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United States General Accounting Office
Washington, DC 20548

Office of the General Counsel

Subject: U.S. Trade Deficit Review Commission

Date: September 27, 1999

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Ms. Kathleen J. Michels
Administrative Officer
U.S. Trade Deficit
Review Commission

Dear Ms. Michels:

This responds to your August 25, 1999, letter requesting our opinion concerning the authority of the U.S. Trade Deficit Review Commission (the Commission) to compensate an employee of the Export-Import Bank (the Bank) that the Commission would like to have detailed to it to serve as executive director.

Your question arises because the individual in question is a career employee who occupies a position with the Bank paid at executive schedule level IV and the Commission is limited by statute to compensating its executive director and other staff members at no more than the rate payable for executive schedule level V. Trade Deficit Review Commission Act, Pub. L. No. 105-277, Div. A, section 127(g)(3)(B). To comply with the compensation limitation, the Commission proposes to reimburse the Bank for the detailee's salary and benefits at the executive schedule V level, and the Bank would cover the additional amount payable for level IV.[1] You ask whether we agree with the Commission's interpretation that its statutory authority would permit this arrangement. As explained below, we believe the proposed arrangement is permissible under the Commission's statute.

The Trade Deficit Review Commission Act, Pub. L. No. 105-277, Div. A, section 127, 112 Stat. 2681-547 (1998), established the Commission to study the nature, causes, and consequences of the United States merchandise trade and current accounts deficits and report its findings to the President and the Congress. The Commission is

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[1]The current annual basic pay rate for Executive Schedule level IV is $118,400, and the rate for level V is $110,700. Executive Order 13106, Dec. 7, 1998, 63 Fed. Reg. 68151.

composed of 12 members, 6 appointed by the President pro tempore of the Senate[2] and 6 appointed by the Speaker of the House.[3] Section 127(c)(3)(A). The members are to have expertise in specified fields and may not be officers or employees of the United States. Section 127(c)(3)(B). The members elect a chairperson and vice chairperson from among themselves. Section 127(c)(7).

Subsection (g) of section 127 addresses commission personnel matters. Section 127(g)(3)(A) authorizes the Chairperson, without regard to the civil service laws and regulations, to appoint and terminate an executive director and such other additional personnel as may be necessary to enable the Commission to perform its duties. Pursuant to section 127(g)(3)(B), the Chairperson may fix the compensation of the executive director and other personnel without regard to the provisions of chapter 51 and subchapter III of chapter 53 of title 5, U.S. Code, relating to classification and pay rates, "except that the rate of pay for the executive director and other personnel may not exceed the rate payable for level V of the Executive Schedule" under 5 U.S.C. § 5316. Significant to the analysis here, section 127(g)(4) provides that "[a]ny Federal Government employee may be detailed to the Commission without reimbursement, and such detail shall be without interruption or loss of civil service status or privilege."[4]

A "detail" is the temporary assignment of an employee to a different position for a specified period, with the employee returning to his or her regular duties at the end of the detail. See B-224033, Jan. 30, 1987, and authorities cited therein. Ordinarily, unless a statute provides otherwise, the employee continues to be the incumbent of the position from which he or she is detailed and receives pay and benefits on that basis. B-224033, Jan. 30, 1987; 33 Comp. Gen. 577 (1954); and 24 Comp. Gen. 420

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[2]Three to be appointed upon recommendation of the Senate Majority Leader after consultation with the Senate Finance Committee Chairman, and three to be appointed upon recommendation of the Senate Minority Leader after consultation with the ranking minority member of the Senate Finance Committee. Section 127(c)(3)(A)(i), (ii).

[3]Three to be appointed after consultation with the House Ways and Means Committee Chairman, and three after consultation with the ranking minority member of the House Ways and Means Committee. Section 127(c)(3)(A)(iii), (iv).

[4]Although section 127 does not define "employee," section 2105(a) of Title 5, U.S. Code, defines it in pertinent part for the purposes of Title 5 (Government Organization and Employees) as meaning "an officer and an individual who is" (1) "appointed in the civil service;" (2) "engaged in the performance of a Federal function under authority of law or an Executive act;" and (3) "subject to the supervision of an individual named" in subsection 2105(a). See also 5 U.S.C. § 2101 and 2104 for definitions of "officer" and "civil service." The detailee in question here would appear to fall within the section 2105(a) definition.

(1944). See also, B-221416, March 12, 1986, concerning an employee detailed to a state agency under the Intergovernmental Personnel Act. We have held that, except in certain limited circumstances, nonreimbursable interagency details are improper without statutory authority authorizing the detail on such basis. 64 Comp. Gen. 370, 380 (1985); and B-247348, June 22, 1992.[5]

As noted above, in this case, section 127(g)(4) of the Trade Deficit Review Commission Act provides the necessary authority for any federal employee to be detailed to the Commission without reimbursement. Without this authority, the Commission would have to rely on the general authority of the Economy Act, 31 U.S.C. § 1535, for the detail in question. However, the Economy Act requires reimbursement to the agency providing the detailee for the “actual costs” of the services provided, unless the detail falls within one of the recognized exceptions.[6] The difficulty with this course of action is that if the Commission were to reimburse the Bank for the employee’s full salary, it would violate the limitation on the Commission’s authority to compensate its staff at no more than the rate payable for level V of the Executive Schedule. However, in this regard, the fact that the detail may be made without reimbursement does not prevent it being effected with partial reimbursement, if the Commission finds that to be in its interests. This appears to satisfy both the language and intent of the limitation on the use of Commission funds to pay its personnel at no more than the rate applicable for level V of the Executive Schedule and the provision authorizing a detail to the Commission of “any Federal Government employee” without loss of civil service status or privilege.

Accordingly, we have no objection to the described arrangement.

Sincerely yours,

Robert P. Murphy
General Counsel

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[5]We held that such nonreimbursable details violate 31 U.S.C. § 1301(a) that limits the use of appropriations only to the objects for which they are appropriated, and the rule against improperly augmenting the appropriation of the agency receiving the detailee’s services.

[6]For a discussion of the limited exceptions to the reimbursement requirement, see 64 Comp. Gen. 380-381.

DIGEST

The U.S. Trade Deficit Review Commission wishes to have an Export-Import Bank Executive Schedule Level IV employee detailed to the Commission to serve as executive director. The Commission's statute provides authority to appoint staff without regard to civil service laws and regulations, but it limits the compensation the Commission may pay to Executive Schedule Level V. To detail the employee under the Economy Act with full reimbursement to the Bank would violate the pay limitation. However, the Commission's statute also provides authority for any federal employee to be detailed to the Commission without reimbursement and without loss of civil service status or privilege. To avoid violating the compensation limitation, the Commission proposes to reimburse the Bank for the employee's compensation at the level V rate, with the Bank providing the amount over level V. Since this arrangement appears to satisfy the language and intent of the pay limitation and the detail provisions, GAO has no objection.