, whether or not he makes an intermediate stop at a different location, are commuting expenses. Vehicles may not be operated

with appropriated funds except for an "official purpose" and since the term "official purpose" does not include transportation between home and work, it cannot logically include transportation to work from some point in between.

The Command's desire to expand the concepts underlying the Federal Flexiplace Project and consider its bus an alternate work site fails to overcome this prohibition. Under flexiplace programs, employees perform their work at alternate work sites, such as the employee's home or a telecommuting site. See Presidential Memorandum, July 11, 1994, 59 Fed. Reg. 36017 (1994). Guidance provided agencies by the Office of Personnel Management does not recognize a bus or other mobile work site as a flexiplace option. Federal Personnel Manual Letter 368-1, attachment p.1 (1991). The fact that work is performed while an employee is commuting does not turn the travel into something other than commuting, and does not allow the employee to obtain compensation for that work. We conclude that expenditure of appropriated funds for the mobile work site would be improper.

We recognize the practical consequences the Command's move may have on its employees individually, and on the office as a whole. However, unless the Command can obtain legislative authority for the proposed mobile work sites, 31 U.S.C. Sec. 1344(a)(1) prohibits it from mitigating the effects of the move in that manner.

/s/

Robert P. Murphy  
for Comptroller General  
of the United States

1. The exceptions listed in subsections (b) and (c) are not applicable here.





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Comptroller General  
of the United States

Washington, D.C. 20548

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## Decision

**Matter of:** Expenditures by the Department of Veterans Affairs Medical Center,  
Oklahoma City, Oklahoma (II)

**File:** B-247563.4

**Date:** December 11, 1996

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### DIGEST

1. The Department of Veterans Affairs was not authorized to use its medical care appropriation for an employee breakfast since the event was not an awards ceremony under the Government Employees Incentive Awards Act, 5 U.S.C. §§ 4501 *et seq.*
2. The Department of Veterans Affairs was not authorized to use its medical care appropriation to pay for refreshments at employee meetings. Agencies generally may not furnish meals or refreshments to employees within their official duty stations and the record contains no evidence that the expenses at issue fell within the exceptions contained in 5 U.S.C. §§ 4109 and 4110.
3. The Department of Veterans Affairs was not authorized to use its appropriation for medical care to purchase Christmas cards and stamps since the cost of holiday greeting cards is a personal expense of the officer who authorizes their use.
4. The Department of Veterans Affairs was not authorized to use its medical care appropriation to pay traveling employees per diem in excess of the amount authorized by governing regulations since the record contains no evidence that the accommodations for which the excess payments were made were necessary for the accomplishment of the agency's mission.
5. The Department of Veterans Affairs was authorized to use its medical care appropriation to purchase items for a Combined Federal Campaign (CFC) reception. The CFC is a government sanctioned charity for which a limited amount of appropriated funds may be used and regulations governing the CFC specifically contemplate the type of event for which the purchases at issue were made.

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### DECISION

In the aftermath of an investigation by its Office of Inspector General (IG), the Department of Veterans Affairs requested an opinion on the legality of 72

expenditures made between March 1990 and September 1991 by the VA Medical Center in Oklahoma City, Oklahoma from VA's medical care appropriation. VA also requested relief from liability for seven Medical Center officials believed to be liable for the payments. Finally, VA requested guidance on the liability of various procurement and financial management officials for improper payments.

To facilitate our analysis and discussion, we divided the 72 expenditures at issue into four broad categories: recruitment, contests, refreshments, and miscellaneous.<sup>1</sup> In B-247563.3, April 5, 1996, we addressed the Medical Center's use of appropriated funds for 15 recruitment- and contest-related expenditures and associated requests for relief. We also provided VA with guidance on financial liability generally. This decision addresses the remaining 57 expenditures and associated relief requests.

In its request, VA identified 11 expenditures for refreshments for "awards ceremonies," as well as one for a floral centerpiece, totalling \$2,004.90. VA identified 41 additional expenditures for refreshments in connection with various employee meetings totalling \$2,105.54. As discussed below, we conclude that one of the expenditures for refreshments in connection with "awards ceremonies," totalling \$287.75, was not authorized. We also conclude that none of the expenditures for employee meetings were authorized. With respect to the four "miscellaneous" expenditures, we conclude that VA was not authorized to purchase Christmas cards and stamps or to pay excess per diem to employees on travel. However, VA was authorized to purchase the items used in connection with a Combined Federal Campaign (CFC) reception.

## BACKGROUND

During the period covered by the IG's investigation, the Medical Center purchased refreshments for a variety of events during which employees were recognized for their contributions to the Medical Center's operations. In addition, the Medical Center purchased refreshments for a variety of employee meetings, including new employee orientations and conferences with other medical professionals.

The IG's report identified several other questionable expenditures. The Medical Center purchased Christmas cards (and stamps) for service organizations, state veterans' centers, and nearby VA medical centers. The Medical Center also paid an amount in excess of per diem to three VA employees on travel. Finally, the Medical Center purchased several items for a reception in connection with the annual CFC.

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<sup>1</sup>We have placed the Medical Center's expenditures for the following items in the "miscellaneous" category: Christmas cards, stamps, excess per diem, and items for a Combined Federal Campaign reception.

Payments for all of the items were made from VA's appropriations for "Veterans Health Service and Research Administration, Medical Care" for fiscal years 1990 and 1991. The appropriations were available, among other things, for necessary expenses for the maintenance and operation of hospital nursing homes, and domiciliary facilities and for furnishing inpatient and outpatient care and treatment to VA beneficiaries. Title I of the Department of Veterans Affairs, Housing and Urban Development, and Independent Agencies Appropriations Act, 1991, Pub. L. No. 101-507, 104 Stat. 1351, 1352-1353 (1990); Title I of the Department of Veterans Affairs, Housing and Urban Development, and Independent Agencies Appropriations Act, 1990, Pub. L. No. 101-144, 103 Stat. 839, 840-841 (1989).

## DISCUSSION

Under 31 U.S.C. § 1301(a) (1994), appropriated funds are available only for authorized purposes. During the period covered by the IG's investigation, VA did not have express authority to make the types of expenditures at issue here. Since the expenditures were not expressly authorized, they were permissible only if reasonably necessary or incident to the proper execution of an authorized purpose or function of the agency. 71 Comp. Gen. 527 (1992). The application of the "necessary expense rule" is, in the first instance, a matter of agency discretion. However, agencies do not have unfettered discretion. Therefore, when we review an expenditure to determine whether it falls within an authorized purpose or function, we consider whether, under the circumstances, the relationship between the authorized function and the expenditure is so attenuated as to take it beyond the agency's legitimate range of discretion. B-257488, Nov. 6, 1995.

### Refreshments

As a general rule, agencies may not furnish meals or refreshments to employees within their official duty stations. 68 Comp. Gen. 604 (1989). However, provisions of title 5, United States Code, set forth exceptions to the general rule in the case of awards ceremonies and meetings incident to approved training or conferences that satisfy specified conditions.

### Awards ceremonies

The Government Employees Incentive Awards Act (act), 5 U.S.C. §§ 4501 et seq., authorizes agencies to make monetary and honorary awards and grants agencies broad discretion to determine when such awards are appropriate. See 66 Comp. Gen. 536 (1987). In addition, the act specifically authorizes agencies to "incur necessary expense[s] for the honorary recognition" of employees who meet the statutory criteria. 5 U.S.C. § 4503. In light of this authority, agencies may conduct awards ceremonies and provide "light refreshments" at receptions incident to such ceremonies. 65 Comp. Gen. 738 (1986). While we have not specifically defined the

phrase "awards ceremony," we have emphasized that the purpose of such events is to allow agencies to publicly recognize employees' meritorious performance and allow other employees to honor and congratulate their colleagues. *Id.* at 740. Thus, the act authorizes expenditures of appropriated funds for "light refreshments" to complement agency functions whose principal purpose is to recognize employees. This is not to say that the act authorizes such expenditures in connection with an event or function designed to achieve other objectives simply because the agency distributes awards as part of the event or function.

The submission includes vouchers for 11 functions. In our view, one of the 11 functions cannot be characterized as an awards ceremony. During the period covered by the IG's investigation, the Medical Center provided a buffet breakfast to a number of Medical Center employees. The submission indicates only that the employees were recognized with a special contribution award for their efforts during a Medical Center fire. However, the submission contains no indication that employees other than the 45 specifically recognized and the Medical Center Director participated in the event. Nor does the record contain any other evidence to suggest that the awards recognizing the employees' contributions were otherwise publicized within the Medical Center community. As discussed above, appropriated funds may be used to purchase food for receptions incident to award ceremonies to facilitate public recognition of award recipients. However, this purpose is not served where, as here, the award recipients and the donor are the only participants at the event. Given these facts, we find that the Medical Center's use of appropriated funds for the breakfast refreshments was improper.<sup>2</sup>

The Medical Center also used its appropriation to purchase supplies and light refreshments for a picnic and Valentine's Day Dance. The submission indicates that the picnic and dance were both annual events. The submission also indicates that the Medical Center recognized employees' accomplishments at both events.

As discussed above, the act authorizes agencies to purchase refreshments for receptions incident to awards ceremonies where the agency determines that the refreshments will enhance the awards ceremonies and foster public recognition of employees' accomplishments. Expenditures for receptions incident to awards ceremonies do not become impermissible merely because such receptions coincide

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<sup>2</sup>Although VA did not assert that the food itself was an award, we note that under then-governing regulations of the Office of Personnel Management (OPM), agencies were not authorized to award food under the Government Employees Incentive Awards Act. See 5 C.F.R. § 451.103 (1993) (defining the term "non-monetary award" as "a medal, certificate, plaque, citation, badge or other similar item that has an award or honor connotation" (emphasis added). See also Federal Personnel Manual, ch. 451, § 7-3 (Inst. 265, Aug. 14, 1981).

with social or recreational events. However, agencies may only use appropriated funds for expenditures that are properly allocable to such receptions. For example, an agency could decide to distribute performance awards in connection with an annual agency sporting event on the grounds that the event has been well-attended by agency staff. Under these circumstances, the agency would not be authorized to use appropriated funds for expenses, such as the rental of equipment, that are unrelated to the distribution of awards and public recognition of award recipients. As we noted earlier, where the totality of facts and circumstances indicates that the awards are purely incidental to an unrelated social or recreational event and appear on close scrutiny to be no more than an artifice, there is no reception incident to an awards ceremony to which expenses for refreshments could be attributed.

The record indicates that the Medical Center used its appropriation to purchase light refreshments and supplies, presumably those supplies required for employees to enjoy the refreshments, for the picnic and Valentine's Day Dance. The record also includes the Medical Center Director's assertion that the distribution of "performance award certificates" and "years of service awards" were the highlights of the organized activities at the annual picnic and that the Valentine's Day Dance was the highlight of the Medical Center's Employee of the Month/Year Program. Based on these facts, we are not prepared to conclude that the Medical Center's expenditures in connection with the two events were unauthorized. However, we point out that where, as here, an agency combines awards receptions with social events for which the use of appropriated funds would be unauthorized, the expenditures should be subject to greater scrutiny than expenditures made in connection with more traditional awards ceremonies.<sup>3</sup>

In its submission, VA characterized two of the 11 events as "employee retirement recognition ceremonies" and stated that "certificates of appreciation and years-of-service awards" were presented. As discussed above, VA's medical care appropriation was not available to purchase refreshments for social functions, including retirement parties. However, we have no reason to conclude that the "awards" presented to the retirees here failed to meet the criteria set forth in the Government Employees Incentive Awards Act and OPM's implementing regulations. Although we remain skeptical of such multipurpose functions, based on the present record, we have no basis to object to VA's expenditures for refreshments incident to

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<sup>3</sup>According to the IG's report, an OPM official advised that picnics and dances are "traditionally not considered [awards ceremonies]." We note that the then-governing guidance from OPM merely stated that it would be appropriate for agencies to provide light refreshments at nominal cost at awards receptions. See Federal Personnel Manual at 451-5. There is currently no guidance for the agencies in this area.

these "ceremonies." We also note favorably that guidance on the Incentive Awards Program issued in response to the IG's report states that refreshments for retirement parties may not be purchased with appropriated funds. MP-4, Part V, Change 206, § 3A.13.

The submission also indicates that the Medical Center used appropriated funds to purchase a floral centerpiece for a Nursing Service awards ceremony. Since the appropriation at issue was available for awards ceremonies and accompanying refreshments, we do not object to VA's use of appropriated funds for a floral centerpiece where it determined that such a centerpiece would enhance the ceremony. See B-158831, June 8, 1966 (authorizing an agency to use appropriated funds for flowers at a building dedication).

### Meetings

Section 4109 of title 5, United States Code, authorizes payments for meals or refreshments for those attending training programs at their duty stations where the agency determines that providing meals or refreshments is a necessary incident to providing the training and to the employees' achieving the objectives of the program. B-221940, Oct. 7, 1987. For example, in 48 Comp. Gen. 185 (1968), we approved an agency's payment of room and board for an employee at his headquarters where dinner meetings, and other meetings integral to the training, were conducted in the evenings. Similarly, in B-193955, Sept. 14, 1979, we approved an agency's payment of luncheon expenses where attendance at the luncheon was mandatory and the luncheon included a training speaker.

Section 4109 applies only to those events that actually qualify as "training" under 5 U.S.C. § 4101;<sup>4</sup> mere references to meetings or other events as "training" are insufficient. B-249795, May 12, 1993. The submission from VA characterizes a number of the events for which it purchased refreshments as "training." However, the submission does not provide us with a basis for concluding that any of the 41 events at issue meet the statutory definition.

Moreover, even if these events are aptly characterized as "training," the record provides us with no basis to find that the refreshments were a necessary incident of

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<sup>4</sup>Under section 4101, "training" means the process of providing for and making available to an employee, and placing or enrolling the employee in, a planned, prepared, and coordinated program, course, curriculum, subject, system, or routine of instruction or education, in scientific, professional, technical, mechanical, trade, clerical, fiscal, administrative, or other fields which will improve individual and organizational performance and assist in achieving the agency's mission and performance goals.

the training or important to the achievement of the training objectives. With respect to several expenditures, the submission contains only the conclusory comment that the refreshments were necessary to achieve the objectives of the events. Further, with respect to a Regional Medical Education Center<sup>5</sup> seminar on equal employment opportunities, an official observed that refreshments were served to enhance employees' interest. Doubtless, the availability of refreshments will enhance employees' interest and enthusiasm for official events. However, given the types of light refreshments served and the absence of any more compelling justification, the sole purpose of the refreshments was apparently to make the events more pleasant for the attendees. This is not sufficient to authorize the expenditures under 5 U.S.C. § 4109. See B-270199, Aug. 6, 1996 (holding that the Pension Benefit Guaranty Corporation was not authorized to provide refreshments to "break the ice" and "reward" participants during a training session).

Section 4110 of title 5, United States Code, authorizes payment for meals in conjunction with a conference or meeting when a determination is made (1) that the meals are incidental to the conference or meeting; (2) that attendance is necessary to full participation; (3) that the employees are not free to take meals elsewhere without missing essential formal discussions, lectures or speeches concerning the purpose of the meeting; and (4) that the meal is part of a formal conference or meeting that includes not only functions such as speeches or business carried on during a meal, but also includes substantial functions taking place separate from the meal. *Id.* at 2. However, section 4110 does not authorize the payment of meal expenses in connection with internal business meetings sponsored by government agencies. 68 Comp. Gen. 606 (1989) (holding that section 4110 did not authorize the Army to pay for employees' meals at quarterly meetings of agency supervisors). Rather, section 4110 applies to formal conferences or meetings, typically externally organized or sponsored, involving topical matters of general interest to governmental and nongovernmental participants. *Id.* at 608.

The record suggests that most of the functions for which the Medical Center purchased refreshments were routine internal meetings involving the operations of the Medical Center and the activities of its personnel.<sup>6</sup> Presumably, such functions were led by Medical Center staff and involved no nongovernmental participants. Moreover, for many of these functions, Medical Center officials offered only general justifications that had, at most, a transparent resemblance to the criteria for purchases of refreshments. The Director of the Medical Center asserted, for example, that refreshments were served during new employee orientations as part

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<sup>5</sup>Sections 7471-7474 of title 38, United States Code, require VA to establish Regional Medical Education Centers at selected medical facilities to train health personnel.

<sup>6</sup>For example, 15 of the 41 expenditures were for refreshments for "new employee orientation."

of the Medical Center's retention program. The Medical Center Director also asserted that randomly selected employees were invited to Director's Breakfasts as a form of recognition. Others asserted that the purchases were necessary to enhance employee morale. In short, VA's submission does not provide us with a reasonable basis to find that any of these purchases satisfied the criteria of section 4110.

#### MISCELLANEOUS EXPENSES

##### Christmas greetings

During the period covered by the IG's review, the Medical Center used its appropriation to purchase Christmas cards and stamps. According to the Medical Center Director, VA sent Christmas cards to service organizations, other VA medical centers, state medical facilities, and others for the purpose of enhancing the relationship between the Medical Center and these organizations. We have long held that the cost of holiday greeting cards is a personal expense of the officer who authorizes their use, even where the agency's name rather than the officer's name appears on the card. See, e.g., 64 Comp. Gen. 382 (1985); 37 Comp. Gen. 360 (1957). Both cases specifically rejected the argument that objectives such as engendering goodwill or ensuring the recipients' cooperation justified using appropriated funds for this purpose. Therefore, the cost of Christmas cards and stamps was not properly charged to VA's medical care appropriation.

##### Excess per diem

According to the submission, VA contracted for the lodging of three employees who traveled to Oklahoma City for two nights each to interview for the chief of staff position at the Medical Center. Travel orders included in the submission indicate that the employees were to be reimbursed on a per diem basis.<sup>7</sup> They also indicate that the cost of lodging was not to exceed \$47 per day and that contract lodging would be provided. At the time the travel at issue here occurred, governing regulations authorized reimbursement at a rate of \$47 per day for lodging and \$26 per day for meals and incidental expenses. 41 C.F.R. Chap. 301, App. A. However,

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<sup>7</sup>Under 5 U.S.C. § 5702 and the Federal Travel Regulation, 41 C.F.R. Parts 301-7 and 8, maximum subsistence expense reimbursements are established for federal employee travel. Typically, employees traveling on official business are to be reimbursed on a per diem basis consistent with administratively prescribed maximum per diem rates. See 41 C.F.R. § 301-8.2(a) (1990). However, travel on an actual subsistence basis may be authorized for travel assignments when the maximum per diem rate is insufficient due to special or unusual circumstances. Id.



according to the IG's report and invoices included in the submission, charges for lodging paid by the Medical Center were \$76.56 per night.

Appropriated funds are not available to pay per diem or actual subsistence expenses in excess of those allowed by statute or regulation. 60 Comp. Gen. 181 (1981). In addition, while agencies may generally contract for lodging and meals, limitations on per diem or actual expense rates apply to such contracts as they do to reimbursements. Id. Consistent with this decision, applicable regulations provided that when lodging was to be furnished at no cost to the employee through use of an agency purchase order, the agency was not to authorize or approve a per diem allowance for other subsistence expenses that would, when combined with the cost of lodging furnished, exceed the applicable maximum per diem rate. 41 C.F.R. § 301-7.7(a). Since the allowance paid here exceeded the applicable rate, we find that the payment was not authorized.

We have previously recognized that where failure to provide a particular accommodation would frustrate an agency's ability to carry out its statutory mandate, the agency, applying appropriate safeguards, may pay an allowance in excess of the authorized amount. B-209375, Dec. 7, 1982. In B-209375, we found that the United States Information Agency was authorized to pay excess per diem to agency employees assigned to cover the President since it was essential to the successful accomplishment of the Agency's mission that such employees stay with the White House Press Corps. However, we have construed this exception narrowly; conclusory statements that particular accommodations are necessary for an agency to carry out its mandate do not provide a sufficient basis to invoke the exception to the general rule. See 64 Comp. Gen. 447 (1985).

Here, VA has not asserted that the particular accommodations provided were necessary for the employees to participate in interviews for the chief of staff position and there is no evidence in the record that would provide us with a basis for reaching this conclusion.<sup>8</sup> In addition, the record contains no suggestion that the Medical Center intended to compensate the traveling employees for actual subsistence expenses in the amounts specified due to special or unusual

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<sup>8</sup>According to the IG's Report, Medical Center officials cited B-219147, Feb. 11, 1986, as justification for their decision not to seek repayment from the employees to whom the Medical Center made excess payments. B-219147 provides no such justification. B-219147 merely clarified the narrow scope of B-209375 and authorized the Army to treat lodging costs in excess of authorized amounts as an administrative expense due to its reliance on GSA and Joint Travel Regulations that had misinterpreted our decision. More importantly, B-219147 clearly held that an agency's contract for accommodations for employees traveling on official business must be included in the employee's per diem or actual expense allowance.

circumstances as authorized by 41 C.F.R. § 301-8.2. Accordingly, payment of per diem in excess of the authorized amount was impermissible.

The IG's report states that the invoice for lodging also reflects the expenses of meals for Medical Center staff participating in the interviews. As discussed above, payment for meals for employees within their official duty stations is generally not authorized. In addition, we have specifically denied employees' claims for subsistence expenses at their duty stations, even where, as here, the employees were escorting or participating in meetings with visiting officials. *Id.* Finally, it is not clear from the record whether these meals were also provided to the employees on official travel. If so, the cost of the meals should have been deducted from any otherwise authorized per diem. See 41 C.F.R. §§ 301-7.4(d), 301-7.7(b).

#### CFC-related items

The Medical Center held a ceremony to recognize associates and key workers for a successful effort in the annual CFC. Refreshments were provided by service chiefs, but the Medical Center used appropriated funds to purchase forks, cups, and napkins. We have long held that agencies may cooperate in charity fund-raising campaigns for health and welfare activities, even though these activities are not specifically provided for by statute. See, e.g., B-155667, Jan. 21, 1965. Further, we have held that agencies may spend reasonable amounts of appropriated funds specifically to promote the CFC. 67 Comp. Gen. 254 (1988). The question remains whether a reception in the aftermath of the annual CFC is the type of event for which an agency may use appropriated funds. CFC regulations promulgated by OPM state that events not specifically provided for, such as raffles, lotteries, and carnivals, are strictly prohibited. 5 C.F.R. § 950.602. However, they also provide that "kick-offs, victory events, awards, and other non-fund raising events to build support for the CFC" are not prohibited. *Id.* Since the Medical Center's reception was an inclusive, "victory" event, we do not object to its use of a limited amount of appropriated funds to purchase necessary items.

#### Liability of VA Officials

We now address VA's request that we relieve designated officials from liability for the improper payments discussed above. VA has identified an imprest funds clerk as the official who made 34 of the 41 purchases of refreshments for various employee meetings. The same imprest funds clerk purchased the stamps for the Medical Center's Christmas cards. As an imprest funds clerk, this individual issued third party drafts for each of the improper purchases.<sup>9</sup> VA's submission indicates

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<sup>9</sup>In B-247563.3, April 5, 1996, we described the Medical Center's extensive use of  
(continued...)

that a program analyst made an additional purchase of refreshments, also with a third party draft. However, in the absence of a statute or agency regulation to the contrary, agency officials other than those designated as accountable officers are not financially liable for improper payments of government funds. B-247563.3, April 5, 1996 (and cases cited therein). Further, unless otherwise designated, issuers of third party drafts are not financially liable for improper purchases made with such drafts since government funds are not disbursed when third party drafts are issued. Id. at 9. Therefore, we need not consider VA's requests for relief for these individuals.

VA also requested relief for three voucher auditors. One of the voucher auditors reviewed the Medical Center's purchase of refreshments for a stress management workshop. Another carried out the same function with respect to the purchase of Christmas cards, and the third with respect to the payment of per diem in excess of the authorized amount. In each of the three cases, the voucher auditors "certified," i.e., reviewed and approved, invoices for payment through VA's automated finance center in Austin. In this regard, their activities supported the certification ultimately made by an authorized certifying officer at the Austin finance center. Further, several documents included in VA's submission refer to their "certifications" or their role as "certifying officers." However, VA advised that these officials had not been designated as certifying officers.<sup>10</sup> We therefore conclude that neither is liable for the Medical Center's improper expenditures of appropriated funds.

VA requested relief from liability for seven Medical Center officials in connection with 52 of the Medical Center's 72 questionable expenditures.<sup>11</sup> In this decision, we have addressed VA's request with respect to 36 of the 41 expenditures for

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<sup>9</sup>(...continued)

third party drafts. In short, the Medical Center obtained third party drafts from a contractor and used them for the same types of purchases that they could make with imprest funds. The contractors processed the drafts as they were presented for payment by vendors of goods or services and subsequently provided VA with a list of the cleared instruments, i.e., those paid by the contractor's financial institution. VA then reimbursed the contractor for the payments made.

<sup>10</sup>Designation as a certifying officer requires a written authorization from the head of the agency. See 31 U.S.C. § 3325; Treas. Financial Manual, vol. I, § 2040.30d (T.L. No. 496).

<sup>11</sup>VA's submission came in two parts. The first contained VA's requests for our views on 52 expenditures and relief for seven officials associated with those expenditures. The second contained VA's request for our views on 20 additional expenditures, but did not include any requests for relief.

refreshments in connection with employee meetings, Christmas cards and stamps, and excess per diem. However, these payments, as well as those for the buffet breakfast and refreshments for five of the 41 employee meetings, were also approved by an authorized certifying officer. Since the circumstances under which the authorized certifying officer(s) approved the unauthorized payments discussed in this decision were identical to those present in B-247563.3, we grant relief under the principles articulated in that decision.

#### CONCLUSION

The VA Medical Center in Oklahoma City charged a variety of unauthorized purchases to VA's medical care appropriation during the period covered by the IG's report. Specifically, an expenditure of \$287.75 for a buffet breakfast was not authorized. In addition, 41 expenditures for refreshments in connection with various employee meetings, totalling \$2,105.54, were unauthorized. Further, VA was not authorized to use a total of \$438.32 to purchase Christmas cards and stamps or to pay amounts in excess of per diem to employees on travel. However, since none of the officials specifically identified by VA in connection with the expenditures were accountable officers, they are not liable for these payments. For the reasons stated in our earlier decision involving the Oklahoma City Medical Center, B-247563.3, April 5, 1996, relief is granted to the authorized certifying officer(s) who approved the payments.

/s/Robert P. Murphy  
for Comptroller General  
of the United States

## ATTACHMENT

## ATTACHMENT

## Refreshments

## Awards Ceremonies - 12 expenditures

PO#	Amount	Description
IF0237	287.75	Breakfast for Employee Recognition
IF0306	50.80	Nursing Staff Reception
IF0330	86.21	Nursing Staff Reception
IF0336	224.00	Nursing Staff Reception
IF0396	500.00	Annual All-Employees Picnic
IF1008	73.98	Employee Retirement Recognition Ceremony
IF1020	16.99	Employee Retirement Recognition Ceremony
I15378	52.65	Nursing Service Award Program
IF1160	125.00	Employee Recognition
IF1162	500.00	Annual Valentine's Day Dance
IF1199	45.52	Awards Ceremony for Chief of Staff
IF1192	42.00	Awards Ceremony Centerpiece
<b>Total</b>	<b>\$2,004.90</b>	

## Employee Meetings - 41 expenditures

PO#	Amount	Description
IF12244	207.00	
	125.00	Public Service Recognition
	52.00	Employee Breakfast
	30.00	Director's Breakfast
IF1286	88.22	Service Officers' Conference
IF1259	40.00	Employee Breakfast
IF1274	81.47	RMEC Seminar for EEO
IF0263	34.10	Doughnuts for Employee Breakfast
IF1048	19.10	New Employee Orientation
IF0327	110.14	RMEC Workshop
IF0259	14.33	Refreshments
IF0369	20.12	New Employee Orientation
IF1119	22.68	New Employee Orientation
IF1078	16.28	New Employee Orientation
IF1131	13.32	New Employee Orientation
IF1032	50.00	Service Officers' Meeting
IF0221	39.29	Cake for National Laboratory Week

IF1203	50.88	Refreshments for Audiology Service
IF1122	40.00	Director's Breakfast
IF0386	172.70	Supervisors Training
IF1061	20.04	New Employee Orientation
IF0297	29.15	New Employee Orientation
IF1104	148.00	RMEC Training
IF0370	19.22	New Employee Orientation
IF0371	31.40	New Employee Orientation
IF0325	24.41	New Employee Orientation
IF0262	60.00	In-service Meeting
IF1120	40.00	Hospital Residents Meeting
IF1159	40.00	Employee Recognition
IF0269	13.40	EEO Membership Drive
IF1012	20.12	New Employee Orientation
IF0387	18.77	New Employee Orientation
IF1182	44.00	New Employee Orientation
IF0326	25.31	New Employee Orientation



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B-302992

September 10, 2004

The Honorable Richard W. Pombo  
Chairman  
Committee on Resources  
U.S. House of Representatives

The Honorable Greg Walden  
Chairman  
Committee on Resources  
Subcommittee on Forests and Forest Health  
U.S. House of Representatives

Subject: *Forest Service—Sierra Nevada Forest Plan Amendment brochure and video materials*

This responds to your request for our legal opinion regarding the Forest Service's use of appropriated funds to produce and distribute a brochure entitled "Forests With a Future: Protecting Old Growth Trees, Wildlife and Communities in Sierra Nevada." Specifically, you asked whether the use of appropriated funds for the brochure constitutes a violation of the prohibition on using funds for publicity or propaganda purposes enacted in the Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, Div. F., Tit. VI, § 624, 118 Stat. 3, 356 (2004). You also asked whether the Forest Service's contract with a private company, OneWorld Communications, Inc. (OneWorld), to assist with the production and distribution of the brochure violated 5 U.S.C. § 3107, which prohibits the use of appropriated funds to pay a publicity expert without authorization from Congress.

To respond to your request, we wrote to the Department of Agriculture (USDA) requesting factual information and its legal justification for its use of appropriations to produce and distribute the brochure. Letter from Susan A. Poling, Managing Associate General Counsel, GAO, to Nancy S. Bryson, General Counsel, USDA, May 11, 2004. In response to our letter, we received a copy of a legal memorandum written by Ms. Bryson to Mark E. Rey, Under Secretary, Natural Resources and Environment, USDA, Apr. 23, 2004 (Bryson Memo). This memorandum explained USDA's legal justification as to why the brochure at issue here did not violate the publicity or propaganda prohibition and other anti-lobbying prohibitions of the

annual appropriations act.<sup>1</sup> Letter from Nancy S. Bryson, USDA, to Susan A. Poling, GAO, May 13, 2004. On May 27, 2004, we received a supplemental response from Mr. Rey (Rey Response). This response provided answers to the specific questions we posed in our May 11 letter, documentation evidencing the contractual relationship between the Forest Service and OneWorld, and video material. We met informally with Forest Service officials, including Mr. Rey, on June 18 (June Meeting) to clarify the answers provided in both responses and to develop further the factual record. On July 8, 2004, we received additional documentation from Forest Service officials (July Response), including written communications between OneWorld and the Forest Service evidencing the business relationship between them.

As we explain below, the Forest Service did not violate the publicity or propaganda prohibition nor did it violate section 3107. The written and video materials provide the administration's view of the Forest Service's thinning policy on preventing catastrophic forest fires; while the Forest Service policy is controversial, the materials explaining the policy do not constitute prohibited publicity or propaganda. Furthermore, OneWorld was not acting as a "publicity expert" within the meaning of section 3107 when it assisted the Forest Service in the production of materials to help explain its thinning policy to the public. This opinion does not address the soundness or advisability of the policies addressed in the brochure and video at issue herein.

## BACKGROUND

### The Sierra Nevada Forest Plan Amendment

Under federal statute, the Secretary of USDA must maintain land and resource management plans for each unit of the National Forest System.<sup>2</sup> 16 U.S.C. § 1604. The Secretary also must revise these plans every 15 years or sooner if conditions in a forest unit have changed significantly. 16 U.S.C. § 1604(f)(5). After approximately a decade of reevaluation of the land and resource management plan for the Sierra

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<sup>1</sup> In a footnote, Ms. Bryson concluded also that the Forest Service did not violate the prohibition on paying for a publicity expert under 5 U.S.C. § 3107. She determined that, because section 3107 is closely related to the publicity or propaganda prohibition, the memorandum's analysis supports the conclusion that the brochure is not in violation of that section.

<sup>2</sup> A land management and resource plan includes the creation of three analytical documents: (1) a management plan, (2) an environmental impact statement (EIS), and (3) the record of decision (ROD). See 36 C.F.R. § 219.12(j). The process of creating these documents involves analysis of data by a team of individuals in various relevant professional disciplines and public comment. See generally 36 C.F.R. § 219.10. The ROD details the Forest Service's policy regarding the information contained in the EIS and management plan. See 36 C.F.R. § 219.12(j). All citations are to the Forest Service's 1982 planning regulations, under which the Plan Amendment was developed. See 2004 ROD at 20.



Nevada Forest region, the Forest Service issued the Plan Amendment.<sup>3</sup> On January 12, 2001, the Forest Service released its record of decision (ROD) for the Sierra Nevada Forest Plan Amendment providing the management direction for national forests in that region. ROD, Jan. 12, 2001 (2001 ROD), *available at* <http://www.fs.fed.us/r5/snfpa> (last visited August 27, 2004).

The 2001 ROD identified that a primary concern in creating forest management policy is the uncertainty of forest management activities on the wildlife habitat. *See* 2001 ROD at 21, 22. With regard to reducing the risks of catastrophic forest fires, the ROD focused on perpetuating old forest conditions and habitats for species associated with old forests. 2001 ROD at 36-37. Fire reduction techniques involved the setting of controlled fires and “understory thinning,” or removal of trees less than 12 inches in diameter.<sup>4</sup> *Id.* at 36. The ROD proposed more aggressive fire treatment in urban wildland intermix zones but called for more restraint in fire management in areas outside the intermixed zones. *Id.* at 21. The 2001 ROD directives called for the Forest Service land managers to implement initiatives to sustain old forest species while considering necessary action to protect human life and property from the effects of wildfires. *See* 2001 ROD, App. A at 1.

After considering numerous appeals from the public, the 2001 ROD, and the accompanying final environmental impact statement (EIS), the reviewing officer affirmed the 2001 ROD and EIS. Decision for Appeals at 1, Nov. 16, 2001. He expressed concern, however, over the continued fire catastrophes occurring in California at that time. Without choosing another alternative fire management strategy, the reviewing officer’s decision highlighted other possible alternatives that may more successfully suppress the unusually high fire activity in California. *Id.* at 3. The alternative plans treated forest areas more aggressively with increased thinning of trees and controlled fire. 2001 ROD at 19 to 21. Although the reviewing officer affirmed the 2001 ROD, he instructed the regional forester to reevaluate the plan in light of the increased fire activity and to consider more flexibility for aggressive fire protection treatment. Decision for Appeals at 4.<sup>5</sup>

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<sup>3</sup> Forest Service officials told us that the process for amending the Sierra Nevada Forest Plan began in 1993. June Meeting.

<sup>4</sup> The 2001 ROD did not limit thinning only to 12-inch-diameter trees. It allowed for removal of 20-inch-diameter trees, depending upon the makeup of the area undergoing treatment. 2001 ROD at 37.

<sup>5</sup> Under regulations applicable to the Plan Amendment development process, the Under Secretary may review appeals decisions. 36 C.F.R. § 217.17. Under Secretary Rey did not review this decision and returned the Amendment to the regional forester for action pursuant to the instructions in the appeal decision. June Meeting.

Pursuant to the reviewing officer's directive in the 2001 appeal order, the regional forester established a team to evaluate further the Plan Amendment.<sup>6</sup> Bryson Memo at 1. The work of the evaluation team eventually culminated in Management Review and Recommendations and a Supplemental Environmental Impact Survey (Supplemental EIS). *See id.*; *see also* ROD at 3, Jan. 21, 2004 (2004 ROD). After public comment on the Supplemental EIS, the regional forester replaced the 2001 ROD with a new ROD issued on January 21, 2004. As noted in the text of the 2004 ROD, the proposed changes to the Plan Amendment reflected the primary goal of reducing the risk of catastrophic forest fire to local communities. 2004 ROD at 3. The 2004 ROD found that the 2001 ROD did not provide adequate solutions for reducing the threat of wildfire. In particular, the 2004 ROD noted that using controlled fire was too risky in the current state of the Sierra Nevada forests and the proposed thinning activities were too meager. 2004 ROD at 5. Instead, the 2004 ROD proposed more thinning of larger trees in more remote areas. *See* 2004 ROD at 9. It also discussed the commercial aspects of allowing the removal of larger trees, but retained a limit on trees not larger than 30 inches in diameter. *See id.* The 2004 ROD chose an alternative management scheme that used thinning, salvage, and fire to meet its goals. *See id.* at 16. It asserted that this method would continue to preserve the 2001 ROD objectives of preserving old forest ecosystems; however, it acknowledged the method would change the current forest landscape by reducing density and regenerating shade intolerant species. *Id.*

#### Contract with OneWorld

With the Forest Service's growing concern over the media reaction to the release of the 2004 ROD, the Forest Service launched a media "campaign" with the objective of creating "a favorable public atmosphere for the [ROD] by presenting early and accurate messages and quick and direct responses to those who oppose [it]." Statement of Work for Sierra Nevada Framework Media Relations Strategy and Action Plan (Statement of Work) at 1. The Forest Service expressed concern that after the release of the Management Review and Recommendations in March 2003, and the Draft Supplemental EIS in June 2003, a "generally negative, distrustful tone [had] been established in the media and by some persuasive stakeholders . . . ." *Id.*

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<sup>6</sup> While the Forest Service was reevaluating the 2001 ROD, President Bush announced his administration's new policy on the national forests and the protection of surrounding communities from devastating forest fire, the Healthy Forest Initiative (Initiative). *See* Healthy Forests: An Initiative for Wildfire Prevention and Stronger Communities, Aug. 22, 2002, *available at* [www.fs.fed.us/projects/hfi/background](http://www.fs.fed.us/projects/hfi/background) (last visited August 27, 2004). This new policy introduced aggressive fire management, including techniques of thinning, planned burns, and forest restoration. *See* Initiative at 2.

To meet its objectives, the Forest Service contracted with OneWorld,<sup>7</sup> which the Forest Service described as a marketing/advertising/public relations/media firm. Rey Response at 1. The contract required OneWorld to provide the following products and services: strategy development and management, creation of brochure, other written products, short video and power point presentations, review of existing Forest Service B-roll film, update of website to include new information regarding the plan, and training on improving interview and presentation skills. *See generally* Statement of Work, Jan. 5, 2004. Forest Service officials explained to us that, by the time OneWorld began providing services to aid in the media campaign, Forest Service had already devised language for a brochure for their contractor's review and that OneWorld provided editorial services to make the brochure easier to read. June Meeting; July Response. In essence, according to the Forest Service, OneWorld assisted in the rewriting of the brochure to turn scientific and technical language into text that could be more easily understood by the public and individuals without technical expertise in the management of forest health. *Id.*

### Brochure

In response to your request, we analyzed the brochure that was provided to us with the Rey Response.<sup>8</sup> The brochure consists of six pages and two inserts that discuss forest fires, methods to reduce forest fires, the Forest Service plan to implement these methods, and the effects upon the ecosystem and wildlife in the Sierra Nevada. The brochure contains pictures of forests and forest fire, sketches, graphs, and maps relaying both basic information and statistical analysis. The title page proclaims that the Forest Service is engaging in "[a] Campaign Against Catastrophic Wildfires" and includes the phrase: "Forests with a Future." The brochure's title, "Protecting Old Growth Trees, Wildlife and Communities in the Sierra Nevada," describes the stated purpose of this campaign. In addition to the campaign declaration and brochure title, the Forest Service/USDA seal is prominently displayed in the bottom right hand corner of the first page of the brochure and the two inserts.

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<sup>7</sup> At the time the Forest Service entered into a contract with OneWorld, OneWorld was a contractor listed on the General Services Administration (GSA) Schedule of Contractors for providing document conversion services. GSA Schedule e-Library, Schedule 36, *available at* <http://www.gsa.e-library.gsa.gov> (last visited June 4, 2004). Although GSA maintains schedules describing more general public relations services, OneWorld is not listed on these schedules. Forest Service officials told us that they believed that OneWorld was listed as a contractor for general public relations work. Under its contract with OneWorld, the Forest Service paid OneWorld \$89,642.14. *See* Rey Response, Billing Statement, February 9, 2004.

<sup>8</sup> The Forest Service revised and was in the process of distributing the revised brochure at the time that we were developing the record to respond to your request. Forest Service officials told us that they revised the brochure in response to criticism regarding the labeling of photographs as discussed later in this opinion. We have enclosed copies of both brochures.

The brochure states that the Sierra Nevada forests face increasingly catastrophic fires and that conditions are deteriorating because the forests have become too dense over time. The reader is told that historically the Sierra Nevada forests had fewer trees and underbrush, which allowed for "good fire" to clean the forest floor, and that today's denser forests are at risk for catastrophic wildfires. To illustrate the increased density in the forests, the Forest Service included a series of photographs depicting the increasing density of a forest from 1909 until 1989. The first picture in the series, a picture of trees and tree stumps, shows a forest that had recently been logged.

The brochure tells the reader that if no action is taken, the effect of wildfires will be devastating to the surrounding communities. The text states that in order to protect communities and wildlife "the forests of the future must become more like the forests of the past." The brochure claims that, in addition to safeguarding communities, the management methods will have a positive impact on indigenous wildlife. As an example, the brochure indicates that the decrease of wildfires resulting from the management methods will double the amount of old growth trees in the California Spotted Owl habitat.

The brochure notes several methods to reduce the risk of devastating fire, including controlled burns, removal of underbrush and thinning. The brochure says that thinning is necessary due to the current overgrown conditions in the Sierra Nevada forests. The reader is told that in addition to returning the forests to this historic state, the cost of thinning 20-to-30-inch-diameter trees will be offset by \$80 million of revenues generated by tree removal. The brochure states, however, that only a selected few 20-inch to 30-inch trees will be removed.

The brochure mentions that the Plan Amendment forms the basis of the Forest With a Future Campaign. The brochure directs the reader to a web site, [www.fs.fed.us/r5/snfpa](http://www.fs.fed.us/r5/snfpa), to obtain the ROD and Supplemental EIS. On the back side of the brochure, readers are asked to get involved with the Fire Safe Council and work with community organizations to identify resources available to undertake the thinning methods and other activities. At the end of the brochure, the Forest Service asks readers to learn about taking action and not to confuse thinning operations with logging operations of a decade ago. To that end, readers are directed again to the "Forest With a Future" and the Plan Amendment websites for further information.

Forest Service printed 20,000 brochures. Rey Response; June Meeting. The Forest Service publicly presented these brochures at a news conference to announce release of the ROD. The Forest Service forwarded packages of the brochures to the county supervisors of the 11 national forests and two research stations in the Sierra Nevada Region. Each of these recipients received 1000 brochures. Rey Response, Specifications at 3. Forest Service officials told us that county supervisors may have forwarded this material to other groups and individuals in their region. The brochures were also distributed internally to Forest Service employees and provided to members of the public requesting the information. June Meeting.

### Video material

In addition to the printed brochure, OneWorld prepared a script for a video presentation and B-roll film of footage related to the national forests and the dangers of forest fires. OneWorld edited this script and B-roll into a 10-minute video presentation and created a separate tape with select B-roll footage.

Forest Service officials told us that the video presentation was shown only during the press conference announcing the 2004 ROD and was not used in any other capacity. The video presentation lasts approximately 10 minutes. The presentation begins with an image containing the Forest Service seal and then the words "The Sierra Forest Must Endure." The beginning images show the devastating effects of wildfire in the forests and to communities. The audience is told that the forests of today are overgrown and dense unlike the forests of the past. Some of the same photographs that were displayed in the brochure are displayed in this video to show the increased forest density. The video does not show the 1909 photograph. Animation compares the effects of fire in less dense forests and the effects of "crown" fire occurring in more dense forests. The presentation notes that thinning and controlled burning are necessary to lessen the risk of catastrophic fire. The presentation asks for a public commitment to the "Forest With a Future" Campaign. The final image tells the audience that the video was based upon the 2004 ROD, and identifies the websites for more information regarding the Plan Amendment and the supporting documentation.

Forest Service officials told us that the B-roll footage was available to local television stations from which they could create their own news reports. June Meeting. The B-roll film provides various video and audio shots of forest fires, firefighting efforts, various species of wildlife, and a group of scientists discussing solutions to protecting communities from wildfires. Forest Service did not provide any script with the B-roll nor did it provide suggestions for creating a news story for television stations to air to television audiences.

### DISCUSSION

The Forest Service told us that it used appropriated funds from its Timber Management and Land Resource Management funds for fiscal year 2004 to pay for the production and distribution costs of the brochure and the video materials, including payments to OneWorld. Rey Response at 2. These funds were appropriated in the Department of the Interior and Related Agencies Act, 2004, Pub. L. No. 108-108, 117 Stat. 1241 (Nov. 10, 2003).

### Publicity or Propaganda Prohibition

The Forest Service's use of fiscal year 2004 funds appropriated from Pub. L. No. 108-108 is limited by the governmentwide restriction on using appropriated funds for publicity or propaganda purposes. Specifically, this restriction provides: "No part of any appropriation contained in this or any other Act shall be used for publicity or

propaganda purposes within the United States not heretofore authorized by the Congress.” The Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, § 624, 118 Stat. 3, 356 (Jan. 23, 2004).<sup>9</sup>

We have recognized that the prohibition restricts materials that are self-aggrandizing, covert as to source, and purely partisan in nature.<sup>10</sup> *See generally* B-302710, May 19, 2004; B-302504, March 10, 2004. The brochure and video at issue here do not consist of messages that could be characterized as self-aggrandizing. They do not attempt to persuade the public as to the importance of the Forest Service and/or one of its officials. *Cf.* B-212069, Oct. 6, 1983 (Office of Personnel Management’s press release informing the public of the Administration’s position on pending legislation was not self-aggrandizement where there was no attempt to persuade the public of the importance of the government agency).

Furthermore, it is clear that the brochure and the video presentation do not constitute covert propaganda. Because the Forest Service and USDA emblems and names are prominently displayed on the cover, the government source is clear to the audience and to readers. *Cf.* B-302710 (Department of Health and Human Services’ materials constituted covert propaganda because the materials failed to identify the government source to the entire target audience). The B-roll, which the Forest Service only distributed for local news stations to use as video for stories created by those news organizations, was also clearly identified to the news station source, the target audience of the B-roll film. *See id.* (B-roll film disseminated by the Department of Health and Human Services did not constitute covert propaganda because the audience of this material was the news stations, who were aware of the source of the materials). Accordingly, neither the brochure nor the video materials are covert propaganda for purposes of determining whether the Forest Service violated the publicity or propaganda prohibition.

To be characterized as purely partisan in nature, the brochure and video materials must be found to have been “designed to aid a political party or candidates.” B-147578, Nov. 8, 1962. It is often difficult to determine whether materials are political or not because “the lines separating the nonpolitical from the political cannot be precisely drawn.” *Id.*; B-144323, Nov. 4, 1960. An agency has a legitimate right to explain and defend its policies and respond to attacks on that policy.

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<sup>9</sup> Public Law 108-108, itself, does not prohibit the use of appropriated funds for publicity or propaganda purposes. The language of the publicity or propaganda prohibition in Pub. L. No. 108-199, however, applies to funds appropriated in “this or *any other* Act.” Pub. L. No. 108-199, 118 Stat. 3, 355 (2004) (emphasis added). Accordingly, the prohibition applies to appropriations enacted in Pub. L. No. 108-108.

<sup>10</sup> We have not rejected the notion that a communication could be so misleading or inaccurate as to violate the prohibition; however, to date, we have not been presented with any such communication. We are not confronted with such a communication in this case.

B-302504, March 10, 2004. It is sometimes difficult to differentiate an agency's dissemination of information in exercising this legitimate right to explain and defend its policies from dissemination activities that are for purely political reasons. B-130961, Oct. 16, 1972 (Letter to Representative Richardson Preyer). A standard we apply resolving this struggle is that the use of appropriated funds is improper only if the activity is "completely devoid of any connection with official functions." B-147578, Nov. 8, 1962. We do not raise any objection to the use of appropriated funds if an agency can reasonably justify the activity as within its official duties. See B-144323, Nov. 4, 1960.

As noted above, Forest Service officials told us that the decision to create a brochure and other video materials was based in part upon a desire to better inform the public about the very complicated issue of fire management and protection from catastrophic wildfire. The statute creating the USDA authorizes the USDA to disseminate information "on subjects connected with agriculture . . . ." 7 U.S.C. § 2201. As explained in the Background section of this opinion, the Forest Service, an agency of USDA, is required to devise land resource and management plans for each unit of the National Forest System. See 16 U.S.C. § 1604(f)(5). The Plan Amendment is a plan created under the statutory authority of the Forest Service. Providing the public with information about the Plan Amendment, particularly in a form that the public can easily understand, certainly falls within the scope of USDA's specific statutory authority to provide information to the public on "subjects connected with agriculture." 7 U.S.C. § 2201. The Plan Amendment includes the 2004 ROD, Supplemental EIS, and the final EIS from 2001, which together consist of more than 500 pages replete with technical terminology and addressing land resource information in addition to fire management and wildfires. The Forest Service produced a brochure and video materials to explain some the policies put forth under the Plan Amendment and the supporting documentation, including the 2004 ROD.<sup>11</sup>

Also, as noted above, work order papers and other documents provided to us reveal that the Forest Service designed the brochure and video materials to rebut negative media attention surrounding the policies put forth in the 2004 ROD. The Forest Service has a legitimate right to defend its policies. The Forest Service was well aware of the opposition to its proposed policy changes. Various environmental and other public-interest groups attacked these policies when introduced by the Healthy Forest Initiative.<sup>12</sup> Public comments on the EIS, for example, demonstrate concern over the impact on wildlife habitat if the Forest Service were to increase the number of larger trees that it might remove. The Forest Service's production of the brochure and video materials to explain and defend its fire management policies does not violate the publicity or propaganda prohibition.

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<sup>11</sup> This opinion does not evaluate the accuracy of the analysis or the conclusions put forth in those documents.

<sup>12</sup> See note 6.

The materials are not comprehensive and do not explain all the positive and negative effects of the thinning policy central to its new fire management policies. Indeed, these materials discuss the possible positive results without discussing the negative impact that such policy could have on the environment or wildlife habitat. For example, the brochure mentions the positive impact that decreasing the forest fire threat could have on the indigenous wildlife, but contains no information regarding the threat aggressive forest management will have on these creatures' natural habitats.

The fact that the materials do not present both the negative and positive consequences, however, does not render them purely partisan in violation of the publicity or propaganda prohibition. On the contrary, our recent cases have recognized that restricting all materials that arguably have or are perceived as having some partisan content would hinder the legitimate exercise of the agencies' authority to inform the public of its policies, to justify its policies, and to rebut attacks upon its policies. *See, e.g.,* B-302504, March 10, 2004. Accordingly, while the brochure and video materials may provide only information that supports the Forest Service's view of the need for more aggressive thinning and tree removal, this does not render the material purely partisan in violation of the publicity or propaganda prohibition.

Finally, we note that much controversy surrounds the strip of photographs in the brochure depicting increasing density in a forest from 1909 until 1989. The photographs fail to acknowledge that the forest pictured is not part of the Sierra Nevada nor that the first picture taken in 1909 had been recently logged.<sup>13</sup> The text preceding the strip of photographs leaves the reader of the brochure with the impression that the 1909 picture is the "natural" state of the forest. That text reads:

"Historically the forests of the Sierra Nevada had fewer trees and less underbrush. When wildfire came, it burned low and slow, removing small vegetation and 'cleaning' the forest 'floor.' This kind of fire was a natural part of the ecosystem, helping old growth trees to survive . . .

We need future forests more like past forests.

[t]here should be open stands of large trees . . .

Restoring the entire forest to its former safer state, with fewer trees and less underbrush, would be a gargantuan task."

The Forest Service has claimed that this series of photographs was intended to illustrate increasing density over time and did not intend to deceive the public by

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<sup>13</sup> A close examination of this photograph reveals stumps in the background. This series of photographs has been used in several other reports regarding forests and fire management in a larger size, including GAO. *See, e.g.,* GAO, *Western National Forests: A Cohesive Strategy is Needed to Address Catastrophic Wildfire Threats*, GAO/RCED-99-65 (Washington, D.C.: April 2, 1999).



representing the first picture of the series as a natural state of the Sierra Nevada in 1909. *See* Rey Response at 2. In later versions of the brochure, the Forest Service has clearly identified that the pictures were not pictures of the Sierra Nevada and their purpose was to exhibit increased density of the forests over the time period mentioned.<sup>14</sup> Indeed, in the original version of the brochure, the pictures are labeled “Increasing Density” and the brochure does not state that the 1909 picture was a “natural state” of the Sierra Nevada forests. Although the Forest Service could have been more careful in its labeling of the pictures to eliminate any inference that the logged 1909 forest was a more natural state of the forest, the Forest Service’s failure to do so does not constitute a violation of the publicity or propaganda prohibition. The Forest Service’s explanation and the remedial measures taken in the second printing of the brochure support its assertions that the series of photographs was intended only to exhibit increased forest density over time.

### Section 3107—Publicity Experts

You also asked us to determine whether the Forest Service violated section 3107 by hiring OneWorld to assist with production and dissemination of materials related to its “Forests With a Future Campaign.” As stated in the work orders and supporting materials provided by the Forest Service, the Forest Service hired OneWorld, a public relations firm, to make the technical language of the ROD and the Plan Amendment easier for the public and media to understand. *See* Rey Response at 1.

Section 3107 provides that “[a]ppropriated funds may not be used to pay a publicity expert unless specifically appropriated for that purpose.” 5 U.S.C. § 3107. This restriction applies to the use of all appropriated funds, including the appropriations used to produce and distribute the brochure and video materials at issue here.<sup>15</sup> Section 3107 was enacted in 1913 and has not been amended.

The statutory language of section 3107 focuses on paying a “publicity expert.” Notwithstanding the fact that the Forest Service describes OneWorld as a public relations specialist, our determination of whether OneWorld qualifies as a “publicity expert” for purposes of section 3107 is based upon the meaning of “publicity expert” as used in the law. Our case law has rarely addressed a challenge to agency expenses for information dissemination activity under section 3107. Our cases have noted difficulty in applying the provision due to the lack of definitional guidance in the statute and the need to protect an agency’s right or duty to inform the public

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<sup>14</sup> The Forest Service provided us an updated version of the brochure it is distributing to its regional offices. We were told that the Forest Service changed the labeling of the series of photographs when alerted to the controversy noted here. *See* note 8.

<sup>15</sup> The Forest Service told us that the funds used to pay OneWorld and the costs associated with producing and distributing the brochure and video materials were appropriated in the Department of the Interior and Related Agencies Act, 2004, Pub. L. No. 108-108, 117 Stat. 1241 (Nov. 10, 2003).

regarding its activities and programs. *See* B-139965, Apr. 16, 1979 (noting the lack of definitional guidance in section 3107); A-82332, Dec. 15, 1936 (noting that what later became section 3107 was not intended to restrict legitimate informational activities). Given the absence of definitional guidance in the statute, we look to the legislative history of the provision to ascertain what Congress meant to prohibit when it passed what is now section 3107 in 1913. We find the legislative history particularly illuminating.

When Representative Gillett introduced this bill, he expressed that his intention was to prohibit the employment of someone “simply as a press agent” without specific authorization from Congress. 50 Cong. Rec. 4409 (1913). Floor debates revealed that supporters intended not necessarily to prohibit employing someone whose duties were “as a press agent,” but to prohibit the use of press agents “to extol or to advertise” the agency or individuals within the agency. 50 Cong. Rec. at 4410 (comments of Representative Fitzgerald, chairman of committee that reported the bill). Importantly, the floor debates clearly revealed that the provision was not meant to prohibit legitimate information dissemination regarding agency work or services. When some Members expressed concern that the provision may affect the hiring of experts to “mak[e] our farm bulletins more readable to the public and more practical in their make-up,” supporters indicated that such bulletins and the hiring of individuals to make the bulletins more readable would not be restricted by its passage. *Id.* at 4410 (statement of Representative Lever). Moreover, supporters of the proposed legislation specifically clarified that it would not prevent the USDA from providing the public with information regarding its work. *Id.*

In our view, the legislative history establishes that section 3107 was not to be applied to impede the legitimate informational functions of the agencies. As we discussed earlier, agencies have a legitimate right to disseminate agency products and information about agency policies. As the legislative history of section 3107 suggests, this includes the right to establish mechanisms to enable the dissemination of information, which today would include, for example, mechanisms such as internet web sites not envisioned in 1913. Nor do we read section 3107 to prohibit the use of appropriated funds to pay press agents and public affairs officers to facilitate and manage the dissemination of agency information. Instead, what Congress intended to prohibit with section 3107 is paying an individual “to extol or to advertise” the agency, an activity quite different from disseminating information to the citizenry about the agency, its policies, practices, and products.

Given the above discussion, in our opinion, section 3107 does not apply to the contract or payment between the Forest Service and OneWorld. Although as a public relations firm OneWorld provided more than just editorial services in creating more readable documents, OneWorld’s services did not go beyond making the policies put forth in the Plan Amendment documents more accessible and understandable to the public and media. According to documents that the Forest Service provided to us, OneWorld advised the Forest Service concerning the best methods and language to put forth the policies announced in 2004 ROD. *See* July Response, Memo from

OneWorld. OneWorld also identified ways to explain this policy more effectively to special interest groups within the population. *See id.* at 3-4.

The tools available to disseminate information have changed drastically in the 91 years since the enactment of section 3107. Indeed, we have changed from a nation relying predominately upon the written word to one engaged in instant communication through broadcast, satellite, and internet communications. The work orders made available to us clearly show that Forest Service hired OneWorld to help communicate to the public the 2004 ROD policies and conclusions and to advise the Service on how to utilize effectively the available media resources. Since OneWorld's services did not go beyond making the Forest Service's complicated and technical policy discussions more understandable to the public, section 3107 does not apply to prohibit the payment to OneWorld for services rendered.

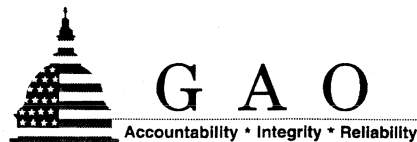
## CONCLUSION

The Forest Service production and distribution of the brochure and video materials regarding the Plan Amendment and the 2004 ROD did not violate the publicity or propaganda prohibition of the Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, Div. F, Tit. VI, § 624, 118 Stat. 3 (2004) or 5 U.S.C. § 3107. The materials produced by OneWorld for the Forest Service did not constitute self-aggrandizement, covert propaganda, or purely partisan materials, in violation of the publicity or propaganda prohibition. While the materials did not provide a balanced picture of the positive and negative aspects of the thinning policies as portrayed in 2004 ROD and supporting documents, the Forest Service was authorized to disseminate such materials under its information dissemination authority and in defense of its own policies. We also find that OneWorld was not acting as a "publicity expert" as defined by section 3107 when it assisted the Forest Service with producing materials to help explain its controversial thinning policy to the general public.

Anthony H. Gamboa  
General Counsel

Enclosures





## Decision

**Matter of:** National Institutes of Health - Food at Government-Sponsored Conferences

**File:** B-300826

**Date:** March 3, 2005

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### DIGEST

The National Institutes of Health (NIH) may pay for legitimate, reasonable conference costs, including meals and light refreshments, of a formal conference pertaining to Parkinson's disease subject to the conditions outlined herein. A formal conference typically involves topical matters of interest to, and participation of, multiple agencies and/or nongovernmental participants. In addition, other indicators of a formal conference include registration, a published substantive agenda, and scheduled speakers or discussion panels. An agency hosting a formal conference may consider the cost of providing meals and refreshments to conference attendees an allowable conference cost so long as (1) meals and refreshments are incidental to the conference, (2) attendance at the meals and when refreshments are provided is important for the host agency to ensure full participation in essential discussions, lectures, or speeches concerning the purpose of the conference, and (3) the meals and refreshments are part of a formal conference that includes not just the meals and refreshments and discussions, speeches, or other business that may take place when the meals and refreshments are served, but also includes substantial functions occurring separately from when the food is served. The NIH conference here satisfies these three criteria.

Without statutory authority to charge a fee and retain the proceeds, NIH may not charge a registration or other fee to defray the costs of providing meals or light refreshments. An appropriation establishes a maximum authorized program level, and an agency, without specific statutory authority, may not augment its appropriations from sources outside the government.

In applying this decision, NIH should develop an agency policy specifying the types of formal conferences at which NIH may consider providing food. NIH also should develop procedures to ensure that the provision of meals and refreshments meet the criteria listed above. We expect agency counsels, as well as certifying officers, agency auditors, and Inspectors General, to apply these criteria. To the extent that agency officials are uncertain as to the applicability of the criteria in particular circumstances, they may request a decision from this office, pursuant to 31 U.S.C. § 3529, before proceeding.

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## **DECISION**

Pursuant to 31 U.S.C. § 3529(a), a certifying officer at the National Institutes of Health (NIH) requested an advance decision regarding the use of appropriated funds to provide meals and light refreshments to federal government and nonfederal attendees and presenters at an NIH-sponsored conference. The certifying officer also asked whether NIH may charge a registration or other fee to defray the costs of any food provided.

NIH may pay for all legitimate, reasonable costs of hosting a formal conference pertaining to Parkinson's disease. A formal conference typically involves topical matters of interest to, and the participation of, multiple agencies and/or nongovernmental participants. In addition, other indicators of a formal conference include registration, a published agenda, and scheduled speakers or discussion panels. An agency may consider the cost of providing meals and refreshments to conference attendees an allowable conference cost so long as (1) meals and refreshments are incidental to the conference, (2) attendance at the meals and when refreshments are provided is important to ensure full participation in essential discussions, lectures, or speeches concerning the purpose of the conference, and (3) the meals and refreshments are part of a formal conference that includes not just the meals and refreshments and discussions, speeches, or other business that may take place when the meals and refreshments are served, but also includes substantial functions occurring separately from when the food is served.

Agencies must have specific statutory authority to charge a fee for their meetings or programs and to retain the proceeds. NIH has no such specific authority and therefore may not charge a registration or other fee to defray the costs of the conference, including providing meals or light refreshments.

## **BACKGROUND**

NIH plans to hold a formal conference on the latest scientific advances in treating Parkinson's disease. NIH has designed the event to be of broad interest to a number of professional disciplines and to advance NIH's research and information sharing efforts. Attendees will include a mix of federal employees and nonfederal individuals. Nonfederal attendees will include grantees, contractors, and research/science advisors. Some of the nonfederal individuals will be presenters

who will receive honoraria, and some will be on invitational travel. NIH will engage a contractor to assist in organizing the conference. The conference will be held at a hotel in Maryland close to NIH headquarters. The cost of food will not be included in the fee NIH is paying for the conference space.<sup>1</sup> NIH would like to charge a fee for meals and light refreshments that it plans to provide at the conference.

NIH asked us if its appropriated funds are available to pay for food for the various attendees and whether NIH has the authority to charge the attendees a fee that could be used to recover the costs of the food.

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## ANALYSIS

Questions concerning the cost of food at a conference are often raised when an agency wants to know whether it may pay for food for an employee attending a formal conference. In this decision we address the question from a different perspective—that of the agency hosting a conference—and whether, as host, it may use its appropriation to provide food to conference participants. In our analysis we first discuss when an agency may sponsor a formal conference. Then, from the perspective of the agency as host, we analyze whether the agency may provide food, as a conference expense, to participants, and whether appropriated funds may be used to provide food for other federal agency and nonfederal attendees. We also analyze whether agencies must have specific authority to both charge a fee for conference-related expenses, including food, and retain the proceeds.

### NIH's authority to host a formal conference

An agency, generally, does not need express statutory authority to host a conference, so long as the agency determines that a formal conference is reasonably and logically related to carrying out its statutory responsibilities and serves its statutory mission. It would not be inappropriate, for example, for an agency that is charged with promoting public health to organize a conference to bring together elected local officials, physicians, public health leaders and practitioners to identify precautions to avoid a possible influenza epidemic. Similarly, it is not inappropriate for NIH to

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<sup>1</sup> In a 1999 decision, we concluded that the Nuclear Regulatory Commission (NRC) could pay an all-inclusive facility rental fee for a meeting of NRC employees to discuss internal NRC matters, even though the fee also covered the cost of food. B-281063, Dec. 1, 1999. The facility charged a fixed fee that included conference rooms, refreshments at breaks, lunch, equipment, and other supplies. We concluded that renting the facilities was a reasonable expense of NRC's Environmental Programs and Management appropriation. Because the fee would have remained the same to NRC whether or not it accepted, and its employees ate, the food, the harm that the general rule is meant to prevent (*i.e.*, expenditure of federal funds on personal items) was not present. *Id.*

organize a conference to coordinate and discuss Parkinson's disease research efforts within the scientific community.<sup>2</sup>

NIH, an agency of the Public Health Service, is composed of 27 institutes and centers that were established "to conduct and support research, training, health information, and other programs with respect to any particular disease or groups of diseases or any other aspects of human health." 42 U.S.C. § 281. Several of its research institutes, as well as a number of universities, medical centers, and pharmaceutical companies, conduct research to understand and find a cure for Parkinson's disease. For the formal conference discussed in this decision, NIH has invited experts from the private sector as well as from other federal agencies, in addition to researchers from its own research institutes. Given NIH's statutory mission "to conduct and support" research, it is well within NIH's discretion, we believe, to organize a formal conference of interested researchers to discuss and coordinate research efforts to encourage efficient and productive research aimed at a common goal— understanding and curing Parkinson's disease.<sup>3</sup>

#### Provision of food at an agency hosted formal conference

In hosting a formal conference, an agency incurs a number of expenses, many of which are discretionary but legitimate nonetheless so long as they serve the purposes of the conference. For example, a conference host typically incurs such obvious expenses as the cost of program materials, conference space, signage, the production of a video or other form of presentation, and personnel costs to administer the conference and conference registration. While meals and refreshments have not been obvious costs of government-sponsored conferences, meals or refreshments are not significantly different from these other expenditures and in some circumstances may be considered, like programs, videos, and signage, to be reasonable, legitimate expenses of the conference.

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<sup>2</sup> Because several of NIH's research institutes conduct Parkinson's disease research, Congress has required NIH to coordinate their research efforts. 42 U.S.C. § 284f(b)(1). "Coordination shall include the convening of a research planning conference not less than once every 2 years." 42 U.S.C. § 284f(b)(2).

<sup>3</sup> From the perspective of participating or sponsoring federal agencies and their employees, many conferences similar to NIH's proposed conference may qualify as "training" under the broad definition thereof in the Government Employees Training Act, 5 U.S.C. § 4101. Paragraph 4 of section 4101, title 5, United States Code, defines "training" to include "making available to an employee . . . a planned, prepared, and coordinated program . . . of instruction or education, in scientific, professional . . . fields which will improve individual and organizational performance and assist in achieving the agency's mission and performance goals." Although not crucial to our holding, the NIH conference, arguably, falls within this definition.



In determining when meals or refreshments are allowable expenses of an agency hosting a formal conference, we turn to earlier decisions dealing with the cost of food as an employee training expense. As noted earlier, the perspective of these decisions look at when an agency may pay for the costs of meals and refreshments incurred by an agency in providing training to its own employees or to an agency employee attending a conference. The Government Employees Training Act (Training Act), Pub. L. No. 85-507, 72 Stat. 327 (1958), authorizes an agency to pay the necessary expenses incident to an authorized training program. 5 U.S.C. § 4109. We have held that the government can provide meals and light refreshments under this authority if the agency determines that providing the meals and refreshments to federal employees is necessary to achieve the objective of the training program. 48 Comp. Gen. 185 (1968); 39 Comp. Gen. 119 (1959); B-247966, June 16, 1993; B-193955, Sept. 14, 1979. Similarly, the Training Act authorizes agencies to pay “for expenses of attendance at meetings which are concerned with the functions or activities for which the appropriation is made.” 5 U.S.C. § 4110. To be considered “expenses of attendance at meetings” under section 4110, we have held that the costs of meals and refreshments must be included as an incidental and nonseparable portion of a registration or attendance fee—B-288266, Jan. 27, 2003; 64 Comp. Gen. 406 (1985); 38 Comp. Gen. 134 (1958); B-233807, Aug. 27, 1990—or satisfy the following criteria: (1) the meals and refreshments are incidental to the conference or meeting, (2) attendance at the meals and when refreshments are served is important for the employees’ full participation in the conference or meeting, and (3) the meals and refreshments are part of a formal conference or meeting that includes not just the meals and refreshments and discussions, speeches, lectures, or other business that may take place when the meals and refreshments are served, but also includes substantial functions occurring separately from when the food is served. 72 Comp. Gen. 178 (1993); B-233807, Aug. 27, 1990; B-198471, May 1, 1980.

We think similar criteria should apply to determining whether the costs of meals or refreshments are allowable expenses of the agency hosting a formal conference. As the discussion above indicates, we have long permitted agencies, under appropriate circumstances, to cover their employees’ costs of meals when attending formal conferences. 38 Comp. Gen. 134 (1958); B-198471, May 1, 1980; B-154912, Aug. 26, 1964. Further, we have permitted agencies that hold formal in-house training conferences for their employees to cover the cost of meals when necessary to achieve the program or conference objective. 48 Comp. Gen. 185 (1968); 39 Comp. Gen. 119 (1959).<sup>4</sup> We think the presence of private citizens or federal employees from other agencies who are essential to achieve the program or conference objectives should not change the character of the expense from

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<sup>4</sup> Federal employees who are in travel status, however, are required to reduce their allowances for meals by the amounts specified in the regulations for each meal furnished as part of the event. 41 C.F.R. § 301-74.21.

allowable to unallowable. The fact that the meals and refreshments also are available to private citizens and employees of other agencies should not be an obstacle so long as an administrative determination is made that their attendance is necessary to achieve the conference objectives.

The extension of the availability of appropriated funds to these circumstances should satisfy the criteria discussed earlier. In this regard, to determine whether the costs of meals and refreshments at an agency-hosted conference involving, in addition to its employees, other interested federal employees and private citizens administratively determined necessary to achieve the conference objectives, the criteria are as follows: (1) the meals and refreshments are incidental to the formal conference, (2) attendance at the meals and when refreshments are served is important for the host agency to ensure attendees' full participation in essential discussions, lectures, or speeches concerning the purpose of the formal conference, and (3) the meals and refreshments are part of a formal conference that includes not just the meals and refreshments and discussions, speeches, lectures, or other business that may take place when the meals and refreshments are served, but also includes substantial functions occurring separately from when the food is served.

The level of formality required is the same as what one would expect of a conference sponsored by a nongovernmental entity. *See* 64 Comp. Gen. 604 (1980); B-249795, May 12, 1993. Thus, a formal conference must involve topical matters of interest to, and the participation of, multiple agencies and/or nongovernmental participants. *See* B-249795, May 12, 1993. In addition, a formal conference would include, among other things, registration, a published substantive agenda, and scheduled speakers or discussion panels. Meetings discussing business matters internal to an agency or other topics that have little relevance outside of the agency do not constitute formal conferences. For example, day-long quarterly supervisors meetings discussing general business/management topics, suggestions, issues, and problems of the agency are not formal conferences. 68 Comp. Gen. 606 (1989); B-249749, May 12, 1993.

As NIH explained its conference to us, the conference has the indicia of a formal conference and will meet the three criteria described above. The conference will include a registration process, a published substantive agenda, and scheduled speakers or discussion panels. It is designed to be of broad interest to a number of professional disciplines, and attendees will include a mix of federal employees and nonfederal individuals. The conference will be organized to take full advantage of the participants' and presenters' time and availability and not to accommodate the provision of food. In order to make the best use of the participants' and presenters' time, essential discussions, panels, and speeches will occur at the time the meals and light refreshments are served. Finally, NIH also has scheduled substantive presentations and discussions separately from the time when the food is served.

Accordingly, based on the conference description NIH provided to us, we conclude that NIH may provide food at this formal conference.<sup>5</sup>

The purpose of the criteria we set out is to balance the legitimate benefits that accrue to an agency hosting a conference with the need to ensure that the agency is not expending public funds on a personal expense, food. It is important to note that these criteria necessarily apply on a case-by-case basis. Before implementing this decision, an agency should develop an agency policy specifying the types of formal conferences at which the agency may consider providing food, consistent with the criteria contained in this decision. An agency also should develop procedures to ensure that the provision of meals and refreshments meet the criteria listed above. We expect agency counsels, as well as certifying officers, agency auditors, and Inspectors General, to apply these criteria. To the extent that agency officials are uncertain as to the applicability of the criteria in particular circumstances, they may request a decision from this office, pursuant to 31 U.S.C. § 3529, before proceeding.

#### Registration fees to cover expenses of formal conferences

If an agency wishes to charge a fee for one of its programs or activities, it must have statutory authority to do so. B-300248, Jan. 15, 2004. In addition, even if an agency has authority to charge a fee, it may not retain and use the amounts collected without statutory authority. *Id.* An appropriation establishes a maximum authorized program level, meaning that an agency, absent statutory authorization, cannot operate beyond the level that can be paid for by its appropriations. *See* 72 Comp. Gen. 164, 165 (1993). An agency may not circumvent these limitations by augmenting its appropriations from sources outside the government, unless Congress has so authorized the agency. *Id.*

In a recent decision we explained that the Independent Offices Appropriation Act, 31 U.S.C. § 9701, known as the user fee statute, provides general authority for an agency to impose a fee if certain conditions are met. *Id.* The user fee statute authorizes an agency to charge recipients of special benefits or services a user fee. 62 Comp. Gen. 262 (1983). Our decisions have not addressed specifically whether

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<sup>5</sup> Because hosting this conference is reasonably related to NIH's statutory responsibilities and serves to advance its statutory mission, NIH is not barred by the prohibition of 31 U.S.C. § 1345 from providing food. Section 1345 prohibits the use of appropriated funds for "travel, transportation, and subsistence expenses for a meeting." Section 1345, however, has limited application, addressing only those conventions and other forms of assemblages or gatherings that private organizations seek to hold at government expense. *See* 72 Comp. Gen. 229, 231 (1993) (effectively overruling prior GAO decisions that applied section 1345 to meetings and conferences other than assemblages and gatherings that private organizations sought to hold at government expense).

the user fee statute authorizes an agency to charge a conference registration or attendance fee, and we need not address that question here. Even if we were to conclude that the user fee statute would permit NIH to charge a registration fee, we are aware of no specific authority that would permit NIH to retain the proceeds. Without such a specific authorization, agencies may not retain or use fees collected under the user fee statute or other laws but must deposit them in the general fund of the Treasury as miscellaneous receipts.<sup>6</sup> B-300248, Jan. 15, 2004. Nor could NIH authorize its contractor to charge a fee to offset costs because, pursuant to 31 U.S.C. § 3302(b), a contractor receiving money for the government may not retain funds received for the government to pay for the conference costs. B-300248, Jan. 15, 2004.<sup>7</sup>

If a host agency concludes that it cannot use its appropriations to provide food to participants because the conference does not satisfy the criteria we discuss herein, or if the host agency otherwise decides not to provide food (for example, because of budgetary constraints), the participants may cover the costs of their food using their own personal funds.

#### CONCLUSION

NIH may pay for meals and light refreshments, for all conference participants including federal employees from other agencies and nonfederal participants, at a formal conference pertaining to Parkinson's disease, subject to the conditions outlined herein. However, without statutory authority to charge a fee and credit the proceeds to its appropriation, NIH may not charge a registration or other fee that can then be used to defray the costs of providing meals or light refreshments.

In applying this decision, NIH should develop an agency policy specifying the types of formal conferences at which NIH may provide food. NIH also should develop procedures to ensure that the meals and refreshments meet the criteria above. We expect agency counsels, as well as certifying officers, agency auditors, and

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<sup>6</sup> The "miscellaneous receipts" statute requires an official or agent of the government receiving money for the government from any source, absent statutory authority to the contrary, to deposit the money into the general fund of the Treasury. 31 U.S.C. § 3302(b).

<sup>7</sup> The only other statute that would have bearing in this situation -- the Economy Act, 31 U.S.C. § 1535, which authorizes an agency to provide goods or services to another agency on a reimbursable basis -- is not applicable in these factual circumstances.

Inspectors General, to apply these criteria. To the extent that agency officials are uncertain as to the applicability of the criteria in particular circumstances, they may request a decision from this office, pursuant to 31 U.S.C. § 3529, before proceeding.



Anthony H. Gamboa  
General Counsel





G A O

Accountability • Integrity • Reliability

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United States Government Accountability Office  
Washington, DC 20548

B-304228

September 30, 2005

The Honorable Frank R. Lautenberg  
United States Senate

The Honorable Edward M. Kennedy  
United States Senate

Subject: *Department of Education—No Child Left Behind Act Video News Release and Media Analysis*

In a letter dated October 14, 2004, you requested our opinion on the Department of Education's (Department) use of appropriated funds to hire Ketchum, Inc. (Ketchum), to conduct a media analysis and to produce and distribute a video news release (VNR) regarding programs available under the No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (Jan. 8, 2002)(NCLB Act). You asked whether these activities violated the governmentwide prohibition against using appropriated funds for publicity or propaganda not authorized by Congress. *See Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, div. F, title VI, § 624, 118 Stat. 3, 356 (Jan. 23, 2004); Consolidated Appropriations Resolution, 2003, Pub. L. No. 108-7, div. J, title VI, § 626, 117 Stat. 470 (Feb. 20, 2003).*

We have applied the publicity or propaganda prohibition to forbid the use of appropriations for (1) covert propaganda, (2) purely partisan activities, or (3) self-aggrandizing activities. B-302504, Mar. 10, 2004. The VNR on supplemental education services under the NCLB Act at issue here contains a prepackaged news story that fails to identify the Department as the source of the news story. *See id.* Because the Department's role in the production and distribution of the prepackaged news story is not revealed to the target audience, the prepackaged news story constitutes covert propaganda. We disagree with the Department's contention that the prepackaged news stories are not covert propaganda because they contain only factual information. To constitute a legitimate information dissemination activity that does not violate the publicity or propaganda prohibition, the Department must inform the viewing public that the government is the source of the information disseminated.<sup>1</sup>

With respect to the media analysis, the Department directed Ketchum to assess whether its messages were reaching target audiences and were being mentioned in a positive

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<sup>1</sup> *See also* Pub. L. No. 109-13, title VI, § 6076, 119 Stat. 231, 301 (May 11, 2005).

way. While we question the usefulness of the Department's methodology in achieving its stated objective, we recognize that a media analysis similar to the one conducted by the Department is within its authority. As part of this media analysis, however, Ketchum evaluated the media perception that the "Bush Administration/the GOP is committed to education." Appropriated funds are not available to evaluate the Republican Party's (or any other political party's) commitment to education, and the Department should take appropriate steps to ensure that no such use of its appropriations occurs in the future.

## BACKGROUND

On January 8, 2002, President Bush signed into law the NCLB Act, with the stated purpose "to close the achievement gap with accountability, flexibility, and choice, so that no child is left behind." Pub. L. No. 107-110, 115 Stat. 1425 (Jan. 8, 2002). In addition to reauthorizing funding for education programs, the Act establishes new testing and accountability requirements for public schools designed to ensure that public school students achieve a level of proficiency in reading and mathematics. *See* Pub. L. No. 107-110, title I, § 1001, 115 Stat. at 1439-40. The Act authorizes, among other things, federal funding for supplemental educational services directed at assisting economically disadvantaged schools and their students. *See* Pub. L. No. 107-110, title I, pt. A, § 1116, 115 Stat. 1478 (*codified in* 20 U.S.C. § 6316). These supplemental services are available to eligible students of schools identified by local agencies as failing to make adequate yearly progress as identified by each state's plan for three consecutive years. 20 U.S.C. § 6316(e)(1). In addition to establishing requirements for identification by local education agencies, 20 U.S.C. § 6316(b)(1), the Act requires that school districts provide parents with appropriate notice of the availability of supplemental educational services, among other information, 20 U.S.C. § 6316(b)(6).

On May 14, 2003, the Department entered into a contract with Ketchum to "develop a comprehensive long-range communications strategy for the Department to communicate to the public information on the No Child Left Behind" Act. Contract at 5. The contract specified that the intended work products include "audio products, videos and some print materials that present clear, coherent, targeted messages regarding ED's programs and that relate to the Department's legislative initiatives . . ." *Id.* at 6. The contract specified that Ketchum was to produce audio and video programs focusing on the Department initiatives, including but not limited to the NCLB Act. *Id.* at 9.

The contract also required "[a]ssessment of the [NCLB Act] knowledge level of diverse audiences and development of targeted communications strategies to reach those who most need the information." Under the contract, Ketchum was required to "[e]valuate effectiveness of the strategies and provide analyses" and "[c]onduct media analysis, focus groups, and other market research." *Id.* at 7.

The Department issued 21 work requests as part of its contract with Ketchum. Pursuant to these work requests, Ketchum delivered various written, audio, and video products, including but not limited to focus group reports, radio public service announcements, brochures, posters, and public polling results. Work Requests 2-21. In September 2003, the Department issued a work order for a VNR regarding supplemental educational



services. Work Request 6 at 2. The statement of work specified that Ketchum was to “create a localized video news feed that features a spokesperson with a localized ‘message’ for each of the 30-target markets.” Statement of Work 6 at 2.<sup>2</sup> The Department paid \$38,421.06 for the production and distribution of the Supplemental Educational Services VNR. Talbert Letter, at 2.

The Department also issued two work requests for media analyses of a random selection of news stories published from April 2003 through January 2004. The Department requested that this “benchmark” analysis contain quantitative and qualitative components to determine the current effectiveness of the “messages” reaching the public about the Act. Work Requests 2, 8; Statements of Work 2, 8. The purpose of these analyses was to provide the Department with information to determine “if the public is gaining an understanding of the law . . .” and to understand “the most appropriate media strategy and help in shaping and designing media activities.” Statement of Work 2, Benchmarking. The Department paid \$96,850.99 for the benchmark media analyses. Talbert Letter, at 2.

#### THE SUPPLEMENTAL EDUCATIONAL SERVICES VNR

The VNR at issue here begins with a slate<sup>3</sup> announcing the topic of the VNR: “Tutoring and Remedial Classes Available to Thousands of Students.” This title slate is followed by a series of slates with statements and “key facts” regarding the NCLB Act, contact information directing viewers to a Web site and toll-free number operated by the Department, and contents of the remaining VNR segments. B-roll film follows the slates and contains statements from Roderick R. Paige, Secretary, U.S. Department of Education; Valerie Garland, a parent of a student receiving supplemental educational services; and Alberta Paul, Program Coordinator for Supplemental Services.

A prepackaged news story, referred to as a story package, appears after the b-roll. It begins with a suggested anchor lead-in script, indicating that Karen Ryan has a report on how some students may be eligible for after-school free tutoring services. As the prepackaged news story begins, a female narrator reports on a predicament facing Valerie Garland and her son, who will be repeating the 11<sup>th</sup> grade due to poor grades. The

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<sup>2</sup> In addition to the VNR at issue here, the Department issued four other work requests for VNRs. The Department issued two work requests after May 2004, when we issued B-304710, May 19, 2004, finding that a prepackaged news story violated the publicity or propaganda prohibition. In the two work requests subsequent to that decision, the Department specified that Ketchum was to create a VNR with only a b-roll package and that would not contain a prepackaged news story. The topics of the VNRs were financial aid, Education Science Summit, back-to-school programs and school improvement issues. While this opinion addresses only the VNR on supplemental educational services, the standards that we apply in this opinion should also be used to evaluate whether any of the other four VNRs violate the prohibition.

<sup>3</sup> A slate is a visual feed containing title cards and other information explaining key facts and other information contained on a VNR. *See* B-302710, May 19, 2004.

narrator tells us that Ms. Garland knows that her son could do better if he had some extra help. At this point, the story package includes a statement from Ms. Garland describing her struggle to find help for her son through the school system. The narrator explains that under the NCLB Act, children who attend schools that do not meet federal standards can enroll in the tutoring programs. The story continues with statements from Secretary Paige and Alberta Paul, indicating that the tutoring is available at no cost and these services are having a positive impact on its participants. The narrator completes the prepackaged story as follows: "For Valerie and many other parents of children with poor grades, this is a program that gets an A Plus. In Washington, I'm Karen Ryan reporting." The prepackaged news story does not inform the audience that the Department produced and distributed the news story.<sup>4</sup>

The VNR continues with additional b-roll film, including video with Valerie and her children at home, children at school, Secretary Paige visiting a school, Alberta Paul in her office, and the exterior of the Department's building in Washington, D.C. The VNR concludes with b-roll film of statements from Secretary Paige and Nina Rees, Deputy Under Secretary of Education, Innovation and Improvement, regarding specific geographic areas and the deadlines for enrolling for supplemental educational services.

In B-302710, May 19, 2004, we examined VNRs produced and distributed by the Department of Health and Human Services (HHS) containing similar prepackaged news stories that failed to identify HHS as the source of the news story. At no point in the news story did HHS identify itself as the source of the story. We concluded that these prepackaged news stories violated the publicity or propaganda prohibition because they constituted covert propaganda. *Id.* The obvious, "critical element" of covert propaganda is concealment of the agency's role in preparing the material from the target audience.<sup>5</sup> B-229257, June 10, 1988. *See also* B-303495, Jan. 4, 2005; B-302710, May 19, 2004. In January 2005, we examined VNRs containing unattributed prepackaged news stories,

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<sup>4</sup> The Department's regulations require that contractors who are publicizing the work of the Department contain the following disclosure:

"This project has been funded at least in part with Federal funds from the U.S. Department of Education under contract number \_\_\_\_\_. The content of this publication does not necessarily reflect the views or policies of the U.S. Department of Education nor does mention of trade names, commercial products, or organizations imply endorsement by the U.S. Government."

48 C.F.R. § 3452.227-70. The contract with Ketchum did not include this disclosure language requirement.

<sup>5</sup> In addition to covert propaganda, our decisions have recognized two other types of information activities that violate the publicity or propaganda prohibition, including self-aggrandizement and materials characterized as purely partisan materials. *See* B-302504, Mar. 10, 2004.

similar to the HHS VNRs, that the Office of National Drug Control Policy (ONDCP) produced and distributed. B-303495, Jan. 4, 2005. Applying the same standard set forth in B-302710, we concluded that the prepackaged news stories of the ONDCP VNRs also violated the publicity or propaganda prohibition.

The VNR at issue here is not materially different from the HHS and ONDCP VNRs. It contains a prepackaged news story that fails to identify the Department to the targeted audience as the source of the prepackaged news story. Consistent with our HHS and ONDCP opinions, the Department's prepackaged news story constitutes covert propaganda and violates the publicity or propaganda prohibition. The Department contends that its prepackaged news story is not covert propaganda because it contains only "factual information," Talbert Letter, at 8, and it is not required to disclose the source of only factual information. In support of this view, the Department cites a July 30, 2004, opinion of the Office of Legal Counsel (OLC) of the Department of Justice. The OLC opinion disagreed with our May 2004 conclusion that HHS's prepackaged news stories violated the publicity or propaganda prohibition. OLC believes that if the content of the news stories is factual, the government need not disclose itself as the source of the news story; disclosure is only necessary if the news story or other communication advocates a point of view. *See* July 30, 2004, OLC Opinion at 7, 13.

We disagree. The failure of an agency to identify itself as the source of a prepackaged news story misleads the viewing public by encouraging the viewing audience to believe that the broadcasting news organization developed the information. The prepackaged news stories are purposefully designed to be indistinguishable from news segments broadcast to the public. When the television viewing public does not know that the stories they watched on television news programs *about the government* were in fact prepared *by the government*, the stories are, in this sense, no longer purely factual—the essential fact of attribution is missing.

Source identification is essential in assessing the credibility and utility of any communication. *See* Garth S. Jowett and Victoria O'Donnell, *Propaganda and Persuasion*, 215, 221-28 (1992) (noting the importance of source identification in analyzing information). OLC failed to recognize that withholding the source of information by the agency removes the prepackaged news story from the realm of "purely factual," since it severely inhibits the capability of the reader or listener to assess the credibility of the information proffered and its utility to the reader or listener.<sup>6</sup>

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<sup>6</sup> OLC provides several dictionary definitions of propaganda in its opinion. *See, e.g.*, July 30, 2004, OLC Opinion at 9 (defining propaganda as "to advocate, disseminate, and encourage a particular view, doctrine, or cause"). Accepting, for the purposes of discussion, these definitional measures of propaganda, both the HHS and the Department prepackaged news stories "advocate, disseminate, and encourage a particular point of view." The Department's prepackaged news story at issue "encourage[s] a particular view" when Ms. Ryan, the putative news reporter, states at the end of the story, "[T]his is a program that gets an A-Plus." The HHS prepackaged news story also "advocate[ed] and encouraged a particular point of view" through the selection of fact and perspectives highlighted or omitted. Only the most innocent, or naïve, would

For nearly 20 years, the Comptroller General has found source identification to be an essential element of government communications and has found agencies in violation of the prohibition when they failed to identify the government as the source. *See, e.g.*, B-223098, B-223098.2, Oct. 10, 1986 (Small Business Administration violated the prohibition when it prepared suggested editorials for placement in newspapers around the country, and did not disclose to the readers that the government was the source of the editorials); *see also* 66 Comp. Gen. 707, 708-9 (1987) (State Department violated prohibition by paying others to write op-ed pieces for publication in newspapers without revealing that the writer was paid by the State Department).<sup>7</sup> Over this same time period, Congress continued to re-enact the prohibition with little change and without criticism.

This year, Congress enacted section 6076 of the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. L. No. 109-13, 110 Stat. 231, 301 (May 11, 2005), which affirmatively rejected OLC's opinion. Section 6076 provides that no appropriations "may be used by an executive branch agency to produce any prepackaged news story intended for broadcast or distribution unless the story includes a clear notification within the text or audio of the prepackaged news story that the prepackaged news story was prepared or funded by that executive branch agency." Pub. L. No. 109-13, title VI, § 6076, 119 Stat. 231, 301 (May 11, 2005). The conference report accompanying Public Law 109-13 states that section 6076 "confirms the opinion of the Government Accountability Office dated February 17, 2005."<sup>8</sup> H.R. Conf. Rep. No. 109-72, at 158-59 (2005).

The Antideficiency Act prohibits authorizing an expenditure that exceeds available budget authority. *See* B-300325, Dec. 13, 2002. We have interpreted agency violations of explicit prohibitions on the use of appropriated funds as a violation of the Antideficiency Act. *See* B-302710, May 19, 2004; *see also* B-303495, Jan. 4, 2005. Accordingly, the Department violated the Antideficiency Act because no appropriations are available for the production of materials that violate the publicity or propaganda prohibition. The Antideficiency Act requires the Department to report immediately an Antideficiency Act violation to the President and Congress. *See* 31 U.S.C. §§ 1351, 1517(b). On the same day that the Department transmits reports of its violations to the President and

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conclude that the selection of facts and perspectives was not done to encourage the audience to have a favorable view of new legislation. Thus, even under the OLC analysis, these prepackaged news stories would be propaganda.

<sup>7</sup> We find no difference between explicit advocacy that may be contained in an editorial piece and implicit advocacy of a news story that purposefully reports certain facts and omits other facts to encourage public support for its position.

<sup>8</sup> The conferees were referring to the Comptroller General's circular letter to Heads of Agencies alerting the agencies to our analysis concerning unattributed prepackaged news stories and referencing our HHS and ONDCP opinions.

Congress, the Department must also send copies of those reports to the Comptroller General.<sup>9</sup> *See id.*

## THE MEDIA ANALYSIS

Your letter also raised concerns about the use of appropriated funds to conduct the media analysis. In particular, you expressed concern that the Department may have violated the law by asking Ketchum to assess media reports to determine whether the media reports, among other things, included the message that “The Bush Administration/the GOP is committed to education.”

In a work request, the Department directed Ketchum to “conduct baseline research to benchmark the media coverage for the messages associated with the No Child Left Behind Act . . . in trade and consumer media outlets.” Work Request 2, Statement of Work; Work Request 8, Statement of Work. The Department also directed Ketchum to “use a combination of quantitative and qualitative media analyses . . . [to] help determine if the desired messages are reaching the target audiences; if the issue is being mentioned in a positive way as part of the editorial content; and if spokespeople are effectively referencing the issue in news articles.” *Id.* The stated purpose for the work request was to assist the Department “in determining if the public is gaining an understanding of the law . . . [and] in shaping and designing media activities.” *Id.*

Ketchum delivered several reports to the Department, covering the time period of April 2003 through January 2004.<sup>10</sup> Talbert Letter, at 4. To compile these reports, Ketchum analyzed a random sample of news articles from trade publications, newspapers, magazines, and television and radio programs that referenced the NCLB Act in the text or headline and were published in the relevant time period. *See, e.g.,* No Child Left Behind Benchmark Analysis, April–June 2003 at 3. Ketchum then assigned a value or algorithm to each article based on four criteria, including (1) the type of publication or media outlet publishing the article, assigning higher points to publications that are more widely read; (2) inclusion of positive and negative messages, noting that key messages were determined jointly by the Department and Ketchum; (3) inclusion of expert quotes in support of NCLB; and (4) tonality of the article. *Id.* at 4.

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<sup>9</sup> An agency may send copies of its Antideficiency Act reports in electronic form to [AntideficiencyActReports@gao.gov](mailto:AntideficiencyActReports@gao.gov). B-304335, Mar. 8, 2005. In the alternative, an agency may send copies of reports to the following address: Comptroller General of the United States, U.S. Government Accountability Office, Antideficiency Act Reports, Room 7165, 441 G Street, NW, Washington, DC 20548.

<sup>10</sup> The Department provided us with copies of six benchmark analysis reports, including two quarterly reports, analyzing articles published from April through June 2003 and July through September 2003, and four monthly reports, analyzing articles published during October 2003 through January 2004.

In order to determine whether an article had a positive or negative message, Ketchum looked for the presence of 23 different themes within an article. The positive messages that Ketchum looked for in news articles were:

- NCLB supports learning in the early years, helping to prevent learning difficulties that arise later;
- NCLB provides more information for parents about their child's progress;
- NCLB alerts parents to important information on the performance of their child's school;
- NCLB is working to close the achievement gap between "haves" and "have nots";
- NCLB improves teaching and learning by providing better information to teachers and principals/fairer standards for testing;
- NCLB ensures teacher quality is a high priority;
- NCLB gives more resources to schools, such as tutoring services;
- NCLB allows parents more choice (transfer option);
- NCLB makes schools accountable for students' success;
- The Bush Administration/the GOP is committed to education;<sup>11</sup> and
- NCLB is based on scientific methods/proven research to achieve results.

The negative messages that Ketchum looked for were:

- NCLB is not sufficiently funded;
- NCLB law is too vague and confusing and too difficult for states to implement;
- Federal testing requirements contradict existing state requirements; states will have to spend a lot to develop new tests;
- There are wide discrepancies between state criteria for evaluating under performing schools;
- Teacher training programs do not have enough money to train teachers to meet new requirements;
- Better schools will become too crowded/burdened as the school transfer option progresses;
- In some districts, there are no better schools to which students may transfer, or the better schools are already crowded;
- Spending money on transporting students to better schools means taking money away from schools; parents have to spend extra time/money for transportation;
- States do not have enough flexibility; federal government/Bush administration is interfering;
- Increased testing is not a substitute for education reform; "teaching to the test";
- The new law may cause a teacher shortage, as qualification requirements are too rigid; teachers are set up to fail; and

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<sup>11</sup> This positive factor appeared only in the second quarter report, July 2003–October 2003. In other reports the factor appeared as "The Bush Administration is committed to education" or "The Bush Administration/federal government is committed to education."

- States are lowering their standards to avoid negative labels/unfairly stigmatizing schools.

After scoring each article, Ketchum provided the Department with a list of the highest and lowest scoring articles, an analysis of the most prevalent positive and negative messages—both nationally and on an individual state basis—and a summary of articles written by the most prevalent reporters.

As a general matter, an agency may use appropriations to engage in information dissemination and related activity, such as the media analysis, to further its legitimate interest of informing the public about its policies and programs. *See* B-302504, Mar. 10, 2004 (quoting B-130961, Oct. 26, 1972). Indeed, our decisions reflect societal values in favor of a robust exchange of information between the government and the public it serves. *See, e.g.*, B-184648, Dec. 3, 1975 (discussing an agency’s “legitimate interest in communicating with the public”).

After examining all the benchmark analysis reports, including two quarterly reports, we found the assessment of one message that appeared in the second quarter analysis to be inappropriate. Ketchum looked for the positive message—“The Bush Administration/the GOP is committed to education”—in a random sample of articles. The five other reports did not analyze this factor or any other objectionable factor. Under the Purpose Statute, 31 U.S.C. § 1301(a), appropriated funds may be used only for purposes for which they were appropriated and for any expenses that are reasonably necessary for the accomplishment of that purpose. B-303170, Apr. 22, 2005. Stated differently, Congress appropriates funds for official government functions, not for political activities of the administration, B-302504, Mar. 10, 2004, or personal obligations of federal employees, B-261720, Apr. 1, 1996. Appropriated funds are not available to gather information concerning the media’s perception of a political party.

The Department used the “Departmental Management—Program Administration” appropriation under the Consolidated Appropriations Resolution, 2003, to contract for the media analysis. Talbert Letter, at 1. This appropriation is available for carrying out the Department of Education Organization Act of 1979, Pub. L. No. 96-88, 93 Stat. 668 (Oct. 17, 1979). *See* Pub. L. No. 108-7, div. G, tit. III, 117 Stat. 11, 331-2 (Feb. 20, 2003). This Act requires that the Department “inform the public regarding federally supported education programs. . . and . . . collect data and information on applicable programs for the purpose of obtaining objective measurements of the effectiveness of such programs in achieving the intended purposes of such programs.” 20 U.S.C. §§ 1231a(2), (3).

While the Department may use its funds for a media analysis consistent with the Department’s public information functions under section 1231a(2), the gathering of information regarding the media and public’s favorable view of the Republican (or any other political) Party does not fall within the information functions Congress authorized the Department to perform. We see no use for such information except for partisan, political party purposes. Engaging in a purely political activity such as this is not a proper use of appropriated funds. *See* B-147578, Nov. 8, 1962 (noting that appropriated funds are not available for purely partisan purposes or in an effort to aid a political

party). *Cf.* B-248991, Mar. 3, 1993 (examining the apportionment of “mixed trips” involving official and political business when determining what expenses were consistent with the requirements of 31 U.S.C. § 1301).

The evaluation of the media’s representation of the Republican Party comprises, however, a small part of the entire analysis that Ketchum conducted at the direction of the Department. It is virtually impossible to separate and cost out the amount of funds associated with this factor. The Department incurred little if any additional expense by including the improper factor in one of six analyses, and there is no evidence that the Department otherwise spent funds to benefit the Republican Party. *See* B-136762, Aug. 18, 1958 (finding that although no funds were available for the Deputy Assistant Secretary of Defense’s speech, no additional funds were expended in delivering the speech). We caution that if the Department chooses to conduct media analyses in the future, it should be more diligent in its efforts to ensure that such analyses are free from explicit partisan content.<sup>12</sup>

Although we question whether the media analysis as structured was an effective means of determining where the public needs more information to ensure that parents have “accurate information on which to base decisions about their children’s education,”<sup>13</sup> or to determine “if the public is gaining an understanding of the law,” we do not find that it violated the publicity or propaganda prohibition. Generally, we will not object to an agency’s use of appropriated funds to engage in information functions if the agency justifies its activity as “made in connection with official duties” and there is a reasonable basis for that justification. B-302504, Mar. 10, 2004; B-144323, Nov. 4, 1960.

As its justification for conducting a media analysis, the Department contends that the purpose of the media analysis was to identify “where the media, and therefore the public, needed more information or explanation of how the law would benefit the public” and to ensure that parents would have “accurate information upon which to base decisions about their children’s education.”<sup>14</sup> Talbert Letter, at 6. Although we question the efficacy of using a media analysis of positive and negative messages for assessing the public’s knowledge, we decline to find that this analysis is improper. We have consistently held that an agency’s information dissemination functions include informing the public about the administration’s policies and the defense of those policies. *See* B-302992, Sept. 10, 2004; B-302504, Mar. 10, 2004; B-223098, B-223098.2, Oct. 10, 1986. It is therefore not unreasonable for the Department to track the messages reaching the public. To find otherwise would unduly restrain the recognized and legitimate exercise of the Department’s and the Administration’s ability to inform the public of its policies,

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<sup>12</sup> The Department’s stated purpose in the contract is to determine “if the public is gaining an understanding of the law.” Using an analysis of positive and negative messages—all of which might be true—does not further the Department’s goal of understanding what the public knows about the NCLB Act.

<sup>13</sup> Talbert Letter, at 6.

<sup>14</sup> Work Request 2, Statement of Work; Work Request 8, Statement of Work.

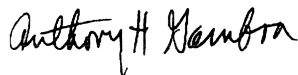


to justify those policies and to rebut attacks on those policies. *Cf.* B-302504, Mar. 10, 2004 (noting that restricting materials with some political content would curtail the Administration's legitimate exercise of authority to defend and explain its policies).

## CONCLUSION

The Department's use of appropriated funds to produce a prepackaged news story regarding Supplemental Educational Services that failed to inform the viewing audience of the government source violates the publicity or propaganda prohibition. As we have stated in previous opinions and as recently affirmed by Congress, to avoid a violation of the publicity or propaganda prohibition, an agency must inform the viewing public that the government is the source of the information disseminated. Moreover, because the Department had no appropriation available to produce and distribute materials in violation of the publicity or propaganda prohibition, the Department violated the Antideficiency Act, 31 U.S.C. § 1341. In accordance with 31 U.S.C. §§ 1351, 1517(b), the Department must report immediately its Antideficiency Act violation to the President and Congress and also send a copy of all reports to the Comptroller General.

With regard to the media analysis, there were no appropriations available for analyzing the media and public's opinion concerning the Republican Party's (or any other political party's) commitment to education. However, the media analysis as a whole was within the information functions authorized to be performed and the inclusion of a partisan factor in one of six media reports incurred little if any additional expense. Nevertheless, we caution that, if the Department chooses to conduct media analyses in the future, it be more diligent in its efforts to ensure that such analyses be free from such explicit partisan content.



Anthony H. Gamboa  
General Counsel

## DIGEST

1. Consistent with prior case law, we conclude that the Department of Education's (Department) use of appropriated funds to produce and distribute a prepackaged news story regarding programs under the No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (Jan. 8, 2002), violated the publicity or propaganda prohibition, *see, e.g.*, Pub. L. No. 108-199, div. F, title, VI, § 624, 118 Stat. 3, 356 (Jan. 23, 2004). We disagree with the Department's contention that the prepackaged new story is not covert propaganda because it contained only factual information. To constitute legitimate information dissemination activity, the Department must inform the viewing public that the government is the source of the information dissemination.

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2. There are no appropriated funds available for the Department to conduct a media analysis that gathers information regarding the media and public's perception of the Republican Party's (or any other political party's) commitment to education. Because the Department incurred little if any expense by including this purely partisan factor in an otherwise acceptable media analysis, we find that the Department did not violate the publicity or propaganda prohibition. However, we caution that if the Department conducts future media analyses, it should be more diligent in its efforts to ensure that such analyses are free from explicit partisan content.



GAO

Accountability • Integrity • Reliability

United States Government Accountability Office  
Washington, DC 20548

B-305368

September 30, 2005

The Honorable Frank R. Lautenberg  
The Honorable Edward M. Kennedy  
United States Senate

Subject: *Department of Education—Contract to Obtain Services of Armstrong Williams*

This responds to your letter of January 10, 2005, in which you asked that we consider the Department of Education's arrangements with Ketchum, Inc., and Mr. Armstrong Williams concerning the "No Child Left Behind" program. Your letter was prompted by some press reports about a Department of Education contract with Ketchum, Inc., and Ketchum subcontracts with the Graham Williams Group (GWG). Among other things, the press reports allege that pursuant to these arrangements, the Department paid Mr. Williams to promote the No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (Jan. 8, 2002). You asked whether, in contracting for the services of Armstrong Williams, the Department violated the publicity or propaganda prohibition.<sup>1</sup>

As explained below, we find that the Department contracted for Armstrong Williams to comment regularly on the No Child Left Behind Act without assuring that the Department's role was disclosed to the targeted audiences. This violated the publicity or propaganda prohibition for fiscal year 2004 because it amounted to covert propaganda. As a result of this violation, the Department also violated the Antideficiency Act, 31 U.S.C. § 1341.

#### BACKGROUND

Consistent with our usual practice, we requested factual information and the Department's legal justification for using appropriated funds to obtain the services provided by Mr. Williams and his company. Letter from Susan Poling, Managing Associate General Counsel, GAO, to Kent Talbert, Acting General Counsel, Department of Education, Jan. 28, 2005 (hereinafter, Poling Letter). The Department delayed its response to our request pending completion of work by the Inspector

<sup>1</sup> Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, div. F, title VI, § 624, 118 Stat. 3, 356 (Jan. 23, 2004).

General (IG) on whether the Department's arrangements with Ketchum and GWG complied with the Federal Acquisition Regulation and other pertinent contract law.

The IG issued his report on April 15, 2005. ED-OIG Report No. A19-F0007, April 15, 2005 (hereinafter, "ED-OIG Report"). The Department "accept[ed] the report as drafted and embrace[d] the recommendations" made in it. Letter from Margaret Spellings, Secretary, Department of Education, to John P. Higgins, Jr., Inspector General, Department of Education, Apr. 15, 2005. Subsequently, the Department's Acting General Counsel replied to our request. Letter from Kent Talbert, Acting General Counsel, Department of Education, to Susan Poling, Managing Associate General Counsel, GAO, May 18, 2005 (hereinafter, Talbert Letter). In determining the facts pertinent to this opinion, we relied upon the ED-OIG Report, the Acting General Counsel's reply, and the documents provided with them.

The No Child Left Behind Act (NCLB Act) became law in January 2002. In order to disseminate information to the public about the NCLB Act, the Department decided to acquire media relations services. On May 14, 2003, the Department awarded Ketchum, Inc. (hereinafter, Ketchum) a 1-year "indefinite delivery, indefinite quantity" (IDIQ) contract, with three renewal options. ED-OIG Report at 8. Over time, the Department issued multiple task orders and work requests under the Ketchum contract. ED-OIG Report at 2. Two of those task orders were for the services of Armstrong Williams and his company, GWG.

According to the IG report, Mr. Williams initially approached the Secretary of Education in March 2003 with an undated written proposal that the Graham Williams Group (GWG) do some work for the Department.<sup>2</sup> *Id.* at 5. Mr. Williams told the Department at the time (and later repeated to the IG) that he was willing to accept significantly less for his services than he would normally charge because "he believed in NCLB." *Id.* at 6. In November 2003, the Department directed Ketchum to arrange a subcontract with GWG for a minority outreach program featuring Mr. Williams. *Id.* For this reason, Ketchum submitted a formal proposal to the Department for GWG to regularly comment on the NCLB Act during the course of his broadcasts and to produce, among other things, two television and two radio advertisements for broadcast during Mr. Williams's weekly television and radio show, "The Right Side." *Id.* See also Talbert Letter, Exhibit 1: Memorandum from Monica Marshall, Senior Vice President, Ketchum, to John Gibbons, Director of Public Affairs, and D.J. Nordquist, Deputy Director of Public Affairs, Department of Education, Nov. 17, 2003.

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<sup>2</sup> Mr. Williams is a syndicated columnist and commentator. He founded and heads GWG, which represents Mr. Williams and owns and produces the shows that he hosts. See Armstrong Williams, *About Armstrong—The Graham Williams Group*, at <http://www.armstrongwilliams.com> (last visited Sept. 29, 2005).

The Department adopted the Ketchum proposal<sup>3</sup> and, on January 6, 2004, issued Task Order No. 9,<sup>4</sup> which amended the Ketchum contract and made \$113,441.06 available for the conduct of a six-month (from December 2, 2003, through June 2, 2004) minority outreach campaign using GWG. The Statement of Work for Task Order No. 9 states that Ketchum “shall arrange” for the production of two television and two radio ads that would run on “The Right Side,” featuring the Secretary of Education and Mr. Williams and focus on the NCLB Act.<sup>5</sup> It also states that Ketchum “shall arrange for Mr. Williams to regularly comment on NCLB.”

The Statement of Work also set out a list of “Deliverables” that included two television ads and two radio ads “promoting NCLB,” to be broadcast during Armstrong Williams’s radio and television shows; an option for the Secretary and other Department officials to appear from time to time as studio guests to discuss the NCLB Act; a 6-month advertising campaign in “The Right Side” with Armstrong Williams, with “bonus ads” during Black History month and on Rev. Martin Luther King, Jr.’s Birthday; and a requirement that Mr. Williams “utilize his long term working relationship with America’s Black Forum, where he appears as a guest commentator, to encourage the producers to periodically address the No Child Left Behind Act (67 million viewers; reach 87% of urban market).”

The Statement of Work required Ketchum to provide monthly reports to the Department. After the Department issued Task Order No. 9 to Ketchum, Ketchum and GWG entered into a “firm-fixed price subcontract,” effective retroactively from December 2, 2003, through June 2, 2004, to execute the task order. Talbert Letter, Exhibit 2. A copy of the Statement of Work for Task Order No. 9 was included as an attachment to that subcontract. *Id.* On May 18, 2004, Ketchum proposed that the Department renew and expand those arrangements for an additional 6-month period.<sup>6</sup> The Department agreed and on June 25, 2004, issued Task Order No. 16

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<sup>3</sup> The Department’s Statement of Work “mirrored the Ketchum proposal,” *see* ED-OIG Report at 7, which was, in turn, based on the GWG proposal “with limited modifications.” *Id.* at 6.

<sup>4</sup> Talbert Letter, Exhibit 3: Contract No. ED-03-PO-1725, Amendment of Solicitation/Modification of Contract No. 7, Jan. 6, 2004 (hereinafter Task Order No. 9). This task order took effect retroactive to December 2, 2003. Task Order No. 9.

<sup>5</sup> The Right Side is a radio and television show hosted by Armstrong Williams.

<sup>6</sup> Talbert Letter, Exhibit 4: Memorandum re: “Response to Statement of Work #16,” from “Ketchum” to Janet D. Scott, Contracting Officer, Department of Education, May 18, 2004.

extending the outreach campaign until December 25, 2004.<sup>7</sup> The Statement of Work for Task Order No. 16 was nearly identical to that of Task Order No. 9,<sup>8</sup> and Ketchum and GWG implemented it in the same manner that they implemented Task Order No. 9.

Over the course of both task orders, GWG submitted to Ketchum a series of monthly invoices and reports.<sup>9</sup> Ketchum passed these invoices and reports to the Department<sup>10</sup> as part of its billing process.<sup>11</sup> Ketchum's invoices included line items for its own administrative expenses, plus an additional line item indicating that it had paid GWG's subsidiary, Right Side Productions, Inc., along with the date and amount.<sup>12</sup> All of GWG's invoices billed for "Professional Services."<sup>13</sup> Some of those invoices included a line item for "Ad production,"<sup>14</sup> "Ad costs,"<sup>15</sup> or "Ad Campaign."<sup>16</sup> The IG found that the invoices paid by the Department did not clearly identify what

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<sup>7</sup> See Talbert Letter, Exhibit 5: Contract No. ED-03-PO-1725, Amendment of Solicitation/Modification of Contract No. 20, June 25, 2004 (hereinafter Task Order No. 16).

<sup>8</sup> ED-OIG Report at 7.

<sup>9</sup> See Talbert Letter, Exhibits 28-40.

<sup>10</sup> Talbert Letter at 4, nn.6, 8; ED-OIG Report at 15.

<sup>11</sup> In a letter to the Federal Communications Commission (FCC) which the Department submitted to us, Ketchum said, "GWG produced invoices detailing run times and locations for the ads, which Ketchum forwarded to the government for payment." Talbert Letter, Exhibit 47. GWG's monthly reports itemized the run times and locations for the ads, but the GWG invoices did not.

The FCC is presently conducting an ongoing investigation into whether any laws under its jurisdiction were violated as a result of actions taken in this matter. See FCC Press Release dated Jan. 14, 2005, at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-256115A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-256115A1.pdf) (last visited Sept. 29, 2005).

<sup>12</sup> Talbert Letter, Exhibits 7-14.

<sup>13</sup> Talbert Letter, Exhibits 15-26.

<sup>14</sup> *E.g.*, Talbert Letter, Exhibit 15.

<sup>15</sup> *E.g.*, Talbert Letter, Exhibit 16.

<sup>16</sup> *E.g.*, Talbert Letter, Exhibit 22.

the Department was paying for.<sup>17</sup> None of the invoices provided the Department by Ketchum or GWG specifically referred any of the “deliverables” listed in the Statements of Work.<sup>18</sup>

GWG’s monthly reports were organized into two sections. Every report began with a list (often lengthy) of what GWG characterized as activities undertaken during that month in which “Mr. Armstrong Williams promoted NCLB.”<sup>19</sup> The activities listed included radio and television shows, radio stations, networks, published columns, and other activities. Most of those entries for these activities consisted solely of dates and event names. Other entries were more detailed. For example, in the report for February 2004, GWG included in its list the entry, “Sinclair Broadcasting—February 16 & 23, 2004. Two (2) minute commentary devoted to NCLB.”<sup>20</sup> The January report listed and reproduced in full a column that Mr. Williams had published “devoted to NCLB” that appeared in 34 newspapers.<sup>21</sup> (Mr. Williams did not disclose in the column his contractual relationship to the Department.) The monthly reports also listed the dates, times, and stations on which the GWG-produced TV and radio advertisements ran during that month.<sup>22</sup>

The IG found that, taken together, Mr. Williams’s 12 monthly reports listed “168 activities other than ads . . . promoting NCLB.” ED-OIG at 15. We asked the Department for copies or transcripts of all of the interviews, speeches, columns, and other public statements that Armstrong Williams made promoting the NCLB Act as result of its subcontracts with Ketchum.<sup>23</sup> Other than the one column which GWG reproduced in full as part of its Monthly Report for January 2004, *see* Talbert Letter, Exhibit 29, the Department did not provide us with copies or transcripts for any of the activities listed in the monthly reports. For this reason, we searched the internet for copies, transcripts, or press reports of the other public statements that GWG listed in its monthly reports. We were unable to locate any of those statements on the internet, but we did find other columns that Mr. Williams made promoting the

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<sup>17</sup> ED-OIG Report at 15.

<sup>18</sup> *Id.* at 1, 18 (“the invoices received and paid by the Department were vague”).

<sup>19</sup> *E.g.*, Talbert Letter, Exhibit 29 (Minority Outreach Campaign, Task Order No. 9, Monthly Report for January 2004).

<sup>20</sup> Talbert Letter, Exhibit 30.

<sup>21</sup> Talbert Letter, Exhibit 29.

<sup>22</sup> Talbert Letter, Exhibits 28-40.

<sup>23</sup> Poling Letter.

NCLB Act during the period covered by the Department's task orders.<sup>24</sup> However, we could not directly connect these other columns to Task Order Nos. 9 and 16 because, while the GWG and Ketchum proposals stated that Mr. Williams would "place stories and commentaries on NCLB"<sup>25</sup> in the media, GWG did not list these other columns in its monthly reports.

The Department told us that it has paid Ketchum a total of \$188,543.48 for Task Order Nos. 9 and 16. Of that amount, \$186,000 covered amounts that Ketchum paid GWG.<sup>26</sup> Talbert Letter at 9. The Department paid these amounts using funds appropriated for "Departmental Management—Program Administration" in the Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, div. E, title III, 118 Stat. 3, 262 (Jan. 23, 2004). According to the Department, it has paid eight of the twelve monthly Ketchum invoices. Talbert Letter at 10.

## DISCUSSION

Your letter asked us to determine whether the Department's arrangements with Ketchum, GWG, and Armstrong Williams violated the governmentwide publicity or propaganda prohibition, as contained in the 2004 fiscal year appropriations act.<sup>27</sup> This prohibition states that "[n]o part of any appropriation . . . shall be used for publicity or propaganda purposes within the United States not heretofore authorized by the Congress."<sup>28</sup> It bars agencies from using appropriations (a) to produce or distribute "covert propaganda," (b) for purposes of self-aggrandizement, and (c) for purely partisan purposes. *E.g.*, B-304272, Feb. 17, 2005; B-302504, Mar. 10, 2004; B-178528, July 27, 1973. In our view, the Department violated the publicity or propaganda prohibition when it issued task orders to Ketchum directing it to arrange for Mr. Williams to regularly comment on the NCLB Act without requiring Ketchum to ensure that Mr. Williams disclosed to his audiences his relationship with the Department. This qualifies as the production or distribution of covert propaganda.

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<sup>24</sup> Our research revealed several other columns that Mr. Williams published on the NCLB Act during this period which were not mentioned in the monthly reports. *See, e.g.*, Townhall.com, *The Education Costa Nostra*, originally at <http://www.Townhall.com/columnists/ArmstrongWilliams/printaw20040301.shtml> (Mar. 1, 2004) (last visited Sept. 1, 2005); now available at <http://www.davidstuff.com/incorrect/williams1.htm> (Mar. 1, 2004) (last visited Sept. 29, 2005).

<sup>25</sup> Talbert Letter, Exhibits 1, 4; ED-OIG Report at 7, 12.

<sup>26</sup> The Department has already agreed to the IG's recommendation that it recover some of these amounts. ED-OIG Report at 19; ED-OIG Report, Attachment 1 at 6.

<sup>27</sup> Pub. L. No. 108-199, div. F, title VI, § 624, 118 Stat. at 356.

<sup>28</sup> *Id.*



This violation, in turn, caused the Department to violate the Antideficiency Act, 31 U.S.C. § 1341. We explain these findings below.

### Violation of the Publicity or Propaganda Prohibition

In previous opinions and decisions, we have found “materials . . . prepared by an agency or its contractors at the behest of the agency and circulated as the ostensible position of parties outside the agency” amount to covert propaganda that violates the prohibition. B-229257, June 10, 1988. A critical element of this violation is the concealment of, or failure to disclose, the agency’s role in sponsoring the material. *E.g.*, B-303495, Jan. 5, 2005. For example, in B-223098, B-223098.2, Oct. 10, 1986, the Small Business Administration (SBA) prepared “suggested editorials” and distributed them to newspapers. The editorials advocated public support for an administration proposal to merge the SBA with the Department of Commerce. We found that those agency-prepared editorials were misleading as to their origins. The agency intended for the newspapers to print the editorials as their own position without identifying them as SBA-authored documents. This effort to conceal the agency’s authorship and make it appear that respected, independent authorities were endorsing the agency’s position went “beyond the range of acceptable agency public information activities” and violated the publicity or propaganda prohibition. *Id.* Similarly, in 66 Comp. Gen. 707 (1987), we held that newspaper articles and editorials (supporting the government’s Central American policy) that were prepared by paid consultants at government request and published as the work of nongovernmental parties violated the prohibition. Again, it was the covertness of the government’s actions that led to the violation. In that case, the government was attempting to convey a message to the public advocating the government’s position while misleading the public as to the origins of the message. *Id.* at 709.

In this case, the Department directed Ketchum to subcontract for Armstrong Williams to convey a message to the public on behalf of the government without disclosing to the public that the messengers were acting on the government’s behalf and in return for the payment of public funds. The Statements of Work for both task orders explicitly stipulated that “Ketchum shall arrange for Mr. Williams to regularly comment upon NCLB.” Talbert Letter, Exhibit Nos. 3 and 5. The Statements of Work also required Mr. Williams to “utilize his long term working relationship with America’s Black Forum . . . to encourage the producers to periodically address the No Child Left Behind Act.” *Id.*

The Department knew when it directed Ketchum to contract with GWG that Mr. Williams’s commentary and discussion under these Statements of Work would endorse the NCLB Act. Both Ketchum and Mr. Williams had stressed to the Department that he was willing to accept significantly less than he would normally charge for his services because “he believed in the NCLB.” ED-OIG Report at 6. *See also* Talbert Letter, Exhibits 1 and 4. In fact, as the IG noted, GWG specifically proposed to “win the battle for media space [through] favorable commentaries [that] will amount to passive endorsements from the media outlets that carry them.”

ED-OIG Report at 12 (quoting the GWG proposal presented to the Department in November 2003).

To meet the requirements of the Statements of Work, Mr. Williams reported to the Department on a monthly basis. In those reports he listed the activities in which he had “promoted NCLB.” The IG counted in those monthly reports 168 separate activities in that effort, including speeches, interviews, appearances, and a published newspaper column.<sup>29</sup> The Department did not provide us recordings or transcripts of those activities. We only received the newspaper column from the Department because GWG reproduced it in whole in one of its monthly reports. In that newspaper column, Mr. Williams praised NCLB, the President, and the Secretary of Education.<sup>30</sup> We independently located on the internet other activities promoting the

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<sup>29</sup> The Department’s Statements of Work do not mention the use of published columns or other media. However, the IG reported that “there were numerous indicators during the formation process that the GWG work under the work requests could include providing or attempting to arrange favorable NCLB commentary through various media outlets.” ED-OIG Report at 11. For example, the GWG and Ketchum proposals stated that Ketchum and Mr. Williams would “work with African-American newspapers to place stories and commentary on NCLB.” Talbert Letter, Exhibit 1: Memorandum from Monica Marshall, Senior Vice President, Ketchum, to John Gibbons, Director of Public Affairs, and D.J. Nordquist, Deputy Director of Public Affairs, Department of Education, Nov. 17, 2003. *See also* Talbert Letter, Exhibit 4: Memorandum from “Ketchum,” to Janet D. Scott, Contracting Officer, Department of Education, May 18, 2004; ED-OIG Report at 7, 12.

More importantly, GWG’s monthly reports identifying its activities in performance of the task orders explicitly notified Ketchum and the Department that Mr. Williams was publishing columns and using other media outlets to “promote” NCLB in order to satisfy his obligations under the contract.

<sup>30</sup> *See* Townhall.com, *Secretary Paige and Mayor Williams fight for change*, at <http://www.townhall.com/columnists/ArmstrongWilliams/aw20040107.shtml> (Jan. 7 2004) (last visited Sept. 1, 2005). This column stated, among other things:

“President Bush’s No Child Left Behind Act was designed to redress th[e] ‘soft bigotry of expectations’ [i.e., that ‘many teachers believe that poor students—mostly of color—cannot really do much better’ in school]. . . .

“[Secretary] Paige has long been at the forefront of the movement to increase educational options for underprivileged students. . . .

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NCLB Act that Mr. Williams undertook between December 2, 2003 and December 25, 2004, but those activities cannot be directly connected to the Department's Task Orders because they were not listed in GWG's reports.

The IG did not opine on whether the activities that it identified violated the prohibition on publicity or propaganda.<sup>31</sup> His review was limited to "determin[ing] whether the initial award to Ketchum and the subsequent work requests involving the GWG were in compliance with the Federal Acquisition Regulation (FAR) and other pertinent contract law." ED-OIG Report at 1. The IG also evaluated the "effectiveness of the oversight function" with respect to the Ketchum contract and the GWG work requests. *Id.* Nevertheless, the IG noted that "because other activities relating to commentary were included in the [Statements of Work] and activity reports, and because the invoices received and paid by the Department were vague, the appearance is that the Department may have been paying for more than just the advertising." *Id.* at 18.

It is clear to us from the monthly reports and invoices provided by GWG that Mr. Williams promoted the NCLB Act at the behest of the Department and that he thought it was part of the contract. It is also clear that the Department did not ask Ketchum to ensure that the Department's sponsorship of Mr. Williams's activities in promotion of the NCLB Act was disclosed to his targeted audiences. The Department did not include in its contracts a requirement for Ketchum, and hence Mr. Williams, to disclose to intended audiences the fact that the Department had retained him to comment upon the NCLB Act. In the column promoting the NCLB Act that Mr. Williams reproduced in his monthly report for January 2004,

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(...continued)

"Providing children with a decent education is something we can do to haul our society along. We may not be able to end all inequality; but we can, as individuals, demand that our underprivileged children have options when it comes to the greatest single instrument of empowerment—education. This is a rather straightforward goal of men like Secretary Paige . . . And it is the next great battleground in the fight for social equality."

<sup>31</sup> Recently, the IG published another report reviewing 15 grants and 20 contracts that the Department awarded for public relations services during fiscal years 2002–2004, but did not include the contract and subcontracts at issue here. ED-OIG Report No. ED-OIG/113-F0012, September 2005 at 1. This report did consider whether the Department had violated the prohibition on publicity or propaganda in the 15 grants and 20 contracts that it reviewed. *Id.* at 3.

Mr. Williams did not disclose the Department's sponsorship role.<sup>32</sup> As noted above, we asked the Department to provide us copies or transcripts of all of the activities that GWG listed in its monthly reports as "promotional" events, but the Department did not provide us with any of them—with the exception of the one column which GWG included in its January report. For this reason, we could not independently verify whether Mr. Williams made appropriate disclosures to his audiences and colleagues during the other activities listed in GWG's monthly reports.<sup>33</sup>

Mr. Williams, however, has publicly acknowledged that he did not regularly, if at all, disclose to his audiences or the colleagues he was to influence that he had been hired at the Department's request to promote the NCLB Act.<sup>34</sup> For these reasons, we think it is clear that the Department violated the publicity or propaganda prohibition by using appropriated funds to arrange for commentary by Armstrong Williams on the NCLB Act without assuring that the Department's role in sponsoring that commentary was disclosed to the targeted audiences.

#### The Department's Position

In its reply to us, the Department did not dispute that Armstrong Williams made favorable commentaries on the NCLB Act during the period covered by Task Order Nos. 9 and 16. Nor did it dispute that the Statements of Work in the Task Orders required Mr. Williams to comment regularly on the NCLB Act. Instead, the Department argued that it contracted only for television and radio advertisements featuring Mr. Williams.<sup>35</sup> Talbert Letter at 2. The Department offered three points in

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<sup>32</sup> See Townhall.com, *Secretary Paige and Mayor Williams fight for change*, at <http://www.townhall.com/columnists/ArmstrongWilliams/aw20040107.shtml> (Jan. 7, 2004) (last visited Sept. 1, 2005).

<sup>33</sup> As noted above, we found on the Internet several other columns that Mr. Williams published on the NCLB Act between December 2003 and January 2005, the period covered by these task orders, but he did not list these in his monthly reports. These columns did not disclose that the Department had retained Mr. Williams to comment on the NCLB Act.

<sup>34</sup> See Media Matters for America, *Armstrong Williams's conflicting statements on disclosure*, at <http://mediamatters.org/items/200501110001> (video recording at <http://mediamatters.org/static/video/williams-200501100010.wmv>) (last visited Sept. 29, 2005).

<sup>35</sup> To the extent that the Department maintains that the advertisements were the main deliverables under Task Order Nos. 9 and 16, the IG found that the Department "only received two of the eight ads it was supposed to receive under both work requests," yet it paid the full invoiced prices anyway. ED-OIG at 16.

(continued...)

support of its position: First, the only portions of its Statements of Work that have any legal significance are the lists of “deliverables.” The Department argues that its task orders did not procure Mr. Williams’s commentary, which meant there was nothing for the Department to disclose. Second, the Department did not pay any appropriated funds for covert propaganda. Third, the Department’s task orders represented the legitimate dissemination of information to the public. *Id.* We do not agree.

The Department’s first point is that the only portions of its Statements of Work that have any legal significance are the lists of “deliverables.” Although the Department acknowledges that its Statements of Work contained language directing Ketchum to “arrange for Mr. Williams to regularly comment upon NCLB,” the Department stresses that this language was not in the lists of “deliverables” included in the Statements of Work.<sup>36</sup> Talbert Letter at 4–5. The Department offers no explanation of the meaning or significance of the rest of the language contained in the Statements of Work, nor does it offer any precedent in support of its position.

We identified no case law supporting the Department’s position that contractual obligations are limited to those enumerated as deliverables.<sup>37</sup> On the contrary, the courts have long recognized that a “cardinal principle of contract construction [is] that a document should be read to give effect to all its provisions and to render them consistent with each other.” *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63 (1995). *See also KiSKA Construction Corp. v. Washington Metropolitan Area Transit Authority*, 321 F.3d 1151, 1163 (D.C. Cir. 2003); Restatement (Second) of Contracts, § 203(a). The Department’s approach, however, would have us ignore key sentences contained in the Statements of Work and assign to them no legal

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We reviewed the GWG-produced television and radio ads that the Department provided to us. We found that those ads did not violate the prohibition on publicity or propaganda. They clearly disclosed to the target audiences that the Department had paid for them.

<sup>36</sup> As noted above, each list of “Deliverables” specified two television ads and two radio ads promoting the NCLB Act ; an option for the Secretary and other Department officials to appear from time to time as studio guests to discuss the NCLB Act; a 6-month advertising campaign in *The Right Side* with Armstrong Williams, with bonus ads during Black History month and on Rev. Martin Luther King, Jr.’s Birthday; and a requirement that Mr. Williams utilize his influence with America’s Black Forum to encourage the producers to periodically address the NCLB Act.

<sup>37</sup> We also note that the FAR, which does not require deliverables, does require that the statement of work define the requirements and specific work to be accomplished. *See, e.g.*, 48 C.F.R. §§ 37.602-1(a), 16.504(a).

significance. Indeed, the Department's own policies and procedures state: "The final Statement of Work . . . serves as the nucleus of . . . the contract. It tells offerors what [the Department] wants and, after award, it establishes the standard for the contractor's performance." Departmental Directive No. OCFO:2-107, *Acquisition Planning*, § VII.G.1.b(3) at 12 (June 10, 1992) ("establishing departmental policy and procedures for . . . acquisitions").

The case law and the Department's own directives compel us to conclude that the language in the statements of work of these task orders may not be casually read out of the contract. Accordingly, we reject the Department's suggestion that we ignore the explicit language from the Statements of Work that "Ketchum shall arrange for Mr. Williams to regularly comment on NCLB." This passage was not rendered nugatory simply because the Department did not replicate it in its list of deliverables. To determine the "scope" of the Department's arrangements with Ketchum and GWG and the "specific work to be accomplished" under them, we must construe all of the language of the Statements of Work. 48 C.F.R. § 37.602-1(a).

Having concluded that the Department's contract may not be restricted to the lists of deliverables, we think the Department's task orders did procure commentary from Mr. Williams. "It is widely accepted that the plain language of a contract, if unambiguous, is the best source to use to interpret it." B-302358, Dec. 27, 2004, citing *In re: Crow Winthrop Operating Partnership*, 241 F.3d 1121, 1124 (9th Cir. 2001); *In re: Cambridge Biotech Corp.*, 186 F.3d 1356, 1374 (Fed. Cir. 1999); *Kokomo Tube Co. v. Dayton Equipment Services Co.*, 123 F.3d 616, 624 (7th Cir. 1997). The Statements of Work, which are the "nucleus"<sup>38</sup> of the Department's task orders and which define and identify the "specific work to be accomplished,"<sup>39</sup> use clear, plain English: "Ketchum shall arrange for Mr. Williams to regularly comment upon NCLB." Having issued task orders for Ketchum to arrange for regular commentary by Mr. Williams, the Department was obligated by the publicity or propaganda prohibition to assure that its role in procuring that commentary was disclosed to the target audiences. We can find no evidence in the record that the Department took any steps to assure that appropriate disclosures were made.

The Department's second argument is that it did not pay any appropriated funds for covert propaganda because none of the invoices reference commentary by Mr. Williams. The problem with this argument is that none of the invoices actually identified any specific deliverable listed in the statements of work.<sup>40</sup> Instead, GWG billed for "Professional Services." Some of the invoices mention "ad production," "ad

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<sup>38</sup> Departmental Directive No. OCFO:2-107, *Acquisition Planning*, § VII.G.1.b(3) at 12 (June 10, 1992).

<sup>39</sup> 48 C.F.R. § 37.602-1(a).

<sup>40</sup> See Talbert Letter, Exhibits 7-26; ED-OIG Report at 15.

costs," or "ad campaign," but the language used in the invoices is not sufficient to identify a specific deliverable under Task Order Nos. 9 and 16, such as one of the television or radio ads. The Statements of Work do not specify unit prices for anything in the task orders that could serve as a basis to separately bill for the performance of a particular deliverable. Each task order is a firm, fixed price contract for everything in the task order.

The invoice reference to "Professional Services" is to a package of products and services, including commentary that GWG had bundled together and offered to the Department at a reduced price. The record shows that the proposals Ketchum and GWG made and the Department adopted featured a complete package of services, including both ads and favorable commentary in the media, at a reduced cost. GWG and Ketchum recommended an "integrated marketing campaign" to target audiences through a variety of mediums, including commentary by Mr. Williams in other forums he frequently appeared. Talbert Letter, Exhibit 4. Ketchum had noted to the Department that the typical fee for this level of services would be far greater than the amount that the Department agreed to pay under the task orders. Talbert Letter, Exhibit Nos. 1, 4. In its proposals to the Department, which eventually became the statements of work, GWG had offered to provide all of the services as a package at a reduced fee.<sup>41</sup> In light of the vague billing, the monthly reports itemizing the number of times Mr. Williams promoted the NCLB Act, and the inclusive packages of services included in the proposals and statements of work, when GWG billed the Department for "Professional Services," these services included the commentary that Mr. Williams reported in his monthly reports.<sup>42</sup>

The Department's third argument is that these task orders are no more than the legitimate dissemination of information to the public.<sup>43</sup> In its view, the subcontracts

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<sup>41</sup> Mr. Williams told the IG that "the cost associated with the level of services he provided was well below what he would normally charge. Because he believed in NCLB, and wanted the business, [he] agreed to perform for the cost the Department was willing to pay." ED-OIG Report at 6.

<sup>42</sup> Although the ED IG's investigation was focused on contract formation and oversight issues, the Inspector General did conclude that the Department paid for ads that were never received (ED-OIG Report at 15-16) and the ads that were received were of poor quality. ED-OIG Report at 16, 18. In addition, because commentary was included in the Statements of Work and the activity reports, the Inspector General concluded that the Department "may have been paying for more than just the advertising." ED-OIG Report at 18.

<sup>43</sup> We note in passing that in each of his monthly reports, Mr. Williams claimed to be "promoting" the NCLB Act, not educating the public. The column reproduced in the monthly report for January 2004 is the only sample provided of those activities. It discussed the political controversy surrounding the NCLB Act and the character, roles, and motives of the Department, the Secretary, the President, and various other

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to obtain the services of Mr. Williams and GWG represented “a concerted effort . . . to inform the public and parents about NCLB and the opportunities it offers to them and their children.” Talbert Letter at 6. Every agency has a legitimate interest in the “dissemination to the general public, or to particular inquirers, of information reasonably necessary to the proper administration of the laws” for which the agency is responsible. 31 Comp. Gen. 311 (1952). *See also, e.g.*, B-303495, Jan. 4, 2005. However, while we agree that the Department should disseminate information to the public on the NCLB Act, it must disclose its role.

#### Antideficiency Act Violation

The Department’s use of appropriated funds in violation of the publicity or propaganda prohibition also constituted a violation of the Antideficiency Act, 31 U.S.C. § 1341(a). This act prohibits making or authorizing an expenditure or obligation that exceeds available budget authority. B-300325, Dec. 13, 2002. Because the Department has no appropriation available to procure favorable commentary in violation of the publicity or propaganda prohibition, it violated the Antideficiency Act, 31 U.S.C. § 1341(a). *Cf.* B-303495, Jan. 4, 2005; B-302710, May 19, 2004. Under 31 U.S.C. § 1351, the Department must report its Antideficiency Act violations to the President and the Congress. At the same time, a copy must be sent to the Comptroller General.<sup>44</sup>

#### CONCLUSION

The Department of Education violated the fiscal year 2004 publicity or propaganda prohibition by contracting with Ketchum for the services of GWG to obtain commentary by Armstrong Williams on the NCLB Act without requiring Ketchum to

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(...continued)

interested parties with respect to the enactment and implementation of the NCLB Act.

<sup>44</sup> Recent amendments to 31 U.S.C. § 1351 require the Department to transmit a copy of that report to the Comptroller General. 31 U.S.C. § 1351, as amended by Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, div. G, title I, § 1401, 118 Stat. 2809, 3192 (Dec. 8, 2004) (“[a] copy of each report [required by 31 U.S.C. § 1351] shall also be transmitted to the Comptroller General on the same date the report is transmitted to the President and Congress”).

Office of Management and Budget Circular No. A-11 provides guidance on what information to include in Antideficiency Act reports. Agencies must report violations found by GAO, even if they disagree with the finding. OMB advises agencies, “If the agency does not agree that a violation has occurred, the report to the President and the Congress will explain the agency’s position.” OMB Circ. No. A-11, ¶ 145.8 (July 2004).



ensure that Mr. Williams disclosed to his audiences the Department's role. The commentary obtained as a result of these contracts violated the publicity or propaganda prohibition because it was "covert," in that it did not disclose to the targeted audiences that it was sponsored by the Department and was paid for using appropriated funds. *E.g.*, B-303495, Jan. 4, 2005; B-302710, May 19, 2004. At the same time, because the Department had no appropriation available to contract for commentary in violation of the cited publicity or propaganda prohibitions, the Department also violated the Antideficiency Act, 31 U.S.C. § 1341. B-303495, Jan. 4, 2005; B-302710, May 19, 2004. It must report this violation to the Congress and the President, and submit a copy of that report to the Comptroller General. 31 U.S.C. § 1351, as amended. B-304335, Mar. 8, 2005.

If you have any questions regarding this matter, please contact Susan A. Poling, Managing Associate General Counsel, at 202-512-2667, or Thomas H. Armstrong, Assistant General Counsel, at 202-512-8257.

Sincerely yours,



Anthony H. Gamboa  
General Counsel

B-304228

Digests

1. The Department of Education contracted to obtain commentary on the No Child Left Behind Act by Mr. Armstrong Williams, but took no steps to assure that its role in sponsoring that commentary was disclosed to the targeted audiences. This constituted covert propaganda in violation of the fiscal year 2004 publicity or propaganda prohibition found in the Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, div. F, title VI, § 624, 118 Stat. 3, 356 (Jan. 23, 2004).
2. Because the Department of Education had no appropriations available to contract for covert propaganda in violation of the publicity or propaganda prohibitions found in Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, div. F, title VI, § 624, 118 Stat. 3, 356 (Jan. 23, 2004), the Department also violated the Antideficiency Act, 31 U.S.C. § 1341. It must report these violations to the Congress and the President, and transmit a copy of that report to this Office. 31 U.S.C. § 1351, as amended.



G A O

Accountability \* Integrity \* Reliability

United States General Accounting Office  
Washington, DC 20548

B-305349

December 20, 2005

The Honorable Frank R. Lautenberg  
United States Senate

Subject: *Social Security Administration—Use of the Gallup Organization to Poll the Public on Social Security*

Dear Senator Lautenberg:

This responds to your request for our legal opinion regarding the Social Security Administration's (SSA) use of the Gallup Organization to poll the public on Social Security. Among questions included in recent Public Understanding Measurement Systems (PUMS) polls conducted by Gallup on behalf of SSA, Gallup surveyed the general public on its familiarity with how the Social Security program is financed and on elements of various proposals to reform Social Security. You requested our legal opinion on whether the agency may have violated 5 U.S.C. § 3107 by using appropriated funds to pay for the polling. Section 3107 provides that "appropriated funds may not be used to pay a publicity expert unless specifically appropriated for that purpose."

As we explain below, SSA did not violate section 3107 by hiring the Gallup Organization to survey the general public, because Gallup is not a "publicity expert" within the meaning of section 3107. SSA's authority to survey the general public on its knowledge of the Social Security program and program financing stems from the agency's authority to administer that program. 42 U.S.C. § 901(b).

Consistent with our customary practice when rendering opinions, upon receipt of your request, we wrote a letter to SSA's General Counsel to establish a record on the matter you put before us. Letter from Susan A. Poling, Associate General Counsel, GAO, to Lisa de Soto, General Counsel, SSA, July 12, 2005. We requested factual information and official copies of recently conducted PUMS polls and posed a series of questions to the General Counsel designed to permit us to assess SSA's legal authority to conduct the polling in question. We received responses from SSA on August 11, 2005, including copies of all PUMS surveys conducted to date and subsequent reports prepared by the Gallup Organization, SSA's Performance and Accountability Reports (PAR) for fiscal years 1998 through 2004, and three Strategic Plans covering the years 1997 through 2008. Letter from Thomas W. Crawley, Deputy General Counsel, SSA, to Susan A. Poling, GAO, Aug. 11, 2005 (Crawley Letter). We also received copies of a "Library Bookmark Project" survey and an "Electronic Wage

Reporting” survey, which were both conducted in fiscal years 2004 and 2005, and a “Medicare Part D Subsidy Outreach Survey” then underway. *Id.*

## BACKGROUND

According to SSA, it first conducted Public Understanding Measurement Systems (PUMS) surveys in 1998 to meet strategic goals and objectives that the agency had developed under the Government Performance and Results Act (GPRA) of 1993. Crawley Letter. GPRA requires federal agencies to develop and submit to the Congress a strategic plan covering a period of at least 5 years.<sup>1</sup> 5 U.S.C. § 306. Among GPRA goals established in SSA’s first strategic plan, the agency undertook “[t]o strengthen public understanding of the social security programs.” *Social Security: Keeping the Promise*, Strategic Plan 1997–2002, at 31–32 (September 1997). As SSA explained in that strategic plan, one of the agency’s “basic responsibilities to the public is to ensure that they understand the benefits available under the Social Security programs to them individually and to the population as a whole. . . . [T]he achievement of this goal supports every other goal of the organization.” *Id.*

To achieve its GPRA goal of strengthening public understanding, SSA adopted as an agency objective that—

“[b]y 2005, 9 out of 10 Americans will be knowledgeable about the social security programs in five important areas: basic program facts; financial value of programs to individuals; economic and social impact of the programs; how the programs are financed today; [and] financing issues and options.”<sup>2</sup>

*Id.* SSA sought to measure “the percent[age] of individuals who are knowledgeable in each of the five subject areas as demonstrated by responses to an objective test.” *Id.* It was with the PUMS surveys that SSA intended “to elicit from the public information that [SSA] might use in meeting its strategic plan objectives.” Crawley Letter. SSA has also used the PUMS survey results to assess the effectiveness of the agency’s communications strategies and products, including the *Social Security Statement*, which SSA mails annually to over 140 million workers age 25 and older. *Id.*

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<sup>1</sup> The strategic plan must contain a comprehensive mission statement covering the major functions and operations of the agency, general goals and objectives for those major functions and operations, and how those goals and objectives are to be achieved. 5 U.S.C. § 306. *See also* 31 U.S.C. § 1115 (requiring agencies to submit annual performance plans).

<sup>2</sup> This opinion does not consider SSA’s development of, or whether the agency achieved, its GPRA goals and objectives. Rather, we address here the legal question of whether SSA violated 5 U.S.C. § 3107 in conducting recent PUMS surveys.

Beginning in the fall of 1998 and continuing through the fall of 2004, the Gallup Organization (Gallup) conducted six PUMS surveys on behalf of SSA. *Id.* All surveys were conducted as recorded telephone interviews, typically between August and December.<sup>3</sup> *Id.* The surveys asked a series of general demographic questions designed to ensure a representation of specific demographic groups—Caucasians, African-Americans, Hispanic-Americans, and Asian-Americans.<sup>4</sup> See PUMS VI National Survey, *prepared by* The Gallup Organization *for* SSA, Office of Communication, March 2005 (PUMS VI Report).

The PUMS surveys also posed a series of approximately 24 to 32 substantive questions. Among these, Gallup pollsters would ask respondents questions such as:

- What type of benefits does Social Security provide;
- What is the youngest age at which someone can retire and receive full Social Security retirement benefits;
- Were Social Security retirement benefits, by themselves, designed to provide enough money for retirees to live on;
- What percentage of Social Security tax dollars goes towards paying administrative and other expenses; and
- Had they contacted SSA for information in the last year?

Beginning in 2003 the PUMS survey was significantly revised consistent with the agency's new strategic goals and objectives under GPRA, and to provide SSA "with a baseline measure of the 'percentage of Americans who are knowledgeable about the current social security program and related issues, including long range financing.'" Fiscal Year 2003 PUMS V National Survey, *prepared by* The Gallup Organization *for* SSA, Office of Communication (December 2003), at 4 (PUMS V Report). Among the goals in SSA's current strategic plan, the agency seeks "[t]o achieve sustainable solvency [of the Social Security trust funds] and ensure [that] Social Security programs meet the needs of current and future generations." SSA, *Strategic Plan*

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<sup>3</sup> PUMS I survey was conducted October through November 1998; PUMS II, November 1999–January 2000; PUMS III, October–December 2000; PUMS IV, August–October 2001; PUMS V, August–September 2003; PUMS VI, November–December 2004.

<sup>4</sup> For example, respondents were asked their age, race, ethnicity, highest level of education, employment status, income bracket, marital status, number of adults living in their household, whether they have internet access, and the number of telephone lines in their home. The Gallup pollster would also note the respondent's gender. This opinion does not evaluate, nor did GAO verify or test, the Gallup Organization's methodology for conducting the PUMS surveys.

2003–2008, at 29.<sup>5</sup> To achieve this goal, SSA undertook a strategic objective to support reforms, through education and research efforts, to ensure sustainable solvency and more responsive retirement and disability programs. *Id.* The PUMS survey was also substantially revised to include information to help SSA gauge the interest level of Americans in getting information about Social Security. PUMS V Report.

As Commissioner Barnhart expressed in SSA’s fiscal year 2004 Performance and Accountability Report, “[a]s the debate moves forward on how best to strengthen social security for the future, the agency must continue to educate the public about long-range financing issues affecting solvency, ensuring the program meets the needs of today’s and tomorrow’s beneficiaries.”<sup>6</sup> Crawley Letter (referring to SSA, *Performance and Accountability Report for Fiscal Year 2004* (Nov. 10, 2004), at 2). *See also Social Security Improvements for Women, Seniors and Working Americans: Hearing before the House Ways and Means Committee, Subcommittee on Social Security*, 107<sup>th</sup> Cong. 22-23 (Feb. 28, 2002) (testimony of SSA Commissioner Jo Anne B. Barnhart describing the PUMS surveys and expressing concern that the general public does not understand social security’s current pay-as-you-go funding system).

Besides the general demographic questions, and substantive questions similar to those discussed above, PUMS V and PUMS VI included additional questions such as:

- “Currently, Social Security takes in more money in taxes each year than it needs to pay benefits for that year. Which of the following do you think best describes what happens to the excess tax money? [The pollster was directed to read the following three statements.]
  - 1 The money is kept by the government as cash in the bank.
  - 2 The money is invested in government treasury bonds.
  - 3 The money is invested in the stock market.” PUMS V, App. A, q. 15 (Statistical findings omitted.)

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<sup>5</sup> Available at [www.ssa.gov/strategicplan.html](http://www.ssa.gov/strategicplan.html) (last visited Nov. 15, 2005). GPRA requires federal agencies to update and revise their strategic plans at least every 3 years. 5 U.S.C. § 306(b).

<sup>6</sup> The serious solvency and sustainability challenges facing the social security trust funds have been widely reported. *See, e.g.,* GAO, *Social Security Reform: Early Action Would Be Prudent*, GAO-05-397T (Washington, D.C.: Mar. 9, 2005); *Social Security Reform, Answers to Key Questions*, GAO-05-193SP (Washington, D.C.: May 2005); *Social Security: Restoring Long-Term Solvency Will Require Difficult Choices*, GAO/T-HEHS-98-95 (Washington, D.C.: Feb. 10, 1998). *See also The 2005 Annual Report of the Board of Trustees of the Federal Old-Age and Survivors Insurance and Disability Insurance Trust Funds*, H.R. Doc. No. 109-18, at 1–3 (2005).

- “Currently, the government loans out the extra money from the bonds to help pay for other government programs. Do you believe that Social Security would be able to pay all future benefits if the government did not loan out the extra money?” PUMS VI q. 21.
- “Currently, the government uses the money from the bonds to pay for other government programs. Some people believe that Social Security would be able to pay all planned benefits if the government held the money specifically for Social Security instead of using it for other government programs. Do you agree or disagree with this statement?” PUMS V, App. A, q. 21 (statistical findings omitted.)
- “Now, I’m going to read [to you] several ways that have been suggested for changing social security. Please tell me whether you have ever heard about any of the following ideas: [The pollster was directed to read and rotate six ideas, and to ask a follow-up question.] Have you heard a lot or a little?”
  - Letting workers decide whether to shift some of their Social Security tax payments into personal Savings Accounts that they would invest on their own
  - Allowing workers to pay an extra tax into personal [savings] accounts that they would invest on their own
  - Having the government invest a portion of Social Security [trust funds] in the stock market
  - Increasing the tax rate employers and employees pay to Social Security
  - Making workers pay Social Security taxes on all of their earnings
  - Raising the age at which people are eligible to receive their full Social Security benefits.” PUMS V App. A, q. 23; PUMS VI q. 23 paraphrased (statistical findings omitted.)

## ANALYSIS

You asked us to determine whether the Social Security Administration (SSA) violated 5 U.S.C. § 3107 by hiring the Gallup Organization to conduct public understanding polls. Section 3107 provides that “[a]ppropriated funds may not be used to pay a publicity expert unless specifically appropriated for that purpose.” 5 U.S.C. § 3107.

This restriction applies to the use of all appropriated funds.<sup>7</sup> The provision, which is now section 3107, was enacted in 1913 and has not been amended.

The language of section 3107 focuses on paying a “publicity expert.” While we have had few occasions to address section 3107, our cases have noted difficulty in applying the provision due to the lack of definitional guidance in the statute and the need to protect an agency’s legitimate interest in informing the public regarding its activities and programs. *See* B-302992, Sept. 10, 2004; B-139965, Apr. 16, 1979 (noting the lack of definitional guidance in section 3107); A-82332, Dec. 15, 1936 (noting that the provision was not intended to restrict legitimate informational activities). Given the absence of definitional guidance in the statute, we referred to the legislative history of the provision to ascertain what Congress meant to prohibit when it passed in 1913 what is now section 3107. The legislative history of section 3107 suggests that the provision seeks to prohibit the hiring of publicity experts “to extol or to advertise” the agency or individuals within the agency. B-302992. Our decisions have applied this standard in analyzing section 3107 cases.

In the circumstances at issue here, we do not view the Gallup Organization as a “publicity expert” within the meaning of section 3107. *Id.* SSA did not hire Gallup to—nor did Gallup in fact—extol or advertise SSA or individuals within SSA. SSA hired Gallup to survey the general public on its familiarity with the Social Security program and how that program is currently financed, and on its familiarity with various proposals to reform the program. In fact, SSA hired Gallup to engage in the legitimate agency activity of collecting information that the agency needs in order to carry out its Social Security program responsibilities.

SSA’s authority to survey the general public on its knowledge of the Social Security program and program financing is inherent in the agency’s authority to administer that program, 42 U.S.C. § 901(b). As a general matter, an agency may use appropriations to engage in information gathering related to its specific program authorities. Indeed, our decisions reflect societal values favoring a robust exchange of information between the government and the public it serves. *See, e.g.*, B-184648, Dec. 3, 1975 (discussing an agency’s “legitimate interest in communicating with the public”).

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<sup>7</sup> SSA paid Gallup to conduct the PUMS surveys from its Limitation on Administrative Expenses appropriations. *Crawley Letter. See, e.g.*, Labor, Health and Human Services, and Education, and Related Agencies Appropriations, 2004, Pub. L. No. 108-199, div. E, title IV, 118 Stat. 3, 274–75 (Jan. 23, 2004). The costs of carrying out the functions of SSA are derived from the Social Security trust funds, as appropriated annually by Congress. *See* 42 U.S.C. § 401(g); Pub L. No. 108-447, div. F, title IV, 118 Stat. 2809, 3161 (Dec. 8, 2004).



Further, SSA's reference to the Government Performance and Results Act (GPRA) as a basis for conducting such polling is reasonable and consistent with the Act's provisions and purpose to "improve Federal program effectiveness and public accountability by promoting a new focus on results, service quality, and customer satisfaction." Pub. L. No. 103-62, § 2(b)(3), 107 Stat. 285 (Aug. 3, 1993).

#### CONCLUSION

The Social Security Administration did not violate 5 U.S.C. § 3107 by hiring the Gallup Organization to survey the general public on its familiarity with the Social Security program and how that program is currently financed, and on its familiarity with various proposals to reform the program. For this purpose, Gallup is not a "publicity expert" within the meaning of section 3107. SSA's authority to survey the general public on its knowledge of the Social Security program and program financing derives from the agency's authority to administer that program.

/signed/

Anthony H. Gamboa  
General Counsel

B-305349

DIGEST

The Social Security Administration did not violate 5 U.S.C. § 3107 by hiring the Gallup Organization to survey the general public on its familiarity with the Social Security program and how that program is currently financed, and on its familiarity with various proposals to reform the program. For this purpose, Gallup is not a “publicity expert” within the meaning of section 3107. SSA’s authority to survey the general public on its knowledge of the Social Security program and program financing derives from the agency’s authority to administer that program.



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United States Government Accountability Office  
Washington, DC 20548

B-306663

January 4, 2006

The Honorable Barbara A. Mikulski  
United States Senate

Subject: *Contractors Collecting Fees at Agency-Hosted Conferences*

Dear Senator Mikulski:

We received your letter dated October 4, 2005, asking us to revisit our March 2005 decision, *National Institutes of Health—Food at Government-Sponsored Conferences*, B-300826, Mar. 3, 2005. In that decision, we addressed the availability to the National Institutes of Health (NIH) of its appropriation for the purpose of providing food to attendees at NIH-hosted conferences. *Id.* In addition, in response to a question from NIH, we concluded that NIH may not charge an attendance fee at conferences and retain the proceeds, nor permit its contractor to do so, because NIH lacks statutory authority. *Id.* You expressed concern that this conclusion would reduce federal efforts to bring experts together at federally hosted conferences, particularly conferences hosted by the National Security Agency (NSA), to address evolving threats to the nation.

We appreciate your interest in our March 2005 decision. However, we find no basis to change our conclusion that when an agency lacks statutory authority to charge a fee at a conference and retain the proceeds, neither the agency hosting a conference, nor a contractor on behalf of the agency, may do so. When entertaining a request for reconsideration of a decision, we consider whether the request demonstrates an error of fact or law in the earlier decision, or presents new information not considered in the earlier decision. B-271838.2, May 23, 1997. You do not assert that our March 2005 decision contained legal or factual errors. While you present information regarding agencies' practices that we did not address in our March 2005 decision, such information does not change our conclusion, as explained below.

In your letter, you state that for several years, agencies have engaged in the practice of allowing their contractors, on behalf of the agencies, to collect fees from conference participants to offset the costs of agency-hosted conferences. You explain that agencies initiated this practice after we determined that agencies themselves cannot collect such fees without statutory authority.

The miscellaneous receipts statute provides that “an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim.” 31 U.S.C. § 3302(b). In earlier decisions, we indeed have advised that an agency, in the absence of statutory authority, may not retain fees or other amounts paid to the government for activities relating to official duties, but must deposit such funds in the general fund of the Treasury. *E.g.*, B-302825, Dec. 22, 2004 (Office of Federal Housing Enterprise Oversight may not retain money collected from third party litigants for copying costs, but must deposit the money in the Treasury). Both GAO and federal judicial decisions have concluded that the miscellaneous receipts statute precludes an agency of the government diverting to a contractor of the government any amounts the contractor receives on behalf of the government. *See, e.g., Scheduled Airlines Traffic Offices, Inc. v. Department of Defense*, 87 F.3d 1356, 1361-63 (D.C. Cir. 1996); *Motor Coach Industries, Inc. v. Dole*, 725 F.2d 958, 968 (4<sup>th</sup> Cir. 1984) (Federal Aviation Administration (FAA) cannot hold in a trust fund amounts paid by airlines to defray FAA’s cost of acquiring new shuttle buses for Dulles Airport); *cf.* B-300248, Jan. 15, 2004.

A government agency that lacks the authority to charge and retain fees may not cure that lack of authority by engaging a contractor to do what it may not do. A contractor in this situation is “receiving money for the Government,” and the miscellaneous receipts statute requires that such funds must be deposited in the Treasury. *Scheduled Airlines Traffic Offices*, 87 F.3d at 1361-62. Consequently, in our March 2005 decision, we advised NIH that it could not “authorize its contractor to charge a fee to offset costs because, pursuant to 31 U.S.C. § 3302(b), a contractor receiving money for the government may not retain funds received for the government to pay for the conference costs.” B-300826, Mar. 3, 2005.<sup>1</sup>

Congress, of course, may enact legislation authorizing an agency hosting a conference on behalf of the government to collect and retain an attendance fee. Should Congress wish to grant agencies such authority, agencies may in turn permit their contractors to collect such a fee. Congress has available to it a number of options, each offering Congress different degrees of programmatic oversight. For example, Congress could amend the Government Employees Training Act, 5 U.S.C. §§ 4101-4118, to allow agencies to collect attendance fees for conferences. Under 5 U.S.C. § 4110, agencies may pay the expenses of their employees attending meetings and conferences related to agency functions and management. *See* B-288266, Jan. 27, 2003. Congress may choose to add language to section 4110 permitting agencies, when hosting a conference, to charge and retain attendance fees to cover the costs of hosting the conference.<sup>2</sup> As we stated in our March 2005 decision, if an agency has

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<sup>1</sup> The facts present in B-300826, March 3, 2005, did not require us to consider whether an agency could structure a no cost contract to achieve its objective consistent with the miscellaneous receipts statute.

<sup>2</sup> The Government Employees Training Act permits agencies to provide training to employees of other agencies, and to collect and retain a fee to offset the costs associated with training the employees of other agencies. 5 U.S.C. § 4104. *See* B-241269, Feb. 28, 1991.

such authority, an agency may permit its contractor, hosting a conference on behalf of the agency, to collect and retain fees on the agency's behalf to offset the conference costs.

Rather than enacting a statutory change with governmentwide implications, if Congress preferred, it could enact statutory language either as part of the agency's authorizing legislation or its annual appropriation act, permitting a particular agency to charge an attendance fee at conferences and use the fees to offset conference costs. Congress, on occasion, has enacted legislation permitting an agency to charge and retain a fee. For example, Congress has authorized the National Park Service to charge entrance fees at some recreational lands and to retain the fees for expenditure, rather than depositing them in the Treasury. 16 U.S.C. §§ 6802, 6806. Similarly, Congress could enact legislation permitting an agency such as NSA to charge an attendance fee at conferences and use the proceeds to defray the cost of the conferences.

As we explained in our March 2005 decision, Congress has not provided NIH with authority to charge and retain a fee at conferences. We have not analyzed laws pertaining to NSA to determine whether NSA has authority to retain and use fees collected from its conference participants. If you decide to initiate legislative action to authorize NSA or other agencies to charge fees or allow contractors to charge fees to offset the cost of hosting a conference, we are available to assist your office. If you have any questions, please contact Tom Armstrong at 202-512-8257 or Susan Poling at 202-512-2667.

Sincerely yours,

/signed/

Anthony H. Gamboa  
General Counsel





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Washington, DC 20548

## Decision

**Matter of:** United States Capitol Police--Employee Shuttle

**File:** B-305864

**Date:** January 5, 2006

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### DIGEST

The United States Capitol Police (USCP) may not use appropriated funds for a shuttle bus service from its parking lot to the Fairchild Building, or any other USCP building, where the purpose of the service is to facilitate the commutes of USCP employees. Commuting costs are personal expenses, and, absent statutory authority, appropriations are not available for personal expenses. Where, however, USCP establishes a legitimate operational need for a building-to-building shuttle, there is no objection to employees' incidental use of the service as part of the home-to-work commute, so long as such use does not result in additional expense to the government.

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### DECISION

The United States Capitol Police (USCP) asks whether it may use appropriated funds for a shuttle bus to transport USCP employees from USCP-provided parking to a new USCP facility, the Fairchild Building. Letter from John T. Caulfield, General Counsel, USCP, to Anthony H. Gamboa, General Counsel, GAO, July 7, 2005 (Caulfield Letter). USCP also asks whether, in the event such use of funds is not proper, it may use appropriated funds for a shuttle to transport employees from the USCP headquarters building to the Fairchild Building. *Id.* In our view, USCP may not use appropriated funds for shuttle bus service, whether from the parking lot to the Fairchild Building or from headquarters to the Fairchild Building, where the purpose of the shuttle is to enable employees to complete their commutes. USCP, however, may provide shuttle service from its headquarters to other USCP buildings, including the Fairchild Building, so long as it establishes a legitimate operational need for such a service.

USCP states that it is moving several component offices from its headquarters building on the Senate side of the U.S. Capitol complex, near which employees are provided parking, to the Fairchild Building on the House side, where adequate

parking is not available. Caulfield Letter. Whereas in the past employees (primarily USCP officers) would walk from their cars to the headquarters building at the start of their shifts for their daily assignments, they now start their shifts by reporting to the Fairchild Building. *Id.* USCP states that until it is able to acquire parking facilities close to the Fairchild Building, many employees who continue to use the USCP parking on the Senate side will need transportation to the Fairchild Building. USCP asserts that the Fairchild Building is not within a reasonable walking distance of either the current parking location or the headquarters building. The agency also indicates that it may be able to lease parking facilities near, but still not within walking distance of, the Fairchild Building.

USCP suggests that since it is proper to use appropriated funds to provide parking in the first instance, it should be proper to use appropriated funds to transport employees from the parking lots to the Fairchild Building. USCP is concerned, however, that the trip from either the parking lot or USCP headquarters to the Fairchild Building might be viewed as part of an employee's commute so that any attendant expense would not be payable from appropriated funds.

Initially, we point out that the fact that USCP provides parking for its employees is not relevant to the issue here—the propriety of shuttling employees from the parking lot to USCP buildings. The propriety of the use of appropriated funds for a parking lot-to-workplace shuttle turns on the application of a longstanding rule regarding the nature of commuting costs.

It is well-established that an employee's commute between home and work is a personal expense, and personal expenses are not payable from appropriated funds, absent specific statutory authority. 27 Comp. Gen. 1 (1947); 16 Comp. Gen. 64 (1936). For executive branch entities, the rule is codified at 31 U.S.C. § 1344(a)(1), which limits the use of appropriated funds for passenger vehicles to “official purposes,” and provides that, with certain exceptions not applicable here, transporting an employee “between such individual's residence and such individual's place of employment is not transportation for an official purpose.”<sup>1</sup> This limitation applies to *any* portion of the trip between home and work. B-261729, Apr. 1, 1996. The Naval Air Systems Command, for example, could not use appropriated funds for a bus to transport, on a daily basis, employees from their then-current headquarters

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<sup>1</sup> While section 1344 applies to executive branch entities, *see* 31 U.S.C. § 1344(g)(2), the principle embodied in section 1344, that appropriations are available only for official purposes and, without specific statutory authority, not for personal expenses such as home-to-work transportation applies equally to USCP appropriations. *See generally* 31 U.S.C. § 1301(a)(1) (“appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law”). For that reason, section 1344, its legislative history, and case law applying it offer a useful analytical construct in this case.



in Arlington, Virginia, to relocated headquarters in St. Mary's County, Maryland.<sup>2</sup> *Id.* Once the Command moved its offices, the place of employment for its employees would be the new location: "[a]ll of the usual expenses incurred by an employee prior to his arrival at that location, whether or not he makes an intermediate stop at a different location, are commuting expenses." *Id.*

In our view, an employee's arrival at a parking lot cannot be considered the end of the commute. Rather, a parking lot is simply an intermediate stop--like a subway or bus stop--within the totality of the commute from home to office. For purposes of section 1344(a)(1), legislative history suggests that the end of the commute, or "place of employment," is "the primary place where an officer or employee performs his or her business, trade or occupation, and includes, but is not limited to, an official duty station, home base, or headquarters. It includes any place where an employee is assigned to work. . . ." H.R. Rep. No. 99-451, at 7 (1985), accompanying Pub. L. No. 99-550, 100 Stat. 3067 (Oct. 27, 1986). USCP advises that its employees now report for work and daily assignments at the Fairchild Building. Therefore, the trip from the parking lot to the Fairchild Building is part of the employee's commute, and thus a personal expense, so that USCP may not use appropriated funds for shuttle bus service from Senate-side or other parking lots.

There is no objection, however, to the use of appropriated funds for a shuttle bus from USCP headquarters to the Fairchild and other USCP buildings, so long as USCP establishes a legitimate operational need to shuttle persons among those buildings and its purpose is not to aid employees' commutes. *See* 16 Comp. Gen. 64, discussing "official business;" 31 U.S.C. § 1344(a)(1), discussing "official purposes." In that circumstance, there is no objection to an employee's incidental use of such shuttle service on a space-available basis, and so long as it does not result in additional expense to the government, even though the employee may not yet have reported to work at the Fairchild Building or may already have completed his or her daily assignment. However, to the extent that the purpose of the shuttle is to transport employees to their workplaces, that is, to complete their commutes from home, the use of appropriated funds for the service would not be proper. *See* B-210555.3, Feb. 7, 1984 ("... every employee is responsible for his or her own transportation to the headquarters station or to the site or office where the employee's work is to begin . . ."<sup>3</sup>).

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<sup>2</sup> The Command proposed to equip the bus with office equipment and designate it as the riders' official workplace pursuant to the government's flexiplace program; we noted that flexiplace guidance did not recognize a mobile work site as a flexiplace option.

<sup>3</sup> This decision responded to an agency's suggestion that an official entitled to be driven from his headquarters to a particular site or office could be picked up at home, bypass his normal headquarters stop, and be deposited directly at the site or office where his activity was to commence.

A 1979 case, B-195073, Nov. 21, 1979, is illustrative in this regard. The Federal Bureau of Investigation (FBI) allowed some of its employees, engaged in field work, to drive government vehicles to and from work. FBI asked whether other FBI employees could ride to and from work in the vehicle's empty seats, essentially carpooling with the field agent. We saw no objection to FBI's proposal. B-195073, Nov. 21, 1979. We concluded that because of the nature of the field agent's work, the "vehicle is being driven primarily for the benefit of the government. Any use by other employees on a space available basis is only incidental to the government purpose, provided, of course, that there is no additional expenditure of time or money by the government in order to accommodate these riders." *Id.* Similarly, so long as USCP establishes a legitimate operational need for shuttle service among USCP buildings, there is no objection to any incidental use of the service by USCP employees to complete their home-to-work commutes that impose no additional cost to the government.

In sum, the general rule that an employee's commute between home and work is a personal expense precludes the use of appropriated funds for shuttle bus service whose purpose is to complete the employees' home-to-work commute to the Fairchild Building. Incidental use as described above raises no objection.

/signed/

Anthony H. Gamboa  
General Counsel



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## Decision

**Matter of:** NOAA—Reimbursing Mileage for Commuting Expenses for On-Call Emergencies

**File:** B-307918

**Date:** December 20, 2006

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### DIGEST

The National Oceanic and Atmospheric Administration may not use its appropriations to reimburse employees for the mileage traveled between their residences and the agency's warehouse when performing after-hours, on-call emergency services on behalf of the government because 31 U.S.C. § 1344(a)(1) specifically prohibits using appropriated funds to provide government employees with transportation between their homes and places of employment, unless otherwise authorized by law.

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### DECISION

The Chief of the Central Finance Office of the National Oceanic and Atmospheric Administration (NOAA), who is also a certifying officer, has requested an advance decision under 31 U.S.C. § 3529. He asks whether appropriated funds are available to reimburse NOAA employees for the mileage they must travel between their homes and offices when performing official services during on-call emergencies outside of their normal office hours. Memorandum from Auke Hart, Chief of the Central Finance Office, NOAA, to David M. Walker, Comptroller General of the United States, May 1, 2006 (Hart Memorandum). As is our usual practice when rendering a decision, we sought the views of the agency to establish a factual record and to elicit the agency's legal position on the subject matter of the request.<sup>1</sup> The Office of General Counsel of the Department of Commerce, who replied to us on behalf of

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<sup>1</sup> In this matter, we wrote to NOAA's General Counsel. Letter from Thomas H. Armstrong, Assistant General Counsel for Appropriations Law, to James R. Walpole, General Counsel, NOAA, July 27, 2006. See GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006).

both NOAA and the department, does not believe appropriated funds are available for this purpose. Letter from Barbara S. Fredericks, Assistant General Counsel for Administration, Department of Commerce, to Thomas H. Armstrong, Assistant General Counsel for Appropriations Law, GAO, Oct. 30, 2006 (Fredericks Letter). For the reasons given below, we agree.

## BACKGROUND

NOAA, through the National Weather Service, operates and maintains a system of weather forecasting stations across the United States and around the world. These stations function 24 hours a day, 365 days a year. Hart Memorandum, at 1. NOAA states that Congress has mandated it to “provide weather forecasting for protecting life and property for the Nation. When severe weather hits in the form of hurricanes, tornados and snow blizzards, [NOAA] has to have equipment functioning . . . so [it] can perform [its] congressional mandate to protect the public from impending severe weather.” Fredericks Letter, Enclosure 1, at 1–2. To help the National Weather Service minimize interruptions of this service, NOAA created the National Logistic Support Center (NLSC) to stockpile in its warehouse and ship replacement parts and equipment crucial to weather forecasting operations. *Id.*, Enclosure 1, at 1.

In the past, NLSC has received between 200 and 400 requests each year for emergency service outside of NLSC’s normal office hours. *Id.* NLSC schedules employees to attend to these emergency, after-hours service requests on an “on-call” basis. *Id.* For each day of the year, including Saturdays, Sundays, and federal holidays, NLSC places two staff members on-call. *Id.* at 1. On weekdays, the employees assigned to on-call duty work their normal day at NLSC and then go home for the evening. When NLSC receives a request for after-hours emergency service, it notifies the on-call employees who return from their homes to the NLSC offices, where the warehouse is also located. *Id.*, Enclosure 1, at 1. The assigned on-call employees find the required parts or equipment, prepare them for shipment to the affected weather station, deliver them to a shipping vendor, and return home. *Id.* at 1. Some days, NLSC receives multiple after-hours emergency service requests. When this happens, the on-call employees must respond to each call. Hart Memorandum, at 1–2. NLSC follows the same basic on-call process on weekends and federal holidays. *Id.*, Enclosure 1, at 1.

Pursuant to a collective bargaining agreement between the NLSC and American Federation of Government Employees Local No. 29, employees volunteer for on-call duty. *Id.*, Enclosure 1, at 5. Approximately 12 of about 30 NLSC warehouse employees participate in this voluntary arrangement.<sup>2</sup> *Id.*, Enclosure 1, at 1.

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<sup>2</sup> NLSC pays the volunteers standby pay or overtime pay. In this decision, we do not address NLSC’s authority to pay standby or overtime pay. *See generally* 5 U.S.C.

(continued...)

NLSC is concerned that the recent rise in gasoline prices is affecting employee willingness to continue volunteering to perform these services. Hart Memorandum, at 2. If employees stop volunteering to perform on-call services, NLSC will be compelled to require all warehouse employees to participate in the on-call service program. NLSC proposes to reimburse on-call employees for the miles they travel between their homes and the NLSC office/warehouse. NLSC believes that such reimbursements would allow the agency to continue providing these on-call services on a voluntary basis. *Id.*

## DISCUSSION

As a general rule, employees must bear the costs of transportation between their residences and official duty locations, even when unusual conditions may increase commuting costs. 60 Comp. Gen. 633, 635 (1981). Congress has authorized agencies to use appropriations for the “maintenance, operation, or repair of any passenger carrier,” but “only to the extent that such carrier is used to provide transportation for official purposes.” 31 U.S.C. § 1344(a)(1). It has specified that “transporting any individual . . . between such individual’s residence and such individual’s place of employment is not transportation for an official purpose.”<sup>3</sup> 31 U.S.C. § 1344(a)(1). *See also* B-305864, Jan. 5, 2006, at n.1.

At the same time, however, agencies may exercise administrative discretion on a temporary basis when there is a clear and present danger to government employees, or an emergency threatens the performance of vital government functions. 62 Comp. Gen. 438, 445 (1983). Section 1344 allows an agency to provide for home-to-work transportation for an employee if the agency head determines that “highly unusual circumstances present a clear and present danger, that an emergency exists, or that other compelling operational considerations make such transportation essential to the conduct of official business.”<sup>4</sup> 31 U.S.C. § 1344(b)(9). This section also stipulates, however, that exceptions granted under it must be “in accordance with”

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(...continued)

§§ 5544, 5545; 5 C.F.R. § 551.431. *See also* B-235609, Jan. 9, 1995; B-218519, Oct. 15, 1985.

<sup>3</sup> The Commerce Department’s internal rules and regulations are consistent with the prohibition in section 1344(a)(1). *See, e.g., DOC Travel Handbook*, § 301-4.9.

<sup>4</sup> Section 1344 also authorizes agency heads to transport officers and employees between their place of employment and a mass transit facility at government expense. 31 U.S.C. §§ 1344(a)(3), 1344(g)(1). *See also* 5 U.S.C. § 7905. Since NOAA asked about mileage reimbursements, we need not consider this provision here.

section 1344(d). *Id.* The latter section limits emergency exceptions to periods of up to 15 calendar days, subject to periodic renewal for up to a total of 180 additional calendar days, under detailed procedures specified in 31 U.S.C. § 1344(d).<sup>5</sup>

Given the prohibition in 31 U.S.C. § 1344(a)(1), NLSC may provide home-to-work transportation to employees assigned to perform on-call, after-hours, emergency services only if it can qualify for an emergency exemption under sections 1344(b)(9) and 1344(d), or if NLSC, in the alternative, can cite some other statute which independently authorizes it to provide for home-to-work transportation for its on-call employees. The department has concluded that the emergency exception does not apply to this case, Frederick Letter, at 3, and that NOAA does not have any independent authority to reimburse its employees for mileage incurred while commuting to and from their official duty station. *Id.* at 2. We agree.

NLSC's on-call employees do not qualify for exemption under sections 1344(b)(9) and 1344(d). Section 1344(b)(9) contemplates "highly unusual circumstances present[ing] a clear and present danger, that an emergency exists, or that other compelling operational considerations make such transportation essential to the conduct of official business." 31 U.S.C. § 1344(b)(9). In this regard, NLSC argues that NOAA has a "congressional mandate to protect the public from impending severe weather." Fredericks Letter, Enclosure 1, at 2. NLSC asserts that its after-hours emergency services are "vital in ensuring [NOAA's] world-wide weather offices are available to provide accurate life-and-death local forecasts." *Id.* at 1.

However, it is not enough for NLSC to demonstrate that the danger posed under these circumstances constitutes an emergency sufficient to render home-to-work transportation for NLSC's on-call employees essential to the conduct of official business under section 1344(b)(9). NLSC must also demonstrate that emergency exceptions made under its proposal comply with section 1344(d). The limitations imposed by section 1344(d) are detailed and restrict authorized exceptions to brief, specific periods, subject to periodic extensions that may not exceed a specified number of calendar days, and encumber agencies with procedures that compel them to carefully account to Congress for each use of this authority. 31 U.S.C. § 1344(d).

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<sup>5</sup> The detailed procedures include requirements for written determinations that name the specific employees, explain the reasons for their exemption, and specify the duration of their exemptions; they preclude the agency head from delegating this authority to another; and they require congressional notification of the above information for each exemption granted. Other subsections require GSA to promulgate governmentwide regulations and require agencies to maintain logs detailing all home-to-work transportation provided by the agency. 31 U.S.C. §§ 1344(e), 1344(f).

It was in this regard that the department objected to NLSC's proposal. The department observed that "NOAA's overtime work is not performed on a temporary basis but instead performed on a continual basis and numerous times per week." Fredericks Letter, at 3. We agree. The record shows that NLSC schedules on-call employees for each day of the year. NLSC's proposal contemplates reimbursing employees for the mileage traveled between their homes and the NLSC warehouse for each such trip from now on—without limit or end date. For this reason, NLSC's on-call employees do not qualify under the emergency exception in 31 U.S.C. §§ 1344(b)(9), 1344(d).

Just as NLSC's proposal cannot be defended by invoking one of the exemptions set forth in section 1344, neither NLSC nor we have been able to identify any other statute that might provide it with independent authority to provide for home-to-work transportation for its on-call employees. Congress has on several occasions enacted authority to relieve the department from another limitation set forth in section 1344(a)(1). *See, e.g.*, Pub. L. No. 109-108, § 202, 119 Stat. 2290, 2314 (Nov. 22, 2005) ("appropriations made available to the Department of Commerce by this Act for salaries and expenses shall be available for hire of passenger motor vehicles as authorized by 31 U.S.C. 1343 and 1344[(a)(1)]").

NLSC's final argument is that it and its employees accept the general rule, as applied to each employee's normal, daily commute. However, they do not agree that it should be applied to employees who have already performed their normal obligation to get to and from work, and who are voluntarily performing on-call duties in addition to their normal duties, outside of the agency's normal workdays and work times. Hart Memorandum, at 2. As discussed above, the statute makes no such distinction. In the past, we have rejected similar appeals for exceptions to the general rule.

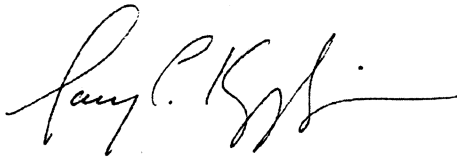
For example, in B-171969.42, Jan. 9, 1976, we considered a claim for home-to-work mileage costs for voluntary overtime performed on Saturdays and Sundays. Applying the general rule, we observed that the general rule must be applied even if regular work is scheduled at irregular hours. In another case, 36 Comp. Gen. 171 (1956), we considered whether United States marshals who were required to return to headquarters after hours were entitled to reimbursements for home-to-work mileage. Again, we applied the general rule, even though the employee's home-to-work expenses were increased by emergency conditions and the performance of necessary overtime, without regard for the fact that the employees resided outside their headquarters cities, and the fact that "call-back overtime duty" was being performed. *Id.* at 172.

The fact that emergency conditions may necessitate additional trips or otherwise increase commuting costs does not alter the employee's responsibility to provide for his or her own home-to-work transportation. 60 Comp. Gen. 420 (1981). As put

plainly in B-190071, May 1, 1978, "We are unable to agree . . . that [home-to-work] transportation expenses . . . for callback overtime duty should be at Government expense."

#### CONCLUSION

Given the prohibition in 31 U.S.C. § 1344(a)(1), NOAA and NLSC may not use appropriated funds to reimburse NLSC employees for the mileage between their residences and the NLSC warehouse for after-hours, on-call, emergency services on behalf of the government. If NOAA wishes to allow NLSC to use appropriated funds for these purposes, NOAA should approach Congress and seek appropriate changes to the law.

A handwritten signature in black ink, appearing to read "Gary L. Keplinger". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Gary L. Keplinger  
General Counsel





GAO

Accountability • Integrity • Reliability

Comptroller General  
of the United States

United States Government Accountability Office  
Washington, DC 20548

## Decision

**Matter of:** Department of Agriculture—Cooperative Agreement for Use of Aircraft

**File:** B-308010

**Date:** April 20, 2007

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### DIGEST

The Animal and Plant Health Inspection Service (APHIS), a division in the U.S. Department of Agriculture, did not violate the *bona fide* needs rule when it used fiscal year 2000 funds to facilitate purchase of an aircraft as part of a cooperative agreement. APHIS had the authority to enter into a cooperative agreement with Wyoming Woolgrowers Association (WWGA), but made the payments prior to a written cooperative agreement. We do not endorse APHIS's actions in expending federal funds prior to executing a cooperative agreement and remind APHIS of its duty to protect government funds from potential loss.

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### DECISION

The Inspector General (IG), U.S. Department of Agriculture (USDA), asked whether expenditures of appropriated funds by the Wildlife Services (WS) program office of the Animal and Plant Health Inspection Service (APHIS) violated the *bona fide* needs rule. Letter from David R. Gray, Counsel to the Inspector General, USDA, to Anthony Gamboa, General Counsel, GAO, May 30, 2006 (Request Letter). In August and December 2000, APHIS made payments to an aircraft owner to facilitate a purchase agreement between the owner and an industry group, Wyoming Woolgrowers Association (WWGA). *Id.* In August 2000, WWGA purchased the aircraft in anticipation of entering into a cooperative agreement with APHIS for use of the aircraft by WS for its wildlife predation program. *Id.*

For reasons explained below, APHIS did not violate the *bona fide* needs rule when it obligated and subsequently expended fiscal year (FY) 2000 funds to facilitate WWGA's purchase of the aircraft. The purchase agreement between WWGA and the aircraft owner credited a portion of APHIS's payment as reimbursements for past modifications to the aircraft in 1999, which the aircraft owner had made on his own initiative. While APHIS's payments reflected the costs the owner had incurred when he made the modifications, APHIS had neither instructed the owner to make

modifications nor was the payment made to induce the owner into making the modifications. APHIS was making payments to the owner to defray a portion of WWGA's purchase price of the aircraft as measured by the cost of the 1999 modifications.

Also, APHIS had the authority to enter into a cooperative agreement for use of the aircraft, but APHIS should have definitized and executed its agreement with WWGA prior to paying part of the purchase price of the aircraft. Otherwise, APHIS risked losing the money it had paid to the aircraft owner on WWGA's behalf. However, sufficient evidence exists that at the time APHIS made the payments, APHIS and WWGA had already agreed to cooperate in the purchase and subsequent exclusive use of the aircraft by APHIS. We, however, do not endorse APHIS's actions in expending federal funds prior to executing a written cooperative agreement and we remind APHIS that it is the duty of all agencies to protect government funds from potential loss.

Our practice when rendering decisions is to obtain the views of the relevant federal agency to establish a factual record and to elicit the agency's legal position in 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.htm](http://www.gao.gov/legal.htm). In this case, the Agriculture Department's General Counsel provided us with a copy of a May 2005 legal opinion in this matter that was prepared for the WS program office. USDA, Office of the General Counsel Memorandum for William H. Clay, Deputy Administrator, Wildlife Services, *Review of Wildlife Services Aircraft Expenditures for Violations of Appropriations Law*, May 24, 2005 (GC Memo).

## BACKGROUND

APHIS conducts programs, through its WS office, to eradicate and control predatory and other injurious wild animals for the protection of domestic livestock. GC Memo, at 1. WS cooperates with states and other cooperators, including industry groups, wherein both parties provide resources to meet the objectives of the program. *Id.*

WS uses aircraft to implement the wildlife predation program. *Id.* Prior to FY 2000, APHIS leased its aircraft for the wildlife predation program in Wyoming by competitive solicitation. *Id.* Because of high leasing costs, APHIS sought other means of procuring use of aircraft and ultimately cooperated with an industry group, WWGA, who purchased an aircraft for APHIS's exclusive use. *Id.*

APHIS helped WWGA locate an acceptable aircraft to purchase. *Id.* WWGA entered into a purchase agreement with Baker Air Service (Baker) for the aircraft on August 1, 2000. *Id.* at 2; USDA Inspector General, *Audit Report: Animal and Plant Health Inspection Service, Wildlife Services, Aircraft Acquisition*, USDA/OIG-A/33099-1-KC (Sept. 2004) (IG Report). APHIS had previously leased this particular aircraft from Baker in the summer of 1999. IG Report, at 4. Earlier in 1999, before leasing to APHIS, Baker had modified the aircraft to conform to APHIS standards.

*Id.* Baker wanted to recoup the costs of these 1999 modifications as part of the purchase price of the aircraft. GC Memo, at 2. Also, Baker's aircraft required a new engine and other alterations in order to comply with APHIS standards. Baker agreed to upgrade the plane but added these costs to WWGA's purchase price. *Id.*

The final cost of the aircraft exceeded WWGA's available funds, and APHIS agreed to pay the costs above what WWGA could afford to spend. *Id.* Therefore, as part of the negotiations for the purchase of the aircraft by WWGA, and written as terms of the purchase agreement between Baker and WWGA, Baker agreed to sell the aircraft to WWGA for \$34,450 on the condition that APHIS pay Baker an additional \$15,050 to cover the costs of Baker's modifications to the aircraft in 1999. GC Memo, at 2; IG Report, at 5. Additionally, the purchase agreement between Baker and WWGA made sale of the aircraft contingent on APHIS either furnishing or compensating Baker for other alterations Baker would make to the aircraft, including a new engine, in the amount of \$33,450. GC Memo, at 2.

WWGA paid Baker its share of the purchase price, \$34,450, on August 8, 2000. *Id.* In August and December 2000, APHIS paid its share of the purchase price. On August 9, 2000, APHIS issued a purchase order in the amount of \$24,500 to an aircraft engine supplier, enabling Baker to acquire a new engine for the aircraft. *Id.* On August 29, 2000, APHIS paid Baker \$15,050, covering Baker's 1999 modifications to the aircraft. *Id.* APHIS paid Baker a total of \$10,157.92 in December 2000 to cover Baker's costs of additional alterations completed in October 2000. *Id.*

On November 20, 2000, 3 months after WWGA's purchase of the aircraft, APHIS entered into the cooperative agreement with WWGA for APHIS's use and management of an aircraft owned by WWGA for aerial hunting services under the wildlife predation program. *Id.*

On September 30, 2004, the IG published the results of a review of the APHIS aircraft cooperative agreement. IG Report. The IG determined that APHIS personnel acted inappropriately in facilitating WWGA's purchase of the aircraft. *Id.* at 3. The IG determined that APHIS likely violated various appropriations law provisions and recommended that APHIS request a legal opinion from the USDA General Counsel's Office (GC) as to whether such violations occurred. *Id.* at 8. The GC determined that, while the transactions made by APHIS to facilitate the cooperative agreement, viewed in their individual parts, appeared problematic, APHIS did have the authority to enter into a cooperative agreement with the industry group and had available appropriations to fund the agreement.<sup>1</sup> GC Memo, at 3. The IG still questions the

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<sup>1</sup> Also, both the IG and the GC concluded that APHIS personnel violated purchase card rules by splitting the cost of the final payment of \$10,157.92 into five invoices in order to allow for use of purchase cards. GC Memo, at 9-10; IG Report, at 10-11.

(continued...)

propriety of the expenditures of appropriated funds and requests our decision in this matter. Request Letter.

## DISCUSSION

The issue presented to us by the IG is whether there was a *bona fide* need in FY 2000 for the payment for modifications of \$15,050 that Baker made to the aircraft in FY 1999. Request Letter. We answer that question below. However, the facts presented to us raise additional questions about APHIS's actions. Therefore, we not only examine the *bona fide* needs question, but we look at APHIS's authority to enter into cooperative agreements for use of aircraft and the legality of APHIS's payments to facilitate WWGA's purchase of an aircraft at a time when APHIS had not definitized or executed a written cooperative agreement with WWGA. We start our discussion with the *bona fide* needs rule.

### Bona Fide Needs Rule

The IG questions the propriety of the payments of appropriated funds by APHIS to Baker for improvements, modifications, and other upgrades to an aircraft purchased by WWGA. Request Letter. The GC identified three separate payments to Baker. GC Memo, at 2. Only one of the three payments is at issue here: the payment of \$15,050 for modifications made by Baker to the aircraft in 1999.<sup>2</sup> APHIS obligated FY 2000 funds. The IG was specifically troubled by this payment because Baker made the improvements to the plane in 1999, over a year before the plane was bought by WWGA. Request Letter. This decision addresses whether APHIS violated the *bona fide* needs rule by obligating FY 2000 funds.

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(...continued)

The IG and GC agree that APHIS's use of purchase cards was improper, *id.*, and, therefore, this question was not presented to GAO.

<sup>2</sup> The IG examines APHIS's payments by looking at the specific objects for which the funds were used. Besides the \$15,050 for 1999 modifications, APHIS also paid \$24,500 to an engine supply company for Baker in FY 2000. APHIS obligated FY 2000 funds for this purchase. Therefore, the IG does not question the use of FY 2000 funds for this payment. APHIS made a final payment of \$10,157.92 to Baker for charges for alterations on the aircraft in FY 2001. APHIS obligated FY 2001 funds for the final payment. *Id.* The GC directed APHIS to deobligate the FY 2001 funds used for the final payment and obligate its FY 2000 appropriation. Therefore, this payment is also not at issue.

The *bona fide* needs rule, derived from the time statute, 31 U.S.C. § 1502,<sup>3</sup> addresses the availability of an agency's appropriation as to time. 73 Comp. Gen. 77, 79 (1994); 64 Comp. Gen. 410, 414-15 (1985). The rule is that an appropriation is available for obligation only to fulfill a genuine or *bona fide* need of the period of availability for which it was made. 73 Comp. Gen. at 79; B-289801, Dec. 30, 2002. It applies to all federal government activities carried out with appropriated funds enacted for a fixed period of time, including contract, grant, and cooperative agreement transactions. 73 Comp. Gen. at 78-79. An agency's compliance with the *bona fide* needs rule is measured at the time the agency incurs an obligation, and whether there is a *bona fide* need at the point of obligation depends on the purpose of the transaction and the nature of the obligation being entered into. 61 Comp. Gen. 184, 186 (1981). At issue here is whether APHIS's *bona fide* need arose when the modifications to the aircraft were made or whether the *bona fide* need arose when APHIS acted to facilitate WWGA's acquisition of the aircraft.

The GC opined that APHIS's *bona fide* need arose at the time the purchase agreement was entered into on August 1, 2000, and not in FY 1999 when Baker modified the aircraft. GC Memo, at 9. The GC determined that when WWGA and Baker signed the purchase agreement, APHIS had a *bona fide* need to pay Baker in order to ensure that APHIS could successfully execute the later cooperative agreement with WWGA. *Id.* Therefore, according to the GC, the payments in August 2000 were necessary to guarantee the subsequent cooperative agreement, and thus FY 2000 funds were appropriately obligated. *Id.*

We agree with the GC's determination. APHIS, during the negotiations for, and the signing of, the purchase agreement, acted in anticipation of the cooperative agreement. APHIS was neither paying for alterations nor directly reimbursing Baker for the costs of the alterations. Instead, APHIS was making a payment to facilitate WWGA's purchase of the aircraft, albeit in amounts related to specific improvements to the aircraft. Therefore, the proper event by which to measure the *bona fide* need was at that time when APHIS acted to facilitate WWGA's purchase of the aircraft. It was at that point, and not previously, that APHIS had a *bona fide* need, namely, the need to ensure that WWGA was able to purchase the aircraft. *See* 37 Comp. Gen. 155, 159 (1957) (*bona fide* need determination depends upon the facts and circumstances of the particular case). Therefore, the actual date that Baker completed the modifications is irrelevant in this situation.

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<sup>3</sup> "The balance of an appropriation or fund limited for obligation to a definite period is available only for payment of expenses properly incurred during the period of availability or to complete contracts properly made within that period of availability." 31 U.S.C. § 1502(a).

### Cooperative Agreement for Use of Aircraft

Notwithstanding our *bona fide* needs conclusion, questions remain regarding APHIS's decision to pay Baker to facilitate WWGA's purchase of an aircraft.<sup>4</sup> The facts of this case present an unusual chain of events leading up to the cooperative agreement between APHIS and WWGA. If APHIS's contribution to the cooperative agreement was a payment to Baker to facilitate WWGA's purchase from Baker, one would have expected APHIS to have entered into a written cooperative agreement with WWGA for the aircraft prior to paying Baker, and the cooperative agreement would have outlined APHIS's share of the costs. Without a written agreement in place, APHIS risked losing the money APHIS had paid to Baker on WWGA's behalf. However, the evidence indicates that at the time APHIS made the payment, APHIS and WWGA had already agreed to cooperate for use of the aircraft.

Like contracts and grants, cooperative agreements are commonly used funding vehicles for agencies to provide financial assistance. 67 Comp. Gen. 13, 14–15 (1987); 64 Comp. Gen. 582, 584 (1985). The purpose of a contract is to acquire goods or services, 31 U.S.C. § 6303; the purpose of a grant is to provide financial assistance, *id.* § 6304. Generally, the purpose of a cooperative agreement is to provide financial assistance to a recipient to carry out a public purpose instead of the agency acquiring property or services directly, as the agency would under a contract. *Id.* § 6305. Unlike grants, the agency as a party to a cooperative agreement is substantially involved with the recipient who is carrying out the activity contemplated in the agreement. *Id.*; 67 Comp. Gen. at 15. APHIS likens the cooperative agreement arrangement to a partnership between the agency and what it calls the nonfederal cooperator.<sup>5</sup>

#### (1) Authority to enter into cooperative agreement for use of an aircraft

Under the annual Agriculture appropriations acts, APHIS has long been authorized to use cooperative agreements with a state or cooperator “to carry out programs to protect the nation’s animal and plant resources.” *See, e.g.*, Pub. L. No. 106-387, § 713, 114 Stat. 1549A-1, 1549A-29 (Oct. 28, 2000). APHIS is authorized to conduct various animal control programs. 7 U.S.C. §§ 426–426c. Section 426 authorizes the Secretary

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<sup>4</sup> The USDA GC memorandum provides a thorough discussion of APHIS's authority to enter into a cooperative agreement for the lease of an aircraft, to use appropriated funds for lease of an aircraft, and to pay amounts to Baker under the purchase agreement, and we find it unnecessary to repeat that discussion in full. *See* GC Memo.

<sup>5</sup> USDA-APHIS-Marketing and Regulatory Programs Business Services, *Frequently Asked Questions*, available at [www.aphis.usda.gov/mrpbs/fmd/agreements\\_faq.html](http://www.aphis.usda.gov/mrpbs/fmd/agreements_faq.html) (last visited Apr. 19, 2007).

of Agriculture to “conduct a program of wildlife services with respect to injurious animal species and take any action the Secretary considers necessary in conducting the program.” The Secretary is required to administer the program “in a manner consistent with all of the wildlife services authorities in effect on the day before October 28, 2000.” *Id.* § 426. On October 27, 2000, section 426 authorized the Secretary to conduct investigations, experiments, and tests where necessary in order to determine, demonstrate, and promulgate the best methods of eradication, suppression, or bringing under control various injurious wildlife on areas of public and private land. 7 U.S.C. § 426 (2000). The Secretary was also directed to protect stock and other domestic animals from predatory and other animals and was to conduct campaigns for the destruction or control of these animals. *Id.* Section 426, at that time, also provided that “in carrying out the provisions of [section 426] the Secretary of Agriculture may cooperate with States, individuals, and public and private agencies, organizations, and institutions.” *Id.*

The GC argues that “WS entered into the Cooperative Agreement here to further the wildlife predation program, the purpose of which is to protect animal resources in the form of various livestock from predatory animals.” GC Memo, at 5. We agree. The agreement itself says, “These aircraft will be used by WS primarily to provide aerial hunting services to Wyoming livestock producers and others requesting control of predatory animals.” *Cooperative Agreement Between Wyoming Wool-Growers Association (WWGA) and United States Department of Agriculture (USDA), Animal and Plant Health Inspection Service (APHIS), Wildlife Services (WS), Regarding Use of WWGA Fixed-Wing Aircraft by APHIS-WS*, Nov. 2000. In our view, APHIS’s authority to enter into cooperative agreements for this purpose was broad enough for use of aircraft, so long as the aircraft was used to carry out the section 426 programs. *See generally* B-306748, July 6, 2006; B-303145, Dec. 7, 2005 (appropriations are available for expenses which are necessary and incident to the proper execution or achievement of the object of the appropriation).

(2) Authority to use appropriated funds for a cooperative agreement for use of aircraft

Subsection 1343(d) of title 31, United States Code, prohibits an agency from using its appropriation to buy, maintain, or operate an aircraft unless its appropriation specifically authorizes the purchase, maintenance, or operation of an aircraft. At the time of this transaction, APHIS’s annual appropriation was available for “the operation and maintenance of aircraft and the purchase of not to exceed four, of which two shall be for replacement only.” *See, e.g.*, Pub. L. No. 106-78, title I, 113 Stat. 1135, 1142–43 (Oct. 22, 1999).

In this case APHIS was not purchasing aircraft; APHIS, instead, entered into a cooperative agreement for use of WWGA’s aircraft. Because the prohibition of 31 U.S.C. § 1343(d) is on the purchase of aircraft and APHIS did not purchase the aircraft, the prohibition does not apply here. We presume that Congress carefully crafted the language of the prohibition and when it limited only the *purchase* of

aircraft, it did not otherwise intend to limit agencies' use of aircraft. Compare, for example, subsection 1343(d) to subsection 1343(b), which prohibits agencies from buying *or leasing* passenger motor vehicles unless specifically provided by law. 31 U.S.C. § 1343(b)(2). The subsection (b) prohibition against leasing was added in 1946. At that same time, subsection (d) was enacted to establish the prohibition on the purchase of aircraft, but Congress did not mention the leasing of aircraft. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5<sup>th</sup> Cir. 1972)). At the same time Congress amended subsection 1343(b) to include a prohibition on leasing passenger motor vehicles, it also added the provision to prohibit the purchase of aircraft, omitting any prohibition on the lease of aircraft. Therefore, we assume that Congress omitted the prohibition against leasing aircraft intentionally. Congress, having affirmatively limited agencies' purchase and leasing of passenger motor vehicles at the same time it limited only purchase of aircraft can be presumed not to have limited agencies' use of aircraft by lease or otherwise.

Under Agriculture's annual appropriation, APHIS is authorized to use appropriated funds "to discharge the authorities of the Secretary of Agriculture under [7 U.S.C. §§ 426–426b]." Pub. L. No. 106-78. Therefore, APHIS had authority to enter into a cooperative agreement with WWGA, and APHIS's appropriation is available to fund the costs under the agreement.

(3) Authority to pay amounts to Baker in advance of the written cooperative agreement

One final issue remains: whether APHIS had the authority to pay amounts to Baker in advance of the written cooperative agreement. If APHIS had entered into a cooperative agreement with WWGA prior to August 2000, under which APHIS agreed to make a payment to Baker to facilitate WWGA's purchase of the plane from Baker, we would not be presented with this issue. Unfortunately, this version of events is not what actually took place. APHIS, instead of making payments under a written, signed agreement, made its payments directly to Baker prior to the execution of the cooperative agreement with WWGA. In this case, however, it is important to examine the course of dealing between APHIS and WWGA because the record indicates that APHIS and WWGA had agreed to cooperate at the time APHIS made payments to Baker. "A course of dealing is a sequence of previous conduct between the parties to an agreement which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct." Restatement (Second) of Contracts § 223 (1981). *See also Brines v. XTRA Corp.*, 304 F.3d 699, 703 (7<sup>th</sup> Cir. 2002).

The course of dealing between APHIS and WWGA lends support to the finding that APHIS and WWGA had agreed to cooperate before APHIS made payments to Baker.



First, it was APHIS that sought out WWGA as a cooperator. GC Memo, at 1. Apparently, because of rising aircraft leasing costs, APHIS was looking to enter into a cooperative agreement for use of an aircraft and approached an industry group that did not yet own an aircraft. *Id.* APHIS had worked with woolgrowers associations under cooperative agreements in several states to carry out the wildlife predation program, and WWGA was no exception. *Id.* APHIS helped WWGA find the aircraft. *Id.* When WWGA notified APHIS that it did not have the necessary funds to acquire the aircraft, APHIS agreed to share the cost of the aircraft, to the extent of the past modifications and future alterations that Baker made, in order to facilitate WWGA's acquisition. *Id.* at 2. Also, prior to the cooperative agreement with WWGA, APHIS had leased the same model plane from another party. On August 4, 2000, before making any payments to Baker and before entering into the cooperative agreement, APHIS notified the previous lessor that APHIS would not renew the option on the aircraft because it was transferring its requirement for a plane to WWGA under the cooperative agreement. *See Baine Clark*, B-289545, Feb. 5, 2002.<sup>6</sup> It is clear that APHIS made payments to Baker only to aid WWGA in procuring the plane for APHIS's exclusive use under the cooperative agreement, and sufficient evidence exists to show that APHIS and WWGA had agreed to cooperate before APHIS made any payments towards the aircraft purchase.

While we acknowledge that no real harm came from APHIS's payments to Baker, we do not endorse APHIS's actions in expending federal funds prior to executing a written cooperative agreement. If something had prevented APHIS and WWGA from entering into the cooperative agreement, the government could have lost the money APHIS paid to Baker on WWGA's behalf. In addition, once executed, the cooperative agreement here did not clearly and affirmatively set out all of the duties and responsibilities of the two parties. APHIS's failure to put into writing the entirety of its relationship with WWGA required us to rely on WWGA's purchase agreement with Baker, and addenda thereto, and APHIS's course of dealing with WWGA. We remind APHIS that it is an agency's responsibility to protect governmental funds from potential loss.<sup>7</sup> *See* 65 Comp. Gen. 806, 809 (1986); B-180713, Apr. 10, 1974. Going forward, APHIS should be aware of the dangers and take steps to alleviate the possibility of loss. Written agreements provide certainty and definition to any relationship between the government and another party.

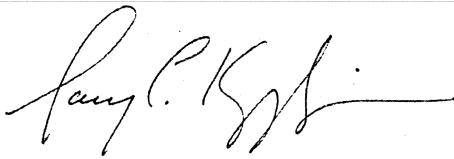
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<sup>6</sup> The previous aircraft lessor filed a bid protest with our Office protesting APHIS's decision to use a cooperative agreement for use of aircraft instead of a procurement contract for lease. The facts above were presented in that protest. We did not examine the merits of the case because it was dismissed due to a procedural deficiency.

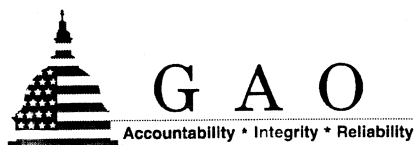
<sup>7</sup> See, for example, 31 U.S.C. § 3324, which generally prohibits advance payments under a contract. The primary purpose of this prohibition is to protect the government from nonperformance.

## CONCLUSION

We concur with the USDA GC that APHIS did not violate the *bona fide* needs rule when it obligated and subsequently made payments to Baker to facilitate WWGA's acquisition of Baker's aircraft. While APHIS had the authority to enter into the cooperative agreement for use of the aircraft, APHIS made payments prior to a written cooperative agreement. We do not endorse APHIS's actions in expending federal funds prior to executing a cooperative agreement and we remind APHIS that it is the duty of all agencies to protect government funds from potential loss.



Gary L. Kepplinger  
General Counsel



## Decision

**Matter of:** National Transportation Safety Board—Insurance for Employees  
Traveling on Official Business

**File:** B-309715

**Date:** September 25, 2007

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### DIGEST

The National Transportation Safety Board (NTSB) improperly used its appropriated funds to purchase accident insurance for its employees on official travel. NTSB does not have an appropriation specifically available for such a purpose, and the expenditures cannot be justified as a necessary expense. Because NTSB has no appropriation available to purchase accident insurance, the payments NTSB made constitute violations of the Antideficiency Act. NTSB must report the violations to the President and Congress, with a copy of the report to the Comptroller General.

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### DECISION

The National Transportation Safety Board (NTSB) has requested a decision under 31 U.S.C. § 3529 regarding whether NTSB properly used its appropriated funds to purchase accidental death and dismemberment insurance for its employees traveling on official business and, if not, whether such payments constituted violations of the Antideficiency Act, 31 U.S.C. § 1341. Letter from Steven E. Goldberg, Chief Financial Officer, NTSB, to David M. Walker, Comptroller General of the United States, *Re: Request for Advisory Opinion Under 31 U.S.C. § 3529 Concerning Payment of Insurance Coverage for NTSB Employees*, June 19, 2007 (Goldberg Letter). We conclude that NTSB's appropriation was not available to purchase such insurance and that NTSB's payments for the insurance violated the Antideficiency Act.

Our practice when rendering decisions is to obtain the views of the relevant federal agencies. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), available at [www.gao.gov/legal.htm](http://www.gao.gov/legal.htm). In this regard, NTSB provided us a legal memorandum detailing its views in this matter. Memorandum from Linda L. Lewis, Assistant General Counsel, NTSB, to Joseph G. Osterman, Managing Director (MD-1), NTSB, *Insurance Coverage for NTSB Employees*, May 25, 2007 (Lewis Memo), submitted with Goldberg Letter.

## BACKGROUND

NTSB employees fly in official travel status on various types of commercial and government aircraft, both as ticketed and non-ticketed passengers, to transportation accident sites around the world. Goldberg Letter, at 1. In the aftermath of a 1996 crash of an Air Force airplane in Croatia, NTSB employees raised concerns about the extent of their insurance coverage when flying to accident scenes on official travel. *Id.* The employees were concerned that travel insurance incidental to the government travel card contract did not cover non-ticketed travel, that there was no Federal Tort Claims Act<sup>1</sup> right of recovery for an accident involving a United States government aircraft, and that there was likely no way to recover losses resulting from accidents involving foreign state aircraft. *Id.* at 2.

To allay these concerns, NTSB purchased an accidental death and dismemberment insurance policy in 1998 for its employees who travel on official business and renewed it regularly until 2006.<sup>2</sup> *Id.* at 1. NTSB paid the policy from its “Salaries and Expenses” appropriation, which is available for “necessary expenses of the National Transportation Safety Board.” *E.g.*, Transportation, Treasury, Housing and Urban Development, the Judiciary, the District of Columbia, and Independent Agencies Appropriations Act, 2006, Pub. L. No. 109-115, div. A, title VI, 119 Stat. 2396, 2487 (Nov. 30, 2005). The policy provided insurance to all NTSB employees traveling domestically or internationally on official business, in any kind of vehicle, whether commercial or government owned. Goldberg Letter, at 2.

In September 2006, NTSB extended the policy until September 2007; however, on the advice of counsel, NTSB did not pay the invoice for that year and canceled the policy retroactively to September 1, 2006. *Id.* NTSB counsel advised that NTSB’s

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<sup>1</sup> The Federal Tort Claims Act allows waiver of the federal government’s sovereign immunity in cases where federal employees are negligent while acting within the scope of their employment. 28 U.S.C. § 1346(b).

<sup>2</sup> NTSB renewed the policy on a yearly basis until July 2002, when it renewed the policy for 3 years. E-mail from Linda L. Lewis, Assistant General Counsel, NTSB, to Wesley Dunn, Senior Staff Attorney, GAO, *Subject: NTSB Insurance Opinion*, Aug. 24, 2007; Letter from Laura A. Cincotta, Assistant Vice President, Marsh USA Inc., to Donald P. Libera, Jr., Deputy Chief Financial Officer, NTSB, *Subject: Group Business Travel Accident Insurance Life Insurance Company of North America Policy #ABL 665772*, Sept. 9, 2002. NTSB renewed the policy for another year in 2005. *See* Letter from Laura A. Cincotta, Senior Associate, Mercer Health and Benefits, to Ms. Colette M. Magwood, Assistant Human Resource Director, NTSB, *Subject: Group Business Travel Accident Insurance Life Insurance Company of North America Policy #ABL 665772*, June 30, 2006. NTSB spent a total of \$74,063 on the policy. E-mail from Stephen Goldberg, Chief Financial Officer, NTSB, to Linda Lewis, Assistant General Counsel, NTSB, *Subject: FW: Flight Insurance Premiums*, Aug. 27, 2007.

appropriation was not available to purchase accident insurance for NTSB employees. Lewis Memo, at 9--10. Counsel concluded that accident insurance is a personal expense to be borne by the employee, not the government, and that accident insurance has no particular nexus with NTSB's mission. *Id.* At counsel's suggestion, NTSB asks us whether it properly used its appropriation to purchase accident insurance for its employees, and if not, whether it violated the Antideficiency Act.

## DISCUSSION

Appropriated funds are available only for the objects for which they were made unless otherwise provided by law. 31 U.S.C. § 1301(a). However, each item of expenditure need not be specified in an appropriations act. B-306748, July 6, 2006. Under the necessary expense rule, appropriations are available for expenses which are necessary or incident to the proper execution or achievement of the object of the appropriation. *Id.* The necessary expense rule recognizes that when Congress makes an appropriation for a particular purpose, by implication it authorizes the agency involved to incur expenses which are necessary or incident to the accomplishment of that purpose. *Id.*

As a general matter, accident insurance while in official travel status is a personal expense to be borne by the employee. 47 Comp. Gen. 319 (1967); B-128981, Sept. 20, 1956 (appropriated funds not available to purchase "flight insurance" for employees traveling on official business). *See also* B-208630, Mar. 22, 1983 (appropriated funds not available to purchase personal collision insurance for employee who rents automobile); 41 C.F.R. § 301-10.452 (when renting an automobile on official business accident insurance "is a personal expense"). Of course, when an agency has statutory authority to provide insurance to its employees, it may do so. For example, agencies are required to pay from their appropriations an amount equal to one half the amount an employee elects to withhold from his or her pay as a contribution to a group life insurance plan purchased by the Office of Personnel Management, such as the Federal Employees Group Life Insurance (FEGLI) program. 5 U.S.C. § 8708. *See* B-143693, Aug. 25, 1960 ("Any extensions of such [agency] contributions . . . or increase in the field of coverage would . . . be appropriate matters for legislation."). NTSB has not identified, and we are not aware of, any statutory authority permitting it to purchase accident insurance for its employees.

We have not objected to the use of appropriated funds to cover what would otherwise be personal expenses where the benefit accruing to the government outweighs the personal nature of the expense. *E.g.*, B-288266, Jan. 27, 2003. That is not the case here, however. In this regard, NTSB is "charged by Congress with investigating every civil aviation accident in the United States and significant accidents in the other modes of transportation." NTSB, *History and Mission*, available at [www.nts.gov/Abt\\_NTSB/history.htm](http://www.nts.gov/Abt_NTSB/history.htm) (last visited Aug. 27, 2007). NTSB also investigates "aviation accidents overseas involving U.S.-registered aircraft, or involving aircraft or major components of U.S. manufacture." *Id.* To fulfill this mission, NTSB employees "travel throughout the country and to every corner of the

world to investigate significant accidents.” *Id.* Prior to the purchase of the insurance policy in 1998, and since its cancellation in 2006, NTSB employees have carried out this responsibility without the benefit of accident insurance supplied by NTSB, belying any notion that accident insurance is necessary to the success of NTSB’s mission. More importantly, as NTSB counsel recognizes, “there is already a general requirement for Federal employees to perform their jobs in accordance with their agency’s statutory mandates and governing regulations. No further inducement is necessary or justified. . . . [Purchasing accident insurance for NTSB employees in official travel status] does not bear a logical relationship to NTSB’s general appropriation.” Lewis Memo, at 9–10. We agree. Accident insurance is not necessary for the successful execution of the object of NTSB’s appropriation, and thus NTSB improperly used its appropriated funds to purchase accident insurance for its employees.

In one case, we concluded that the General Services Administration could accept accident insurance coverage for federal employees when the insurance was merely incidental to a statutorily authorized travel agent contract or a contract for travel cards. B-222234, Dec. 9, 1986. In that case, the incidental benefit did not cost the government extra money, the government could not negotiate the insurance term out of the contract, and the government received no financial incentive if it declined the insurance. *Id.* As NTSB counsel points out, NTSB has purchased its accident insurance policy for the sole purpose of providing coverage to its employees, not as an incidental part of a broader contract. Lewis Memo, at 11.

When an agency’s appropriation is not available for a certain purpose, and the agency has no other funds available for that purpose, any payments the agency makes or obligations it incurs for that purpose violate the Antideficiency Act, 31 U.S.C. § 1341(a).<sup>3</sup> B-302710, May 19, 2004; B-229732, Dec. 22, 1988. As discussed above, NTSB has no funds available to purchase accident insurance for its employees in official travel status. Thus, payments NTSB made for the insurance constitute violations of the Antideficiency Act. B-302710. NTSB counsel agrees. Lewis Memo, at 14 (“In the absence of an appropriation, executive officers and employees may not draw funds from the Treasury to effectuate an otherwise unauthorized purpose. If an agency does so, it has violated the Antideficiency Act.”). NTSB must report such violations to Congress and the President, with a copy of the report to the Comptroller General. 31 U.S.C. § 1351.

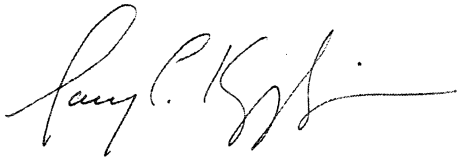
## CONCLUSION

NTSB improperly used its appropriated funds to purchase accident insurance for its employees on official travel. NTSB does not have an appropriation specifically

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<sup>3</sup> Section 1341(a) provides in part, “An officer or employee of the United States government . . . may not make or authorize an expenditure or obligation exceeding an amount available in an appropriation.”

available for such a purpose, and the purchase cannot be justified as a necessary expense. Because NTSB has no appropriation available to purchase accident insurance, the payments NTSB made constitute violations of the Antideficiency Act. NTSB must report the violation to the President and Congress, with a copy to the Comptroller General.

A handwritten signature in black ink, appearing to read "Gary L. Keplinger". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Gary L. Keplinger  
General Counsel







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B-308968

November 27, 2007

The Honorable Barbara A. Mikulski  
United States Senate

Subject: *No-Cost Contracts for Event Planning Services*

Dear Senator Mikulski:

This opinion responds to your letter of January 26, 2007, requesting that we “clarify the suitability of using no-cost contracts to obtain conference, event and trade show planning services.” Specifically, you asked us to review a model contract supplied to us by National Conference Services, Inc.’s (NCSI) counsel.<sup>1</sup> Letter from Antonio R. Franco and Jonathan T. Williams, Piliero Mazza, to Thomas H. Armstrong, Assistant General Counsel, GAO, *Re: No Cost Contract for Conference Services*, Jan. 23, 2007 (NCSI Letter). In its model contract, NCSI offers to provide conference planning services with no financial obligation to the government; NCSI would recoup its costs by charging exhibitors, sponsors, and attendees of the conference. *Id.*

We conclude that the NCSI contract is a valid, binding no-cost contract that agencies may utilize to obtain conference planning services without violating the voluntary services prohibition of the Antideficiency Act, 31 U.S.C. § 1342. Because of the terms and conditions of the NCSI contract, an agency would incur no financial liability and NCSI would have no expectation of payment from the government. Before engaging in no-cost contracts, however, agencies should address several considerations to balance the financial flexibility of no-cost contracts with achievement of agency objectives in hosting a conference.

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<sup>1</sup> Our practice when rendering legal opinions is to obtain the views of the relevant agency to establish a factual record and to elicit the agency’s legal position on the subject matter of the request. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006) available at [www.gao.gov/congress.html](http://www.gao.gov/congress.html) (last visited Oct. 16, 2007). In this instance, your letter did not identify an agency that had contracted with NCSI. At your request, NCSI provided us with a copy of its model contract and its explanation of the contract.

## BACKGROUND

NCSI provides “event planning, production and support services.” NCSI, *About NCSI—Who We Are*, available at [www.ncsievents.com/aboutncsi/who\\_we\\_are.aspx](http://www.ncsievents.com/aboutncsi/who_we_are.aspx) (last visited Oct. 16, 2007). NCSI reports that it has conducted business with various government agencies, including those within the intelligence community and the Department of Defense, by facilitating “information technology conferences, industry days, [and] meetings and technology expositions . . . .” *Id.*

NCSI’s services include: “Planning; Selecting venues; Negotiating contracts; Marketing; Coordinating logistics; Taking registrations; Processing payments; [and] Post-event reporting.” NCSI, *Federal, Intelligence Community and Department of Defense Services—Conferences*, available at [www.ncsievents.com/federal/federal\\_conferences.aspx](http://www.ncsievents.com/federal/federal_conferences.aspx) (last visited Oct. 16, 2007) (NCSI Conferences). NCSI offers to plan “Sponsored receptions;” “Break-out meetings; Seminars; Working luncheons;” and “Workshops.” NCSI, *Events—Conferences*, available at [www.ncsievents.com/event/conferences.aspx](http://www.ncsievents.com/event/conferences.aspx) (last visited Oct. 16, 2007). In contracting with its clients, “NCSI is able to . . . offer its event planning services to government hosts at zero cost . . . .” NCSI Conferences.

The proposed NCSI contract provides:

“The Contractor may choose to provide for all services as required by the task order at no cost to the Government. The Contractor is entitled to all of the registration, exhibition, sponsorship and/or other fees collected as payment for performance under the task order if there is no cost to the Government. In this case, the Contractor is liable for all costs related to the performance of the task order as defined in the task order and the government’s liability for payment of services under this task order is ‘zero.’”

NCSI Letter, Exhibit E. NCSI explained that it recoups its costs by “charging the attendee and exhibitor participants of the event.” NCSI Letter.

## DISCUSSION

Generally, a no-cost contract is a formal arrangement between a government entity and a vendor under which the government makes no monetary payment for the vendor’s performance. B-302811, July 12, 2004. “Under a typical no-cost contract, a vendor provides a service that [an] agency would otherwise perform, but instead of receiving compensation from the agency, the vendor charges and retains fees [assessed against third parties] for its services.” B-300248, Jan. 15, 2004. *See also Ober United Travel Agency, Inc. v. United States Department of Labor*, 135 F.3d 822, 823 (D.C. Cir. 1998). In the instant case, NCSI intends to recoup its costs, and

presumably earn a profit, by charging conference attendees and other participants.<sup>2</sup> At issue when a federal agency agrees to a no-cost contract and receives services without having to pay is whether the agency has violated the Antideficiency Act's voluntary services prohibition, 31 U.S.C. § 1342.

The Antideficiency Act prohibits federal agencies from accepting voluntary services without specific statutory authority.<sup>3</sup> 31 U.S.C. § 1342. The purpose of the prohibition is to preclude situations that might generate claims for compensation that might exceed an agency's available funds. *See, e.g.*, B-211079.2, Jan. 2, 1987.

We have previously examined no-cost contracts in the context of the voluntary services prohibition.<sup>4</sup> In 1928, we concluded that the Federal Trade Commission (FTC) was not prohibited from entering into a no-cost contract for stenographic services. 7 Comp. Gen. 810 (1928). There, FTC gave the contractor the exclusive right to report FTC proceedings and to sell copies of transcripts to the public at rates specified in the contract; in return, the contractor would furnish copies to FTC without cost. *Id.* We determined that FTC did not violate the prohibition because "services furnished pursuant to a formal contract are not voluntary within the meaning" of the statute. *Id.* at 811.

More recently, we found no violation when the General Services Administration (GSA) proposed a no-cost contract with real estate brokers. B-302811, July 12, 2004; B-291947, Aug. 15, 2003. The contract awarded four real estate brokers "exclusive rights to represent the United States with respect to all GSA real property leases" in exchange for the brokers' lease acquisition services. B-302811, July 12, 2004. Reflecting industry practice, the real estate brokers would stipulate in the contract that they had no expectation of payment from the government and GSA had no financial liability to the brokers. B-302811, July 12, 2004; B-291947, Aug. 15, 2003. Nor would any other party pay the brokers on the government's behalf. Instead, consistent with industry norms, the brokers would receive commissions from landlords with whom they did business. B-302811, July 12, 2004; B-291947, Aug. 15,

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<sup>2</sup> To be enforceable, a contract with the United States government requires an offer, acceptance of the offer, and consideration. *Rick's Mushroom Service, Inc. v. United States*, 76 Fed. Cl. 250, 259 (2007), *citing Total Medical Management, Inc. v. United States*, 104 F.3d 1314, 1319 (Fed. Cir. 1997). A no-cost contract "raises the question . . . whether it is void for lack of consideration." 7 Comp. Gen. 810, 811 (1928). A federal agency accepting the NCSI-proposed contract would provide as consideration exclusive access to a group from which the contractor may earn income. Concurrently, the federal agency would receive NCSI's services in planning a conference.

<sup>3</sup> The Act makes an exception "for emergencies involving the safety of human life or the protection of property." 31 U.S.C. § 1342.

<sup>4</sup> GAO has also considered award of various no-cost contracts in the context of bid protests. *See, e.g.*, B-283731.2, Dec. 21, 1999.

2003. We reiterated our long-standing rule that “services received . . . free of cost pursuant to a formal contract or agreement do not constitute ‘voluntary services’” within the meaning of the Antideficiency Act, and determined that GSA did not violate the voluntary services prohibition.<sup>5</sup> B-291947, Aug. 15, 2003.

Critical in the GSA case were the terms and conditions of the contract and the attendant expectations of each party regarding payment. We emphasized, “Because the contract was constructed as a no cost contract, GSA will have no financial liability to [the] brokers, and [the] brokers will have no expectation of a payment from GSA.” B-302811, July 12, 2004. As a consequence, even if the third parties making remuneration to the real estate brokers failed to pay, “the broker would have no claim against GSA.” *Id.* Cf. B-300248, Jan. 15, 2004. We concluded that “accept[ing] services without payment pursuant to a valid, binding no-cost contract does not augment an agency’s appropriation nor does it violate the voluntary services prohibition.” B-302811, July 12, 2004.

In its contract, NCSI would stipulate that it will provide its services “at no cost to the Government,” specifying that “the government’s liability for payment of services under this task order is ‘zero.’” NCSI Letter, Exhibit E. NCSI expects to retain “all of the registration, exhibition, sponsorship and/or other fees collected as payment for performance.” *Id.* As with the FTC and GSA contracts, an agency agreeing to the NCSI contract would have no financial liability to NCSI, nor would NCSI have any expectation of payment from the government. Consequently, an agency entering into the NCSI contract would neither augment its appropriation nor run afoul of the voluntary services prohibition.

In 2006, the Department of Justice’s Office of Legal Counsel (OLC) addressed a Department of Commerce proposal asking whether an agency, when hosting a conference, may permit its contractor “(1) to provide meals, lodging, refreshments, and other goods and services to conference attendees and (2) to charge the attendees a ‘personal convenience’ fee to cover the costs of these items.” Memorandum Opinion for the General Counsel, Department of Commerce, *Applicability of the Miscellaneous Receipts Act to Contractors Receiving Personal Convenience Fees from Attendees at an Agency-Sponsored Conference*, OLC Opinion, Nov. 22, 2006. OLC did not object to the proposal because the personal convenience fees “are not used, and are not intended to be used, by or for the benefit of the host agency that hires the event planner.” *Id.* OLC noted that collected amounts do not “compensate the event planner for any contractual obligation that the host agency owes to it, or enable the agency to avoid expending appropriations . . . .” *Id.* We agree with OLC’s distinction and the rationale OLC applied to the issue before it.

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<sup>5</sup> In our decision, we did not evaluate “the soundness of the terms of the contract or advisability of entering into” no-cost contracts. B-291947, Aug. 15, 2003. In January 2007, GAO reported on the first contract year of GSA’s no-cost leasing contracts with the brokers. GAO, *GSA Leasing: Initial Implementation of the National Broker Services Contracts Demonstrates Need for Improvements*, GAO-07-17 (Washington, D.C.: Jan. 31, 2007).

Notably, the scenario presented by the Department of Commerce to OLC differs from scenarios that we have considered previously regarding agency attempts to collect fees from conference participants. In 2005, we advised the National Institutes of Health (NIH) that absent statutory authority to charge a fee and retain the proceeds, neither NIH, *nor a contractor on its behalf*, may charge a registration or other fee to defray the costs of providing meals or light refreshments integral to a conference. B-300826, Mar. 3, 2005. Doing so would impermissibly augment NIH's appropriation. *Id.* In January 2006, we reiterated the holding in B-300826 – an agency may no more engage a contractor to charge and retain a fee than the agency itself may charge and retain fees for its own benefit without specific statutory authority. B-306663, Jan. 4, 2006. In its request to OLC, the Department of Commerce represented that the department did not intend to provide meals, refreshments, and lodging to conference participants. Nov. 22, 2006, OLC Opinion. In both B-300826 and B-306663, however, we addressed a scenario where the host agency provided food as part of the conference with the purpose of ensuring full participation in the conference. In that situation, an agency may not charge participants to offset the agency's costs without statutory authority.

As with the no-cost contract GSA employed with real estate brokers, we do not opine on the wisdom of such arrangements for conference planning services.<sup>6</sup> Although a no-cost contract such as that offered by NCSI does not violate the Antideficiency Act, there are other considerations beyond compliance with fiscal laws that an agency should take into account before agreeing to a no-cost contract. An agency contemplating use of a no-cost contract for conference planning services should weigh the value of the services received from the contractor with that of the concession offered by the contractor. Important considerations include, for example, who may approve and sign such contracts, registration procedures and collection of fees, and, particularly where many, if not most, attendees are expected to be government employees, the ultimate cost to the government as a whole. Agency officials also should consider possible conflicts of interest before signing a no-cost contract, keeping in mind that control of the agenda, selection of speakers, and other matters concerning content should serve the government's, not the contractor's, purpose. In addition, agencies should ensure an open, transparent selection process before entering into no-cost contracts. Ultimately, an agency must not lose sight of its objectives for a particular event and should ensure that in avoiding costs to the

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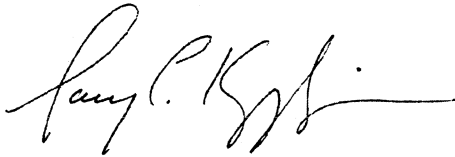
<sup>6</sup> An agency, of course, may request legislation authorizing the agency to charge an attendance fee at conferences and use the fees to offset conference costs. B-306663, Jan. 4, 2006. Last year, Congress enacted authority for the Department of Defense to collect and retain conference fees for the purpose of crediting the appropriation charged to pay conference costs. National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, div. A, title X, subtitle F, § 1051, 120 Stat. 2083, 2395-96 (Oct. 17, 2006), *codified at* 10 U.S.C. § 2262. *See* S. Rep. No. 109-254, at 385-86 (2006). The same provision also allows the department to permit a contractor to collect fees on the department's behalf. *Id.*

agency, it does not take actions that compromise the effectiveness of its conference, undermine the achievement of agency goals, or violate ethics rules.

#### CONCLUSION

The NCSI contract is a valid, binding no-cost contract. An agency may enter into such a contract without violating the Antideficiency Act's voluntary services prohibition, 31 U.S.C. § 1342. Services performed pursuant to a formal contract, in which the agency has no financial obligation and the contractor has no expectation of payment from the government, are not "voluntary" within the meaning of the prohibition. *Id.*

Sincerely yours,

A handwritten signature in black ink, appearing to read "Gary L. Keplinger". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Gary L. Keplinger  
General Counsel



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## Decision

**Matter of:** Forest Service—Light Refreshments for National Trails Day

**File:** B-310023

**Date:** April 17, 2008

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### DIGEST

U.S. Forest Service appropriations are not available to provide light refreshments for attendees of National Trails Day events. Appropriations are not available to pay for food unless specifically authorized, or unless the agency can demonstrate that such expenditures are an essential, constituent part of accomplishing an authorized agency function. Neither of these conditions is present in this case. Providing light refreshments to attendees of Trails Day does not contribute materially to the accomplishment of an agency function.

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### DECISION

The Seward Ranger District of the Chugach National Forest, U.S. Forest Service, requests our decision under 31 U.S.C. § 3529 on whether its appropriations are available to pay for light refreshments for nongovernmental attendees of its National Trails Day (Trails Day) events. Letter from Nancy S. O'Brien, Acting Administrative Officer, Chugach National Forest, to General Counsel, GAO, Aug. 3, 2007 (Request Letter). The Forest Service is an agency of the Department of Agriculture (USDA). As explained below, we conclude that its appropriations are not available for this purpose.

Our practice when rendering decisions is to obtain the views of the relevant agency to establish a factual record and the agency's legal position on the subject matter of the request. 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](http://www.gao.gov/legal/resources.html). In this regard, USDA provided its views on the legal issues involved. Letter from L. Benjamin Young, Jr., Assistant General Counsel, USDA, to Thomas H. Armstrong, Assistant General Counsel for Appropriations Law, GAO, *Subject: Forest Service—Light Refreshments for National Trails Day*, Sept. 28, 2007 (Young Letter). The agency also provided additional information regarding this

matter. Letter from Nancy S. O'Brien, Acting Administrative Officer, Chugach National Forest, to Thomas H. Armstrong, Assistant General Counsel for Appropriations Law, GAO, Sept. 25, 2007 (O'Brien Letter).

## BACKGROUND

National Trails Day (Trails Day) is an annual national event sponsored by the American Hiking Society (Society), a private nonprofit organization dedicated to preserving and promoting hiking. The Society holds Trails Day to "introduce people to the many enjoyments and benefits of trails." American Hiking Society, *Our Work: National Trails Day*, available at

<http://americanhiking.org/NTDGeneralInfoFaq.aspx> (last visited Apr. 11, 2008).

The Society provides guidance and publicity for other organizations such as community groups, businesses, and government agencies that hold Trails Day events locally. Executive Order No. 13195, entitled *Trails for America in the 21<sup>st</sup> Century*, directs federal agencies, to the extent permitted by law, to participate in National Trails Day, coordinating events with the American Hiking Society. Exec. Order No. 13195, *Trails for America in the 21<sup>st</sup> Century*, 66 Fed. Reg. 7391 (Jan. 18, 2001).

The Seward Ranger District has participated in Trails Day every year since its inception. O'Brien Letter. The District's participation consists of activities it conducts throughout the year—not just on Trails Day. Chugach Forest personnel lead visitors on hikes and serve as guides on walks and instructors for educational activities. Telephone Conversation between Nancy S. O'Brien, Acting Administrative Officer, Chugach National Forest, and Jonathan Barker, Senior Attorney, GAO, Nov. 5, 2007. In the past, attendees brought their own lunches to the event. For future Trails Day events, the District would like to provide snacks for attendees. The agency states that the snacks would be especially appropriate for hiking (including, for example, apples, raisins, dried fruit). Request Letter.

## DISCUSSION

In general, an agency may not pay for food because it is a personal expense, and the public's money is not available for personal expenses. B-288266, Jan. 27, 2003; 57 Comp. Gen. 806 (1978). There are exceptions, however; an agency may provide food if it has specific statutory authority, or where it can demonstrate that such expenditures are an essential, constituent part of accomplishing an authorized agency function. *Id.* The Forest Service has not identified any statutory authority to use its appropriations for food in these circumstances. Thus, if funds are available for these snacks, it must be under the second exception.

In considering the second exception, we examine the facts on a case-by-case basis, making our determination in light of circumstances presented. For example, in 57 Comp. Gen. 806 (1978), we concluded that the Administrative Office of the



U.S. Courts (AOUSC) could not use the appropriation for “expenses of jurors” to provide snacks to nonsequestered jurors.<sup>1</sup> AOUSC had argued that providing snacks at government expense would help maintain jurors’ morale and attention during trial. 57 Comp. Gen. at 807. We pointed out that jurors already had access to snack bar facilities via the marshals and that the marshal’s staff could collect money from the jurors to pay for the snacks. *Id.*

We have applied the second exception, however, where the expenditure will contribute materially to the effective accomplishment of a statutory responsibility or authorized function. In B-304718, Nov. 9, 2005, we concluded that the Veterans Benefits Administration (VBA) could use its appropriations to provide refreshments to nonemployee veterans and their families who participate in its focus groups. VBA is required by statute to measure and evaluate the effectiveness of its programs, including the delivery of services to veterans and their families. VBA explained that the expenditure of funds for light refreshments and meals served as an effective incentive to obtain information, and given the target population and their availability, providing refreshments was necessary to obtain focus group participation. Accordingly, we did not object to VBA’s determination since the expenditures “contribute[d] materially to the effective accomplishment of the function.” *Id.*

The determining distinction between these two cases is that VBA demonstrated that the proposed expenditure was integral to the accomplishment of an authorized agency function. AOUSC could not demonstrate that, given the ready alternatives for individual jurors to obtain individual snacks and refreshments, the use of appropriated funds to provide snacks to nonsequestered jurors was otherwise integral to successfully carrying out the jury function.

In the case before us, the Forest Service has not demonstrated how providing refreshments to Trails Day attendees is an essential, constituent part of accomplishing an authorized agency function. The Forest Service receives an appropriation for the “necessary expenses of the Forest Service . . . for management, protection, improvement, and utilization of the National Forest System.” *See, e.g.*, Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, div. F, title I, 121 Stat. 1844, 2129 (Dec. 26, 2007). The agency states that the purpose of the event is to make people “aware of the recreational activities in their area and to get them involved in building, maintaining and enjoying trails and recreation areas with a focus on getting kids and their caregivers outdoors to enjoy the health benefits of being active.” O’Brien Letter. Clearly, the Forest Service appropriation is available for Trails Day activities. Indeed, the activities that Forest Service offers Trails Day attendees are the same as those that it offers routinely the rest of the year. However, the Forest Service can successfully carry out all of the planned activities (*e.g.*,

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<sup>1</sup> The U.S. courts do have statutory authority for payment of subsistence expenses for sequestered juries. 28 U.S.C. § 1871.

guided hikes, crafts) without light refreshments, just as it does at other times of the year and just as it has for previous Trails Days. Unlike the VBA case, providing light refreshments is not an essential, constituent part of accomplishing an authorized agency function, any more so than in the AOUSC case.

USDA Office of General Counsel agrees that the Forest Service's appropriation is not available to pay for light refreshments for Trails Day. Young Letter. USDA believes that 31 U.S.C. § 1345 prohibits agencies from paying for refreshments for nongovernmental persons who attend events like Trails Day. Although we agree with USDA's conclusion, we disagree with its reason.<sup>2</sup> Section 1345 provides, "Except as specifically provided by law, an appropriation may not be used for travel, transportation, and subsistence expenses for a meeting. . . ." Congress enacted the statute in 1935 to prohibit the use of appropriations to underwrite "conventions or other form of assemblage or gathering" that various private organizations were seeking to hold at government expense. *See* 79 Cong. Rec. 709-11 (1935).<sup>3</sup> In the 1982 codification of title 31, United States Code, the more generic term "meeting" was substituted for "conventions or other form of assemblage or gathering." Out of context, the word "meeting" suggests a broader coverage than the principal focus of section 1345. When Congress enacted the codification, it specified that provisions that were restated, as section 1345 was, "may not be construed as making a substantive change in the laws replaced." 31 U.S.C. note prec. § 101.

We have held previously that section 1345's application is not as broad as USDA believes. For instance, we held that section 1345 did not apply to the use of Department of Defense (DOD) appropriations to pay the travel and lodging expenses of public school recruiters attending overseas job fairs for teachers at DOD Dependents Schools. 72 Comp. Gen. 229 (1993). *See also* B-300826, Mar. 3, 2005

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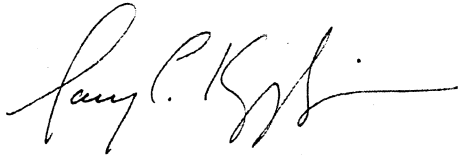
<sup>2</sup> In support of its position, USDA cites an Office of Legal Counsel opinion, Memorandum Opinion for the Deputy Secretary, Department of Commerce, *Use of Appropriations to Pay Travel Expenses for an International Trade Administration Fellowship Program*, OLC Opinion, Oct. 7, 2004. OLC applies section 1345 broadly, such that use of appropriations for travel, transportation, and subsistence for nongovernmental employees for any kind of meeting is prohibited. As noted, we read section 1345 more narrowly, consistent with Congress' original intent.

<sup>3</sup> The Chairman of the House Committee on Expenditures explained that it would address "the activities of national organizations of all characters that are continually making requests of governmental agencies to advance money for the purpose of paying their transportation, lodging, food and so forth, in order that they may come to Washington in support of or in opposition to legislation pending before Congress, and also matters pending before Congress, and also matters pending before some of our emergency organizations." 79 Cong. Rec. at 709.

(light refreshments and meals at National Institutes of Health conference on Parkinson's disease); 45 Comp. Gen. 476 (1966) (transportation of female guests to provide social and recreational services to Job Corps enrollees). The use of the words "travel, transportation, and subsistence" in section 1345 indicates Congress's desire to curb those costs incident to someone in government travel. Where, as here, no one is in travel status, we need not even reach the question of whether Trails Day is a "meeting" within the meaning of section 1345.

#### CONCLUSION

Providing light refreshments to Trails Day attendees is not an essential, constituent part of accomplishing an authorized agency function. Accordingly, Forest Service appropriations are not available to pay for light refreshments for nongovernmental attendees of Trails Day events hosted by the Forest Service.

A handwritten signature in black ink, appearing to read "Gary L. Kepplinger". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Gary L. Kepplinger  
General Counsel





## Washington Post Investigations

Watchdog journalism from The Post and around the Web

### Flushing Out Interior's Bathroom Spending

POSTED: 06:06 PM ET, 01/8/2009 by Derek Kravitz

TAGS: Interior Department, government spending, inspector general

*"Washington Watchdogs," a periodic feature of the Post's Investigations blog, looks at the findings of the federal government's official investigators.*



**By Derek Kravitz**  
*Washington Post Staff Writer*

Does outgoing Interior Secretary **Dirk Kempthorne** need a \$236,000 bathroom? Or is some of that money going down the drain?

That's what Interior Department investigators are determined to find out. Today, Inspector General **Earl Devaney** said his office has launched a probe into the bathroom project and "still have plenty of facts to flush out." (Pun intended.)

Kempthorne spent \$236,000 in taxpayer funds renovating his office bathroom last fall, installing a new shower, a refrigerator and freezer and wainscot wood panelling, department officials say. Questions from The Post sparked the interest of the inspector general.

**Shane Wolfe**, a spokesman for Kempthorne's office, said the new 100-square-foot bathroom will replace an older washroom being removed to make way for an emergency stairwell. Aside from asbestos abatement and electrical and plumbing upgrades, the bathroom was constructed, in part, to preserve the office's "storied history," Wolfe said. At Interior, he said, "Preserving historic structures is part of what we do."

As for the refrigerator and freezer, Wolfe said that Interior secretaries hold meetings in the office and could potentially serve guests a cold beverage, such as "Diet Coke," Wolfe said. "That seems reasonable," he said.

The project was approved and partially funded by the General Services Administration, which owns the Interior Department's Northwest Washington headquarters at 18th and C streets. GSA officials agreed to pay for about half of the project's cost, as part of a \$243 million remodeling of the historic, 72-year-old building. The project, which is scheduled to be completed in 2013, was overseen by the Interior Department's National Business Center.

The \$236,000 cost came in \$26,000 under the approved estimate. But the amount has struck some as excessive. "At a cost that exceeds the late 2008 median price of a Boise home (\$187,300), Kempthorne's bathroom is bound to become as notable as the legendary \$600 paid by the Pentagon for a military toilet and the Minneapolis bathroom stall where Sen. Craig was arrested," the Idaho Mountain Express and Guide opined.

Kempthorne, 57, took office in May 2006 after former Secretary Gale Norton resigned. He had served as the mayor of Boise, Idaho, U.S. senator and two terms as governor of Idaho before being tapped to lead the Interior Department by President Bush, a friend from when the pair were both governors.

Kempthorne was probably well qualified to assess the remodeling of his 1,120-square-foot office, designed by former Secretary **Harold Ickes**; Before his political career started, he served as executive vice president for the Idaho Home Builders Association.



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## The Reliable Source

Amy Argetsinger and Roxanne Roberts, Columnists

### The Reliable Source

By [Amy Argetsinger and Roxanne Roberts](#)  
Wednesday, February 4, 2009, 12:00 AM

#### Just Who's Getting Taken For A Ride?

Another savvy pol taken down by a car and driver. *Tom Daschle* -- the insider's insider -- fails to pay taxes on the limo and chauffeur provided to him. Will they ever learn? That "free" ride *always* ends up costing a bundle. A crash history for all you would-be nominees:

1986

Former White House official *Mike Deaver* is photographed lobbying while sitting in a limo, and the image becomes *Time* magazine's cover. *Ronald Reagan's* pal is slammed for influence peddling and convicted on three counts of perjury for false testimony to Congress and a grand jury.

1991

White House Chief of Staff *John Sununu* resigns after taking a government limo from Washington to a rare-stamp auction in New York, sending the car and driver back alone and flying back to D.C. on a corporate jet.

1993

FBI Director *William Sessions* gets fired after the Justice Department accuses him of ethics violations. Topping the list? Letting his wife use official cars for trips to the hairdresser and dressmaker and to go shopping.

2005

American University President *Benjamin Laddner* is forced to resign for misappropriation of university funds including, but not limited to, using a car and driver to take his wife to the beauty salon and his kids bar-hopping in Georgetown. Former driver dined him out.

2007 Smithsonian Secretary *Larry Small* loses job for excessive spending -- such as \$2,800 on a car service for four days in Los Angeles, claiming it would have been a "safety risk" for him to "carry as much cash as would have been needed to pay a taxi."

2008

Wall Street execs are shocked that Washington lawmakers handing out bailout billions question \$200,000-a-year cars and drivers; bankers say they need chauffeurs to work more efficiently.

2009

*Tom Daschle* doesn't declare car and driver as income -- because he was so used to having them as Senate majority leader? *Oops.*





## Embattled Smithsonian Official Resigns

By ELIZABETH OLSON; Hollie Chmela contributed reporting.  
Published: Tuesday, March 27, 2007

The governing board of the Smithsonian Institution announced Monday that it had accepted the resignation of its top official, Lawrence M. Small, after an internal audit showing that the museum complex had paid for his routine use of lavish perks like chauffeured cars, private jets, top-rated hotels and catered meals.

Mr. Small, 66, a former executive at Citibank and the mortgage financier Fannie Mae, had led the 161-year-old Smithsonian since January 2000. He submitted his resignation as secretary over the weekend, and the governing board unanimously accepted it, effective immediately. Mr. Small will not receive a severance package.

A Smithsonian spokeswoman, Linda St. Thomas, said that Mr. Small, who was traveling outside Washington on Monday, had declined all requests for interviews.

Cristián Samper, director of the institution's National Museum of Natural History, was named acting secretary.


The Smithsonian comprises world-renowned research institutions and 19 museums and galleries, including two of the most popular, the National Zoo and the Air and Space Museum.

The \$1 billion annual budget for the Smithsonian is 70 percent taxpayer-supported, with the rest coming from private donors and commercial ventures. Attractions like the Hope Diamond and the Wright brothers' 1903 airplane, among millions of other exhibitions, brought in some 23 million visitors last year.

The announcement of Mr. Small's resignation comes four days after Senator Charles E. Grassley, Republican of Iowa, persuaded the Senate to freeze a \$17 million increase in the Smithsonian's financing, singling out what he called "out-of-control spending."


Mr. Grassley was especially upset over Mr. Small's compensation, which totaled \$915,698 this year, and "hundreds of thousands" in reimbursements during his tenure for items like "chandelier cleaning and pool heaters" at Mr. Small's home.

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## Administration Paid Commentator

Education Dept. Used Williams to Promote 'No Child' Law

By Howard Kurtz

Washington Post Staff Writer

Saturday, January 8, 2005; Page A01

The Education Department paid commentator Armstrong Williams \$241,000 to help promote President Bush's No Child Left Behind law on the air, an arrangement that Williams acknowledged yesterday involved "bad judgment" on his part.

In taking the money, funneled through the Ketchum Inc. public relations firm, Williams produced and aired a commercial on his syndicated television and radio shows featuring Education Secretary Roderick R. Paige, touted Bush's education policy, and urged other programs to interview Paige. He did not disclose the contract when talking about the law during cable television appearances or writing about it in his newspaper column.

Congressional Democrats immediately accused the administration of trying to bribe journalists. Williams's newspaper syndicate, Tribune Media Services, yesterday canceled his column. And one television network dropped his program pending an investigation.

Williams, one of the most prominent black conservatives in the media, said he understands "why some people think it's unethical." Asked if people would be justified in thinking he sold his opinions to the government for cash, he said: "It's fair for someone to make that assessment."

The Education Department contract, first reported yesterday by USA Today, increased criticism of the administration's aggressive approach to news management. The department already has paid Ketchum \$700,000 to rate journalists on how positively or negatively they report on No Child Left Behind, and to produce a video release on the law that was used by some television stations as if it were real news. Other government agencies -- including the Census Bureau and the Centers for Disease Control and Prevention -- also have distributed such prepackaged videos, a practice that congressional auditors have described as illegal in some cases.

[enlarge photo](#) 



Armstrong Williams did not disclose the \$241,000 contract when commenting on the law. (Lucian Perkins -- The Washington Post)




## Energy Chief's Travel Comes Under Scrutiny

AP

Published: Monday, December 11, 1995

Energy Secretary Hazel R. O'Leary has spent millions of taxpayer dollars on overseas travel, staying in luxury hotels and flying on a charter jet frequently rented by rock stars and royal families, a newspaper reported today.

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Records obtained under the Freedom of Information Act and other sources show that Ms. O'Leary has spent far more than other Cabinet members on overseas travel and often travels in grander style, the Los Angeles Times reported.

In Washington today, Vice President Al Gore defended Ms. O'Leary's trips as having helped to create jobs in the United States.

As to the accusations of lavish spending, Mr. Gore said on NBC's "Meet the Press" program, "All that stuff doesn't sound good and she's the first to want to correct any excesses that might be found."

"She herself has requested an inspector general investigation and review," Mr. Gore said. But he added, "I think it ought to be put in perspective."

He said that on a trip to South Africa, using a chartered jet, Ms. O'Leary "created thousands of American jobs and billions of dollars in contracts for companies in this country."

"There's nobody in the Cabinet who has done a better job of cutting costs, of eliminating wastes," Mr. Gore said. "She's done a fabulous job in reinventing Government and eliminating unnecessary spending."

In three years in office, Ms. O'Leary, a former Minnesota utilities executive, has made 16 trips overseas. Her missions to India, Pakistan, China and South Africa cost \$720,000, \$500,000, \$845,000 and \$560,000 respectively, the newspaper said.

Besides the travel, the newspaper said, Ms. O'Leary also hired an old friend as the agency's "conflict resolution ombudsman," a new position with a \$93,166 annual salary and \$12,700 a year in living expenses.



Ms. O'Leary responded to the newspaper report by announcing before it was published that she had asked the department's inspector general to review the "facts on which the article is based" and assess her office's practices.



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## And Here I Am At Yellowstone . . .

Thursday, January 22, 2009; Page A15

A funny thing happened at the Interior Department last week. The outgoing secretary, *Dirk Kempthorne*, opened his farewell address to employees with a slide show. Our sources say it was a remarkable presentation: about 600 slides, each picturing the distinguished secretary, many of them taken at a national park.

"Slide after slide after slide," a longtime employee said. "It was special. That's all I should say."



How did Dirk Kempthorne spend his 21 1/2 years as interior secretary? His underlings got the answer in Kodachrome form before he departed. (Charlie Litchfield - AP)

 [Enlarge Photo](#)

