

COMPTROLLER GENERAL OF THE UNITED STATES

WASHINGTON D.C. 20548

B-212069

October 6, 1983

The Honorable Steny H. Hoyer
House of Representatives

RELEASED 11/9/83

Dear Mr. Hoyer:

~~Do not make available to public reading~~

Until notified by OOR

We refer to your letter of June 2, 1983, requesting an opinion from this Office concerning whether a press release issued by the Office of Personnel Management (OPM) violated certain restrictions on the use of appropriations. Our review leads us to conclude that the press release did not constitute a violation of restrictions on the use of appropriated funds.

On March 30, 1983, OPM published proposed regulations in the Federal Register (48 Fed. Reg. 13342) entitled "Performance Management System" that were designed to establish performance based incentives for the General Schedule pay system. The new regulations were to make significant changes in the existing compensation system. The Subcommittee on Treasury, Postal Service and General Government, House Committee on Appropriations, voted to delay implementation of the proposed OPM regulations until GAO could complete a study of the impact of the proposal. On May 5, 1983, OPM issued a press release that reads as follows:

"SUBCOMMITTEE VOTE 'WOULD TAKE PAY FROM GOVERNMENT'S BEST WORKERS,' DEVINE SAYS"

"(WASHINGTON, D.C.)--A House Subcommittee vote to delay implementation of the Reagan Administration's performance management reforms of the civil service 'would postpone pay increases for the government's best workers', Donald J. Devine, Director of the Office of Personnel Management (OPM) said today.

"Four Democratic members of the House Subcommittee on Treasury-Postal Service-General Government Appropriations have separated themselves from the President and the American people who want more efficient government as well as from the civil servants who support "pay-for-performance," Devine noted. All three Republican subcommittee members opposed the appropriations amendment that could bar the Administration's proposed reforms implementation until October 1 or until the General Accounting Office reviews the reforms.

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" 'This vote by a few Democrats certainly does not represent the views of many of their Congressional colleagues on both side off the aisle who support the President's efforts to make the federal government more efficient by rewarding its best workers,' Devine continued, 'and they clearly do not represent the majority of the American people who are tired of obstacles being placed before the kinds of sensible management reforms that would make government work better. Therefore, we expect that the delay will be removed through later Congressional action.'

" 'A majority of federal workers responding to a recent Washington Post survey, although they had concerns for how it would be implemented, support the concept of "pay-for-performance," which is the central idea behind the President's management reforms,' Devine said. 'In spite of clear evidence of a "vote early, vote often" effort by federal employee unions to influence the poll's returns, the survey demonstrates that most federal workers also believe that good performance should be rewarded.'

" 'Because civil service reform has already been nearly "studied to death" recently, requiring yet another study by GAO will only delay these reforms and increase the public's frustration with a system they believe to be too bloated, too secure and too expensive,' Devine concluded."

You have requested us to determine whether the above-quoted press release violates the restrictions in sections 601 and 608 of H.R. 7158, the Treasury, Postal Service, and General Government Appropriations Act, 1983, which though not enacted into law were incorporated by reference in section 101(a) of Public Law 97-377, December 21, 1982, the Continuing Appropriations for Fiscal Year 1983.

THE SELF-AGGRANDIZEMENT RESTRICTION

Section 601 is an appropriation restriction on the use of Federal funds for publicity and propaganda and reads as follows:

"No part of any appropriation contained in this Act shall be used for publicity or propaganda purposes not authorized by the Congress."

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This provision has been included in several Appropriation Acts for a number of years. We first had occasion to construe this provision in 31 Comp. Gen. 311 (1952). The National Labor Relations Board asked whether the activities of its Division of Information amounted to a violation. Reviewing the statute's legislative history, we concluded that it was intended "to prevent publicity of a nature tending to emphasize the importance of the agency or activity in question." The prohibition is not applicable to the "dissemination to the general public, or to particular inquirers, of information reasonably necessary to the proper administration of the laws" for which an agency is responsible. The statute does not prohibit an agency's legitimate informational activities. It is geared toward activities whose obvious purpose is "self-aggrandizement" or "puffery."

The statutory restriction does not provide any guidelines to help distinguish legitimate informational purposes from the proscribed publicity or propaganda. We, therefore, have been reluctant to find a violation where the agency involved can provide reasonable justification for its action.

Through issuance of the above-mentioned press release the Director, OPM, was informing the public of the Administration's position on legislation that was being considered by the Congress, rather than attempting to persuade the public as to the importance of OPM as a Government agency. The message was specifically directed toward the importance of proceeding with certain pay proposals for Federal workers as opposed to any self-aggrandizement either directly or by implication. We, therefore, conclude that the press release did not violate section 601.

THE ANTI-LOBBYING RESTRICTION

Section 608(a) is an appropriation restriction against the use of Federal funds for certain kinds of lobbying activities and reads as follows:

"No part of any appropriation contained in this or any other Act, or of the funds available for expenditure by any corporation or agency, shall be used for publicity or propaganda purposes designed to support or defeat legislation pending before Congress."

We have concluded on a number of occasions that section X608(a) is not violated by the general comments on or discussion of pending legislation. We take this view in light of the broad range of agency information functions which have to be conceded as legitimate and lawful. Public officials may with propriety report on the activities of their agencies, may expound to the public the policies of those agencies and of the administration of which they are members, and may likewise offer rebuttal to attacks on these policies. To the extent, however, that policy of an agency or Administration is embodied in pending legislation, discussion by officials of that policy may well necessarily refer to such legislation and be either in support of or against it. An interpretation of section 608(a) as prohibiting expenditures of appropriated funds for dissemination of views on pending legislation would consequently preclude virtually any comment by officials on administration or agency policy covered by the legislation, a result which we do not consider could reasonably have been intended.

The prohibition in section X608(a), in our view, applies only to expenditures involving direct appeals to the public suggesting that they contact Members of Congress and indicate their support of or opposition to pending legislation, i.e., appeals to members of the public for them in turn to urge their representatives to vote in a particular manner. The OPM press release contains comments by the Director, OPM, that express disapproval of legislation then being considered by the Congress. The release did not exhort members of the public to urge their Congressional delegations to vote against the legislation. Indeed it expressed with confidence the expectation that Congress would act favorably to OPM's position without need for public reaction.

We do recognize that this press release could be construed as violative of the prohibitions discussed above. However, because of the difficulty in separating permissible from impermissible information activities, we have taken the position that a violation must embody a clearer exhortation toward a lobbying effort than was involved here.

Accordingly, in this case we are constrained to conclude that the OPM press release did not violate section X608(a).

In the past several months OPM has issued a number of other press releases and publications which reportedly present its views in a similar vein. We are presently investigating these later issuances pursuant to several congressional requests.

Sincerely yours,

MILTON J. SOCOLAR

For Comptroller General
of the United States