

DECISION

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

FILE: B-218840

DATE: September 6, 1985

MATTER OF: National Park Service--Physical Fitness
Program

DIGEST:

1. Billings for the costs of comprehensive physical fitness evaluations and laboratory blood tests, administered to employees as part of the National Park Service, Alaska Regional Office, physical fitness program may be certified for payment. Section 7901 of Title 5, U.S.C., which authorizes heads of agencies to establish health service programs providing examinations and preventive programs, and the implementing regulations issued by the Office of Management and Budget, the Office of Personnel Management, and the General Services Administration, permit the use of appropriated funds for the testing, education, and counseling parts of the fitness programs.

2. Billings for employees' use of a private health club for physical exercise, as part of the National Park Service, Alaska Regional Office, physical fitness program may not be certified for payment. Although 5 U.S.C. § 7901 authorizes agency heads to establish health service programs providing preventive programs relating to employee health, the implementing regulations issued by the Office of Management and Budget, the Office of Personnel Management, and the General Services Administration, limit the scope of these programs for executive branch agencies. These regulations do not authorize use of appropriated funds for physical exercise as part of health service programs.

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3. Late payment penalties, under the Prompt Payment Act, must be paid for allowable billings for the National Park Service, Alaska Regional Office, physical fitness program. Under the Prompt Payment Act, and implementing regulations issued by the Office of Management and Budget, an agency must pay late payment penalties if it has not made payment within 45 days of the receipt of a proper invoice. Neither the Act nor the regulations provide for any exception for the time during which the General Accounting Office is considering a certifying officer request for an advance decision on whether the invoice should be certified for payment.

4. The National Park Service Alaska Regional Office may not grant employees excused absence for participation in an agency-sponsored physical fitness program. Agency discretion to excuse employees from work without charge to leave must be exercised within the bounds of statutes and regulations and guidance provided in General Accounting Office decisions. Office of Management and Budget, Office of Personnel Management, and General Services Administration regulations, which exclude physical exercise from the health services which agencies may provide their employees, should also be interpreted as excluding physical exercise from the purposes for which agencies may grant excused absences.

An authorized certifying officer of the National Park Service, Department of the Interior, has requested an advance decision on whether he should certify for payment four billings arising from the operation of a physical fitness program by the Park Service's Alaska Regional Office. He also asks whether, assuming we answer his first question in the affirmative, late payment penalty charges may be paid on the billings under the Prompt Payment Act, 31 U.S.C. §§ 3901-06 (1982). Finally, he asks whether it is proper for the Regional Office to grant up to 3 hours per week of excused absence to employees for the purpose of participating in physical exercise programs.

For the reasons indicated below, we conclude that:

1. All billings connected with the Park Service's physical fitness program may be properly certified, except those for the use of the facilities of a health club by employees.

2. Late payment penalties under the Prompt Payment Act must be paid on these billings.

3. The Park Service may not grant excused absences to employees for the purpose of physical exercise.

BACKGROUND

In November 1980, the Director of the National Park Service issued a memorandum encouraging Regional Directors and park managers to develop voluntary health and physical fitness programs for their employees. In the same memo, the Director indicated that mandatory physical fitness standards existed or were soon to be implemented for certain Park Service positions, including firefighters, SCUBA divers, search and rescue, law enforcement, and other related emergency services.

In response to the memorandum, the Alaska Regional Office began planning a physical fitness program for its employees. In doing so, it sought advice both from the President's Council on Physical Fitness and the Department of Labor. By memorandum of November 16, 1983, the Alaska Regional Director announced to employees the establishment of a physical fitness program. The program was to be available to all employees in the region on a voluntary basis. The program was to include a health risk analysis, health and fitness education, testing to determine the employee's physical condition, use of Government-contracted physical exercise facilities on a 50/50 cost sharing basis between the Park Service and the employee, and up to 3 hours per week of administrative leave for exercise.

On February 27, 1984, the Alaska Regional Director wrote to York E. Onnen, Director of Program Development for the President's Council on Physical Fitness and Sports. In his letter, the Regional Director described the program, and asked for assistance in finding facilities for the exercise part of the program. On March 13, 1984, Mr. Onnen wrote to the Regional Director, informing him that the President's Council approved the region's physical fitness program. On the same date, Mr. Onnen wrote to the Director of the Space Management Division of the General Services Administration requesting that assistance be provided to the Alaska Regional Office in implementing the program.

By memorandum of January 30, 1985, the Regional Director announced to all employees that he had entered into a contract

with the Greatland Golden Health Club in Anchorage to provide the exercise portion of the fitness program. Under the contract, all participants in the program were entitled to use the health club facilities. The memorandum indicated that employees would not be billed for the use of the facilities, but requested that each employee make a monthly contribution to the Alaska Regional Employees Association. It is our understanding that the Alaska Regional Office will pay the full amount of the monthly bills from the health club. It is hoped, however, that in the future the employees association will be able to contribute funds to the Regional Office to partially offset these costs.

The certifying officer has submitted four bills for our review. One is in the amount of \$1,890 to cover the cost of administering comprehensive physical fitness evaluations to 63 Park Service employees. The bill indicates that the evaluations included physical fitness and health questionnaires; coronary risk appraisals; tests for cardiovascular fitness, muscular endurance, strength and flexibility; and measurements of blood pressure and body composition. A second bill is in the amount of \$630 to cover the cost of blood tests for the employees. The third and fourth bills, in the amounts of \$1,060 and \$1,020, are for the use of the health club by Park Service employees for the months of February and March 1985. The certifying officer also submitted a purchase order for administering health hazard appraisals to all employees participating in the program. As of the time of the submission there had been no billing for these services.

DISCUSSION

Statutory and Regulatory Provisions

Generally, the costs of medical or health care or treatment for civilian Government employees are personal to the employees, and appropriated funds may not be used to pay them, unless provided for by statute or in the contract of employment. E.g., 57 Comp. Gen. 62, 63 (1977); 22 Comp. Gen. 32 (1942). However, the Congress has provided statutory authority for the use of appropriated funds for employee health in certain circumstances.

Section 7901(a) of title 5 of the United States Code provides:

"(a) The head of each agency of the Government of the United States may establish, within the limits of appropriations

available, a health service program to promote and maintain the physical and mental fitness of employees under his direction."

Subsection (c) of the section provides:

- "(c) A health service program is limited to--
- "(1) treatment of on-the-job illness and dental conditions requiring emergency attention;
 - "(2) preemployment and other examinations;
 - "(3) referral of employees to private physicians and dentists; and
 - "(4) preventive programs relating to health." (Emphasis added.)

In our opinion, the second and fourth categories, emphasized in the above quote, are sufficiently broad to encompass the physical fitness program operated by the Alaska Regional Office. However, regulations issued under section 7901, applying to all executive branch agencies, and which we will discuss below, further limit the parameters of health service programs.

Under 5 U.S.C. § 7901(b)(1), heads of agencies are required to consult with and consider the recommendations of the Secretary of Health and Human Services (HHS) before establishing a health service program. Executive Order 12345, 47 Fed. Reg. 5189 (1982), extended the President's Council on Physical Fitness and Sports as an advisory committee to the Secretary of HHS on matters pertaining to ways and means of enhancing opportunities for participation in physical fitness and sports activities. (The existence of the Council was continued through September 30, 1985, by Executive Order 12489, 49 Fed. Reg. 38927 (1984).) In our opinion, the Regional Director's consultation with the President's Council amounts to compliance with the requirement of 5 U.S.C. § 7901(b)(1).

OMB Circular:

The first of the executive branch regulations issued under section 7901 is OMB Circular No. A-72, June 18, 1965, which establishes criteria to be followed by agency heads in establishing health service programs. The Circular, in section 2, "authorizes and encourages" agency heads "to establish an occupational health program to deal constructively with the

health of the employees of [their] department or agency in relation to their work." Section 4 of the Circular, however, limits Federal employee health services to the following six categories:

1. Emergency diagnosis of injury or illness during work hours;
2. Preemployment physical examinations;
3. In-service physical examinations;
4. Administration of prescribed treatments;
5. Preventive services to appraise the work environment, provide health education, and to provide disease screening; and
6. Referral of employees to private physicians.

In our opinion, the health hazard appraisals, physical fitness evaluations, and blood tests administered as parts of the Alaska Region physical fitness program fall within one or more of these categories. However, we see no way in which the exercise portion of the program is covered by any of the six categories of permitted health services.

Federal Personnel Manual:

In the Federal Personnel Manual, the Office of Personnel Management (OPM) has provided more detailed instructions to agencies for employee health programs. FPM, ch. 792 (Inst. 261, December 31, 1980). Section 1-3.c. limits the health services which agencies are permitted to provide to the same six categories as in the OMB Circular. Further, section 4-3 sets out the objectives of employee health programs, two of which are to provide health education and encourage personal health maintenance, and to provide medical services such as voluntary examinations and preventive programs to avoid large scale absences. The activities specified to achieve these objectives include periodic health examinations and health education and counseling, but not physical exercise. FPM, ch. 792, § 4-4.

As in the case of the OMB Circular, we are of the opinion that the Federal Personnel Manual authorizes the testing, educational, and counseling activities of the Alaska program. It does not, however, authorize physical exercise programs.

General Services Administration Regulations:

In the Federal Property Management Regulations, the General Services Administration (GSA) has provided for the establishment of facilities for Federal employee health services in buildings it manages. These regulations do not, of course, apply to the portions of the Alaska program, such as exercise activities, which do not take place in Federal buildings. However, even if the Alaska Regional Office were to attempt to set up its own physical fitness facility, rather than using a private health club, the GSA regulations would not authorize such activity because they specifically limit the scope of permissible programs to the same six categories contained in OMB Circular A-72. FPMR, 41 C.F.R. § 101-5.304 (1984).

GSA has also issued "Guidelines for Establishment of Physical Fitness Facilities in Federal Space." Public Buildings Service, Notice 6820-23-M, 43 Fed. Reg. 56733 (1978). These guidelines contain criteria for the establishment of "various types of physical fitness facilities for Federal agencies." However, even if the Alaska Regional Office were to attempt to establish its own facilities, the guidelines do not authorize the use of appropriated funds for these purposes. Rather, they merely set forth criteria for establishing these facilities assuming funds are authorized for that purpose.

Executive Order 12345:

On February 2, 1982, President Reagan issued Executive Order 12345 "in order to expand the program for physical fitness and sports * * *" 47 Fed. Reg. 5189 (1982). In addition to extending the life of the President's Council on Physical Fitness and Sports, the executive order directed the Secretary of Health and Human Services to "develop and coordinate a national program for physical fitness and sports." Among the activities which the Secretary was instructed to carry out were the following:

"(c) Strengthen coordination of Federal services and programs relating to physical fitness and sports participation and invite appropriate Federal agencies to participate in an interagency committee to coordinate physical fitness and sports activities of the Federal establishment.

* * * * *

"(j) Assist business, industry, government, and labor organizations in establishing sound physical fitness programs to elevate employee fitness and to reduce the financial and human costs resulting from physical inactivity."

In our opinion, the executive order, although designed to encourage physical fitness in Federal employees, as well as others, does not authorize the use of appropriated funds to pay the costs of physical exercise activities.

Based on 5 U.S.C. § 7901 and the executive branch regulations issued to promulgate that statute, we conclude that the certifying officer may certify for payment the billings for physical fitness evaluations and laboratory tests, and any future billings for health hazard appraisals. He may not certify the billings for use of the health club because the regulations do not permit the use of appropriated funds to pay for employee physical exercise activities.

Special Physical Fitness Needs

As we indicated above, the Director of the National Park Service is establishing--or has established--mandatory physical fitness standards for certain especially strenuous positions in the Service such as firefighters, divers, search and rescue, and law enforcement. In a memorandum dated May 18, 1984, the Acting Director announced that a new Service-wide health and fitness program would include "job related fitness tests which must be passed prior to allowing individuals to perform certain hazardous or arduous activities."

In our decision published at 63 Comp. Gen. 296 (1984), we considered whether the Bureau of Reclamation, Department of the Interior, could use appropriated funds to purchase exercise equipment for use in a mandatory physical fitness program for firefighters at the Grand Coulee Project in the State of Washington. In the submission in that case, we were told:

"--Physical fitness is a requirement of the firefighters' job as mandated by position description. The program is monitored by supervisors.

"--Specific levels of physical fitness for each firefighter are identified and evaluated in an ongoing program relative to established performance standards." Id. at 297.

In approving the expenditure for the equipment, we said:

"Due to the nature of their job, firefighters must maintain an unusually high level of physical strength and endurance to perform satisfactorily. The exercise equipment in question appears to be reasonably calculated to maintain that high level of fitness. The equipment will be available to all firefighters. It appears that the Government, rather than the firefighters, receives the principal benefit from the equipment, in the form of improved physical capabilities on the part of the firefighters." Id. at 298.

Based on that decision, we would approve the use of appropriated funds to pay the costs of physical exercise, whether for use of private health clubs or purchase of equipment, for those employees of the Park Service for which the Director has established special physical fitness standards, if a physical fitness program was mandatory for all employees in the designated positions. We would approve the expenditure not as part of an employee health program under 5 U.S.C. § 7901, but rather as a necessary expense of carrying out the activities of the National Park Service.

Late Payment Penalties

As we have indicated, the certifying officer has asked, with respect to those billings which he may certify for payment, whether late payment penalty charges may be paid under the Prompt Payment Act, 31 U.S.C. §§ 3901-06 (1982).

The relevant provisions of the Act provide:

"§3902 Interest Penalties

"(a) Under regulations prescribed under section 3903 of this title, the head of an agency acquiring property or service from a business concern, who does not pay the concern for each complete delivered item of property or service by the required payment date, shall pay an interest penalty to the concern on the amount of the payment due. * * *

"(b) * * * However, a penalty may not be paid if payment for the item is made--

* * * * *

"(3) * * * before the 16th day after the required payment date.

"§3903 Regulations

"The Director of the Office of Management and Budget shall prescribe regulations to carry out section 3902 of this title. The regulations shall--

"(1) provide that the required payment date is--

"(A) the date payment is due under the contract for the item of property or service provided; or

"(B) 30 days after a proper invoice for the amount due is received if a specific payment date is not established by contract;

* * * * *

"(5) require that, within 15 days after an invoice is received, the head of an agency notify the business concern of a defect or impropriety in the invoice that would prevent the running of the time period specified in clause (1)(B) of this section."

The statute is written in mandatory terms. Under section 3902 an agency must pay an interest penalty if it does not pay the contractor before the 16th day after the required payment date. Under section 3903, if the contract does not provide a date of payment, the required payment date is 30 days after the receipt of a proper invoice.

The Director of the Office of Management and Budget (OMB) has issued Circular No. A-125, August 19, 1982, to implement the Act. The Circular is also written in mandatory terms. Paragraph 8 of the Circular states:

"8. Interest Penalty Requirement

"a. An interest penalty will be paid automatically when all of the following conditions are met:

"--There is a contract or purchase order with a business concern.

"--Federal acceptance of property or services has occurred and there is no disagreement over quantity, quality, or other contract provisions.

"--A proper invoice has been received * * * or the agency fails to give notice that the invoice is not proper within 15 days of receipt of an invoice * * *.

"--Payment is made to the business concern more than 15 days after the due date * * *."

From the record we have received, it appears that all of these conditions have been met with respect to the billings for the physical fitness evaluations and the blood tests. There was a purchase order for each service. The Alaska Regional Office has accepted the services, as verified by receiving reports in each case. It appears that proper invoices have been received in each case. Payment will not be made within 15 days after the due date for either billing.

There is some question of whether the National Park Service should pay interest for the period this Office has been considering the certifying officer's request for advance decision. By statute, certifying officers are pecuniarily liable if they certify an unauthorized payment. 31 U.S.C. § 3528 (a)(4) (1982). Therefore, a certifying officer is entitled to a decision from the Comptroller General before certifying a questionable voucher. 31 U.S.C. § 3529. To require an agency to pay an interest penalty for the period vouchers were submitted for our review would penalize the agency for its certifying officer exercising his statutory rights.

Both the Prompt Payment Act and Circular No. A-125 contain exceptions to the requirement for late payment penalties. Section 3906(c) provides:

"(c) * * * this chapter does not require an interest penalty on a payment that is

not made because of a dispute between the head of an agency and a business concern over the amount of payment or compliance with the contract. A claim related to the dispute, and interest payable for the period during which the dispute is being resolved, is subject to the Contract Disputes Act of 1978 * * *."

Likewise, paragraph 8(c) of the Circular states:

"c. Interest penalties are not required when payment is delayed because of a disagreement between a Federal agency and a business concern over the amount of the payment or other issues concerning compliance with the terms of the contract; * * * claims concerning disputes, and any interest that may be payable with respect to the period while the dispute is being settled, will be resolved in accordance with the provisions in the Contract Disputes Act of 1978 * * *."

The only legislative history we were able to find for the statutory provision does little more than paraphrase it. See H.R. Rep. No. 461, 97th Cong., 2d Sess. 15.

In our opinion, the statutory and regulatory exceptions do not apply to situations such as this one, in which a certifying officer requests a decision from this Office on the propriety of a voucher. This situation does not involve a dispute between an agency and its contractor over the amount of payment or compliance with the contract. Rather, it is an internal mechanism whereby a certifying officer may seek assurance that he may properly certify a voucher.

Under the Prompt Payment Act and Circular A-125, both of which mandate interest penalties for late payment, and neither of which provides an exception for a certifying officer seeking an opinion of the Comptroller General, we conclude that the Alaska Regional Office must pay late payment charges on the two billings which we have approved for payment from the required payment date until actually paid.

Excused Absences for Physical Exercise

As we have indicated, the Director of the Alaska Regional Office has authorized up to 3 hours per week of excused absence for each employee participating in the program to engage in physical exercise. The certifying officer questions whether this action is proper.

The question of an agency's authority to grant excused leave to employees without charge to leave (commonly called administrative leave) is dealt with neither in statute nor in general regulations. However, OPM does discuss this matter in the Federal Personnel Manual (FPM) Supplement 990-2, Book 630, Subchapter S11. For example, Subchapter S11-1 defines an excused absence as:

"[A]n absence from duty administratively authorized without loss of pay and without charge to leave. Ordinarily, excused absences are authorized on an individual basis, except where an installation is closed or a group of employees is excused from work for various reasons."

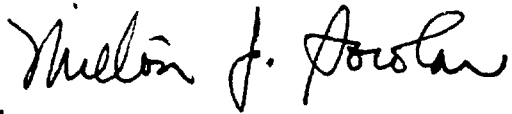
Further, paragraph a of Subchapter S11-5 states:

"With few exceptions, agencies determine administratively situations in which they will excuse employees from duty without charge to leave and may by administrative regulation place any limitations or restrictions they feel are needed.
* * *"

Over the years we have recognized that in the absence of a statute an agency may, at its discretion, excuse employees for brief periods of time without charge to leave or loss of pay. E.g., 64 Comp. Gen. 171 (1984); 63 Comp. Gen. 542, 544 (1984); 54 Comp. Gen. 706, 708 (1975). However, agency discretion is not unlimited. It must be exercised within the bounds of statutes and regulations, and the guidance provided in decisions. 63 Comp. Gen. at 545. The FPM provisions referred to above list several instances in which excused absences have been permitted. See 63 Comp. Gen. at 544; see also 55 Comp. Gen. 510, 512 (1975). These examples have general applicability to employees and are either work-related or civic in nature.

As we indicated above, in implementing 5 U.S.C. § 7901, OMB, OPM, and GSA have chosen not to include physical exercise programs among the health services that agencies may provide their employees. In our view, the executive branch regulations must be interpreted as also excluding physical exercise from the purposes for which agencies may grant excused absences. We therefore conclude that the Alaska Regional Director may not grant excused absences to employees for purposes of participating in physical exercise.

This conclusion does not apply to those instances, which we discussed on pages 8 and 9 above, in which a mandatory physical fitness program is established for employees serving in especially strenuous positions. Under such a mandatory program, physical exercise would be a required part of the employee's job, and it would not be necessary to grant administrative leave to allow employees to participate in the activities.

for 
 Comptroller General
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