149858

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Use of Appropriated Funds to Provide Financial Incentives to Employees for Commuting by Means other than Single-Occupant Vehicle

File: B-250400

Date: May 28, 1993

DIGEST

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. § 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. § 7418(a).

BACKGROUND

The Clean Air Act (Act) provides the framework for federal air pollution control. 42 U.S.C. §§ 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. § 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. § 7511a. Section 118 of the Act provides that federal agencies "shall be subject to, and comply with" these plans. 42 U.S.C. § 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 § 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 Regulation 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 ridesharing 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]

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[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, § 629, 104 Stat. 1478 (1990). (This legislation expires on December 31, 1993.)

(continued...)

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 appropriated 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. § 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, § 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

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[1](...continued)
In B-243677; B-243674, 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.

work-related trips in single-occupancy vehicles. We conclude 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. § 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 (1979). 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 persons 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

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[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).

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.

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