

Memorandum

March 6, 1985

TO : Director, OOH -- A. F. Franklin

FROM : General Counsel - *Harry R. Van Cleve*SUBJECT: Authority of the General Accounting Office
to install and operate a physical fitness
facility - B-216852-O.M.

This is in response to recent inquiries by of your staff concerning the legal authority of the General Accounting Office to install and operate an employee physical fitness facility in the GAO building, the costs of which would be borne by agency appropriations. As set forth below, we conclude that GAO's appropriated funds would be available for the installation and operation of such a facility, under 5 U.S.C. § 7901 (1982), which authorizes Federal agencies to establish "preventive programs relating to health." Further, we conclude that restrictive regulations and guidelines issued by certain executive branch agencies to implement section 7901 would not prevent the use of GAO appropriations to install and operate a physical fitness facility in the GAO building.

Of course, the fact that GAO may legally elect not to follow executive branch restrictions on the establishment of federally funded physical fitness facilities does not mean that, from a policy perspective, Mr. Bowsher will choose not to follow those restrictions. There are numerous laws and regulations which, by their terms, do not apply to the GAO but with which GAO voluntarily complies. (See, e.g. Freedom of information requirements.) Moreover, as you are aware, this Office has not previously endorsed the idea of establishing physical fitness facilities at Government expense in the absence of a determination by the Comptroller General that such a program is desirable. It is up to you to convince the Office of General Services and Controller and then the Comptroller General to authorize the establishment of a physical fitness facility.

The following legal discussion is intended to support your efforts by reassuring all concerned that there are no legal impediments to implementation of the program.

Section 7901(a) of Title 5 provides:

"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 jurisdiction."

Subsection (c) of that section provides:

"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."

5 U.S.C. § 7901(c) (1982) (Emphasis added). In our view, the fourth category, "preventive programs relating to health," is of sufficient breadth to encompass employee physical fitness programs. We note that subsection 7901(b) requires heads of agencies to consult with and consider the recommendations of the Secretary of Health and Human Services (HHS) before establishing any health service program. See B-206751, March 22, 1983.

The guidelines and regulations which have been issued by the Office of Management and Budget (OMB), the General Services Administration (GSA), and the Office of Personnel Management (OPM), to implement section 7901 are substantially more restrictive than the statute itself. In general, these guidelines and regulations limit "preventive programs relating to health" to health education and certain preventive medical services, such as inoculation or screening tests, but do not include physical fitness programs. See OMB Circular No. A-72, June 18, 1965; Federal Personnel Manual, ch. 792 (Inst. 261, December 31, 1980); Federal Property Management Regulations (FPMR), 41 C.F.R. Subpart 101-5.3 (1984).

Nevertheless, we conclude that these executive branch pronouncements would not prevent GAO, an agency independent of the executive branch, from installing and operating a physical fitness facility. The GAO "is an instrumentality of the United States Government independent of the executive

departments." 31 U.S.C. § 702(a) (1982). It is not generally bound by regulations or guidelines issued by the executive branch, unless they are specifically made applicable to the GAO by statute. See, e.g., B-103987, April 27, 1979 (GAO not subject to OPM regulations on post-employment activity issued pursuant to Ethics in Government Act); B-204858-O.M. June 7, 1982 (GAO not subject to OPM regulations on allotments). Section 7901 does not make GAO subject to executive branch regulation. In fact, the section does not provide for the issuance of regulations by any agency. Executive branch agencies such as OMB may, of course, issue guidelines without specific statutory sanction to establish policy and implement uniformity throughout the executive branch. See B-203452, December 31, 1981. However, such regulations do not thereby become binding on agencies, such as GAO, which are not in the executive branch.

Additionally, the General Accounting Office Personnel Act of 1980, 31 U.S.C. §§ 732-755 (1982) generally exempts GAO from executive branch administration of laws and regulations relating to personnel management. B-201695, October 21, 1981. The Act requires the Comptroller General to "maintain a personnel management system." 31 U.S.C. § 732(a) The purpose of the Act was to separate the GAO from executive branch control in order to ensure its independence. Id. The House report explained as follows:

"The committee intends to give wide discretion to the Comptroller General in designing the personnel management system. * * * In matters which are not specifically limited by the statute, however, the Comptroller General is not bound to the way the civil service operates now." H.R. Rep. No. 494, 96th Cong., 1st Sess. 4 (1979).

In our view, the intent of the Act was to establish a GAO "personnel management system" completely independent of executive branch control, except in certain areas clearly specified in the Act. Because the Act makes no specific exception for employee health services provided pursuant to 5 U.S.C. § 7901, and because section 7901 itself includes no provision for executive branch regulation, we conclude that the independence granted the Comptroller General in personnel matters extends to employee health services.

Our conclusion that GAO is not subject to executive branch controls applies specifically to the guidelines issued by OMB and OPM to implement section 7901. OMB Circular No.

A-72, entitled "Federal Employees Occupational Health Service Programs," is on its face, applicable only to "Executive Departments and Establishments." Further, OMB Circular No. A-1, August 7, 1952, provides that all OMB Circulars are applicable only to "executive departments and establishments," which "do not include the legislative or judicial branches of Government."

OMB Circular No. A-72 requires that the Civil Service Commission, now OPM, assist agencies to develop adequate health programs. To that end, OPM has issued chapter 792 of the Federal Personnel Manual, (Inst. 261, December 31, 1980), entitled "Federal Employees Health and Counseling Programs." Chapter 792 does not indicate what the extent of its coverage is intended to be. However, because GAO is generally independent of the executive branch, and is specifically independent in personnel matters, this OPM guideline does not apply to GAO.

In addition, GSA has issued regulations regarding "Federal Employee Health Services" as part of the Federal Property Management Regulations (FPMR). 41 C.F.R. Subpart 101-5.3 (1984). The substance of these regulations is similar to OMB Circular No. A-72 and FPM Chapter 792, discussed above. The regulations apply to "all Federal agencies which occupy space in * * * a building * * * managed by GSA." 41 C.F.R. § 101-5.301. The GAO building is, of course, managed by GSA. Nonetheless, we conclude that these regulations are not applicable to GAO in the case at hand.

The use of space in the GAO building is governed by 31 U.S.C. § 702(c) (1982) which provides:

"The Administrator of General Services shall provide the Comptroller General with space in the General Accounting Office Building that the Comptroller General considers necessary for use by the Comptroller General."

Accordingly, the Comptroller General can requisition space within the GAO building for any purpose for which he feels it is needed. B-39772-O.M., July 30, 1976 (Comptroller General possesses authority to requisition space for a day care center). If the Comptroller General determines that it is necessary to establish a physical fitness facility to promote the physical health of GAO employees pursuant to 5 U.S.C. § 7901, GSA is required to provide suitable space, notwithstanding the more restrictive GSA interpretation of 5 U.S.C. § 7901 reflected in the FPMR.

GSA has also published in the Federal Register, "Guidelines for Establishment of Physical Fitness Facilities in Federal Space." 43 Fed. Reg. 56733 (1978) updated by 48 Fed. Reg. 41525 (1983). These "Guidelines" do not cite 5 U.S.C. § 7901 or any other authority for the use of appropriated funds to establish an employee physical fitness facility. Rather, they merely set forth requirements which must be met before physical fitness facilities will be installed by GSA for tenant agencies which the Guidelines assume by implication, have the authority to establish such a facility. We note that the GSA Guidelines provide that all "costs connected with the installation, operation, and maintenance of a physical fitness facility shall be borne by the requesting agency."

Under a Memorandum of Agreement which became effective May 1, 1983, the Administrator of General Services has delegated to the Comptroller General the authority to carry out certain "reimbursable services" within the GAO building. This delegation would include the authority for GAO to modify space for use as a physical fitness facility. Under this delegation, if the work to be done will cost less than \$25,000 and "may affect the mechanical, electrical or structural systems," it must be reviewed by the building manager. If the work is to cost between \$25,000 and \$500,000 it must be reviewed and approved by GSA.

We would be pleased to offer any further assistance that you or may require.

Digest

Appropriated funds are available for the establishment of an employee physical fitness facility in the GAO building pursuant to 5 U.S.C. § 7901 which authorizes "preventive programs relating to health." GAO is not bound by executive branch agency regulations issued to implement 5 U.S.C. § 7901 which limit the scope of that section to health education and screening and inoculation programs because, as an agency "independent of the executive departments" GAO is not bound by executive branch regulations unless those regulations are specifically made applicable to the legislative branch by statute. Further, the independence granted the Comptroller General in personnel matters in the GAO Personnel Act of 1980, extends to employee health services.