



United States Government
NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE CHAIRMAN
Washington, DC 20570-0001

June 6, 2012

The Honorable Gene L. Dodaro
Comptroller General
U.S. Government Accountability Office
441 G Street. NW
Washington, D.C. 20548

Dear Mr. Dodaro:

This letter is to report two violations of the Antideficiency Act, as required by section 1351 of Title 31, United States Code.

The National Labor Relations Board (NLRB) Office of Inspector General (OIG) identified a violation of the Antideficiency Act, section 1341(a) of Title 31, United States Code, in account 63070100, Salaries and Expenses, as a result of the procurement of food and flowers by the National Labor Relations Board's Office of Equal Employment Opportunity (OEEO). The OIG also identified a violation of the Antideficiency Act, section 1342 of Title 31, United States Code, in account 63070100, Salaries and Expenses, as a result of the procurement of personal services for the Human Resources Branch. The total amount of the violations is \$68,849.29.

Violations of the Antideficiency Act occurred from Fiscal Years (FY) 2006 through 2010, in connection with the purchase of food and flowers for events and celebrations held by the NLRB's OEEO. The total amount of the violations during that period was \$10,771.79. The individual responsible for the violations was Robert Poindexter, Director, OEEO, in that he determined the amount of appropriated funds that could be used for the particular events and directed subordinate employees to purchase the food and flowers.

The violations came to the attention of the OIG when they observed the serving of food to NLRB employees during a 2010 African American History Month program event. The general rule is that appropriated funds may not be used to serve food to employees. One of the narrow exceptions to this rule, consistent with Government Accountability Office (GAO) guidance, is that an agency may use appropriated funds to provide federal employees with a sampling of ethnic food that is prepared and served as an integral part of a celebration intended to further equal employment opportunity objectives by increasing an employee's appreciation for the cultural heritage of an ethnic group. Based on the criteria provided in Comptroller General decisions, the OIG determined that OEEO used appropriated funds to serve employees a full meal, rather than only a sampling at the 2010 African American History Month program event. During an inquiry into the event, the OIG found that OEEO also served full meals to employees as part of other cultural awareness programs, and had made purchases of food and flowers for other celebrations dating back to FY 2006.

The OIG determined that the cause of the Antideficiency Act violations was a misunderstanding on the part of OEEO on the proper use of appropriated funds in support of its function. This determination was based upon the statement of Mr. Poindexter indicating that he believed that the food reflected the culture and traditions being celebrated and that senior Agency managers were aware of and approved the activities of the OEEO. The Agency determined that the violation contained no willful or knowing intent on the part of the responsible officer to violate the Antideficiency Act. The Agency also determined that disciplinary action was not appropriate given that Mr. Poindexter lacked the intent to violate the Antideficiency Act. The Agency took the following steps to ensure that future violations do not occur:

- In a March 26, 2010 response to the OIG report, Mr. Poindexter agreed that OEEO would follow appropriation law principles and provide a sampling of ethnic food rather than a meal and that the OEEO would cease using appropriated funds to provide cakes and other refreshments at its programs;
- On September 16, 2010, an administrative policy document detailing the appropriate use of NLRB funds for OEEO events was issued to NLRB employees;
- In October 2010, training on the NLRB policy for the purchase of food for OEEO programs was provided to employees involved in presenting those programs; and
- NLRB employees with Government purchase cards, as well as those who supervise such employees, received training in FY 2010 on the proper use of the Government purchase card, including the appropriateness of purchasing food for employees.

Violations of the Antideficiency Act occurred in FY 2010 when personal services were procured for the NLRB's Human Resources Branch. The Antideficiency Act, section 1342 of Title 31, United States Code, prohibits an agency from procuring personal services except as authorized by law. The total amount of the violations was \$58,077.50. The responsible officer of the violations was Delfina St. Clair, Contract Specialist, Acquisitions Management Branch, in that she was the contracting officer who executed the contract.

During the audit of the NLRB FY 2010 financial statements, the OIG became aware of a contract with a Glenda Johnson, a former employee, to provide the NLRB with labor relations services. The services included providing planning and implementation of the NLRB's labor relations program and serving as a senior labor relations advisor.

When interviewed about the services, Ms. Johnson stated that she was told what to do by her "supervisor" Michael Gonzalez, the Supervisory Human Resources Specialist, and that she

spoke with him throughout the day. Mr. Gonzalez, who is responsible for the NLRB's employee labor relations program, stated that he supervised the contractor as an "employee" and that the contractor was "hired" by his predecessor. Ms. Johnson also stated that her duties did not differ from the former employees who performed the work prior to the contract period of performance with the exception that she could not speak for the Agency. A review of the contract found that it did not require any specific tasks to be completed, but rather provided a list of duties that Ms. Johnson could have been required to perform. A comparison of the contract to a federal employee position description for labor relations found that the tasks of the two positions were virtually identical. Also, the only deliverable required under the contract was a weekly progress report.

After reviewing the contract and considering the information gathered from the interviews, the OIG determined that it was a contract for personal services. That determination was based on the level of supervision, the fact that the contract mirrored a federal employee labor relations position description, and the factors established by the Federal Acquisition Regulation that include:

- Performance under the contract occurred at the NLRB Headquarters;
- The principal tools and equipment required for the contractor's performance were provided by the NLRB;
- The services provided by the contractor were an integral effort of the NLRB's labor and employee relations function;
- The need for the services could have reasonably been expected to last more than 1 year; and
- The nature of the services required Government supervision to ensure that the interests of the NLRB were adequately protected, that the NLRB retained control over its labor relations programs, and that the NLRB retained full personal responsibility for the labor and employee relations function in a duly authorized federal employee.

The OIG determined that the cause of the Antideficiency Act violation was a misunderstanding of appropriation law principles by Ms. St. Clair. The Agency has determined that the violation contained no willful or knowing intent on the part of the responsible officer to violate the Antideficiency Act. Given Ms. St. Clair's lack of intent to violate the Antideficiency Act and her misunderstanding of appropriation law principals with regard to personal service contracts, the Agency also determined that disciplinary action was not appropriate. The Agency has taken the following steps to ensure that future violations do not occur:

- Ms. St. Clair, and all other contract specialists, received training regarding the procurement of services and appropriations law principles;

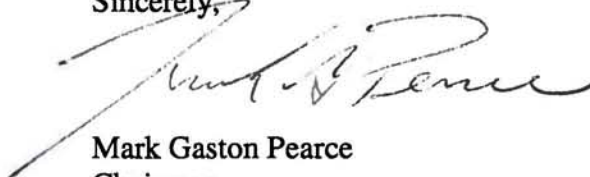
- The Chief, Acquisitions Management Branch, was instructed to ensure that all contracts for services are reviewed by Agency counsel prior to being executed; and
- Ms. St. Clair terminated the contract.

The NLRB fund control regulations, as required by the Antideficiency Act, were reviewed and approved by the Office of Management and Budget in October 2007. The fund control regulations have no deficiencies that warrant changes and should provide the necessary control to help prevent these types of violations in the future.

The Office of Management and Budget has concluded, consistent with opinions of the Office of Legal Counsel, that there was no violation of the Antideficiency Act when NLRB purchased food and flowers for cultural events because there was no violation of an express restriction in an appropriations act. GAO, however, takes the position that an Antideficiency Act violation occurs when an agency uses appropriated funds for the purchase of food for federal employees, even without a prohibition in an appropriations act, unless the food constitutes a sampling for cultural awareness purposes. The Office of Management and Budget agreed with the OIG that the personal service contract constitutes an Antideficiency Act violation.

Therefore, consistent with section 145.8 of OMB Circular A-11, NLRB submits this report in its entirety to the President, the Congress, and the Comptroller General.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark Gaston Pearce", is written over a horizontal line.

Mark Gaston Pearce
Chairman