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Office of the General Counsel

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Mr. John W. Leonard
Budget Officer
U.S. Army Engineer District, Seattle
P.O. Box 3755
Seattle, WA 98124-3755

Subject: Saint Martin de Porres Shelter—Transportation Costs

Dear Mr. Leonard:

In your letter of November 12, 1999, you ask for our views on the legality of the annual payment the U.S. Army Engineer District, Seattle, makes to the Saint Martin de Porres Shelter to cover the costs of operating the shelter's bus. You indicate that the shelter is located in a warehouse on the Seattle waterfront that is under the jurisdiction of the Seattle District. You also state that the District makes no use of the building for any of its official functions. You conclude that, although the District has made similar payments to the shelter for many years, there is no authority for the District to do so.

Subsequent to receiving your letter, we spoke both with you and with Mr. Steven Hanson of the Seattle District Real Estate Division. As we understand the history of the shelter, the building in which it is housed was used by the Army as a point of debarkation, both in World War II and the Korean War. At a later date, the Army declared the building surplus and transferred it to the General Services Administration (GSA). GSA used the building as a warehouse. At some point GSA dedicated a portion of the building for use by the City of Seattle as a shelter to house up to 100 homeless persons. The City, in turn, arranged for the shelter to be operated by Catholic Charities of King County. Since 1996, the Shelter has been operated by the Housing Authority of the Archdiocese of Seattle. In 1985, GSA transferred the building to the Seattle District, which enlarged the capacity of the shelter to house 200 people. Under the agreement of transfer, the Seattle District was required to lease the portion of the building not being used for the shelter back to GSA.

In your letter, you say that the Seattle District relies on 10 U.S.C. § 2546 as authority for making payment to the shelter. Section 2546 authorizes the secretaries of military departments to make military installations available for providing shelter for persons without adequate shelter. It also authorizes the secretaries to provide incidental

services to the shelters, including transportation. You assert that this law only permits the Seattle District to provide transportation in kind, not to reimburse the shelter operator for its transportation costs. You also state that, in any event, the District is soon to transfer jurisdiction over the building in which the shelter is located to the Coast Guard, which will eliminate its authority to provide any services for the shelter.

As discussed below, we conclude that it is lawful for the Seattle District to reimburse the shelter for its transportation costs.[1]

Discussion

Incidental Services for Shelters. Section 2546, title 10, United States Code provides:

> "(a)(1) The Secretary of a military department may make military installations under his jurisdiction available for the furnishing of shelter to persons without adequate shelter. The Secretary may, incidental to the furnishing of such shelter, provide services as described in subsection (b). Shelter and incidental services may be provided without reimbursement.
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> "(b) Services that may be provided incident to the furnishing of shelter under this section are the following:
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> (1) Utilities.
> (2) Bedding.
> (3) Security.
> (4) Transportation.
> (5) Renovation of facilities.
> (6) Minor repairs undertaken specifically to make suitable space available for shelter to be provided under this section.
> (7) Property liability insurance."

On its face, this statute expresses the Congress's intent that unused military facilities be used to provide shelter for homeless persons so long as doing so does not interfere with normal military functions. The Congress also intends that the shelters be provided with those incidental services necessary for them to function, and which are listed in the statute. Support for this legislative intent can be found in the history of the provision that became section 2546.

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[1] The signature line of your letter indicates that you are a budget officer, not a certifying or disbursing officer. Under 31 U.S.C. § 3529, only heads of agencies and certifying or disbursing officers are entitled to a decision from the Comptroller General on the legality of proposed payments. Therefore, you should consider this letter as a statement of our views on the questions you have posed, not as a decision of the Comptroller General.

Section 2546 was enacted in the Department of Defense Authorization Act, 1984, Pub. L. No. 98-94 (1983). The Joint Explanatory Statement of the conferees on S. 675, 98th Congress, states

> "Section 405 of the House amendment would authorize the Department of Defense to provide shelter and incidental services at military installations without reimbursement to the extent that such humanitarian assistance does not interfere with military preparedness or ongoing military functions. In addition, $10 million would be authorized to offset the anticipated incremental cost of this program to ensure that military activities would not suffer through a diversion of funding to provide shelter and incidental support for the homeless."

H. Rept. No. 352, 98th Cong. 1st Sess. 451 (1983). The intent of the amendment was earlier described by Rep. Daniel, its author. He stated:

> "Mr. Chairman, the amendment I am offering does two things. First it authorizes the Secretary of Defense to provide shelter, utilities, and related services to the Nation's homeless when he determines that it will not interfere with military readiness.
>
> "Second, it provides $10 million in increased authorization to cover the estimated costs associated with the sheltering of the homeless."

129 Cong. Rec. H5407 (daily ed. July 21, 1983). The fact that the Congress authorized additional funds, as well as enacting permanent authorization for the program, indicates that it was aware that providing shelter for the homeless would involve significant costs.

You suggest that we read the statute very strictly and find that the incidental services that are authorized to support shelters must be provided in kind. You argue that the law only allows the military departments to provide these services directly; it does not allow them to reimburse the shelter operator for the costs of these services. Your interpretation would mean that the military departments can only provide utilities from their own generators, can only supply bedding from their own supplies, can only provide security with their own guards, can only provide transportation with their own buses driven by their own personnel, can only renovate or repair the facilities using their own personnel, and can only provide insurance through a rider to some preexisting policy.

In our opinion, to read section 2546 to require that incidental services be provided only when they preexist on the installation and are otherwise serving military purposes would defeat the very purpose of the legislation—to provide functional housing for the homeless. This interpretation would severely limit the military departments' use of the authority. The statute specifically says "incidental to the furnishing of shelter . . . ." In our view, the word "incidental" as used in the statute means incidental to the operation of the shelter, not incidental to normal military operations.

We believe the incidental services authority of section 2546 should be read consistent with its purpose and spirit. A military department may provide these services to a shelter either directly or indirectly. It can 1- provide them using its own supplies and personnel; 2- acquire them for the shelter by contract; or 3- agree with the municipality or charity operating the shelter to reimburse it for the cost of acquiring that service for itself.

Accordingly, we do not object to the Seattle District reimbursing the Saint Martin de Porres Shelter for the costs of providing transportation services for the residents of the shelter. Of course, the District should require the shelter to provide adequate documentation to ensure that the reimbursement does not exceed the shelter's actual transportation costs.[2]

Military Installations. Your letter raises an additional issue. On October 29, 1999, the Army notified the Armed Services committees in the House and Senate that it intended to transfer jurisdiction of the building to the United States Coast Guard. Under the proposed transfer, the Coast Guard would grant a permit to the Army to continue administering the space occupied by the shelter. You assert that when this transfer takes place the Seattle District will be without jurisdiction to provide any services to the Saint Martin de Porres Shelter. We discussed this situation with Mr. Hanson of the Seattle District Real Estate Division. He told us that until now, the District has needed only the space in the building occupied by the shelter. The District has leased the remainder of the building to GSA for use as a warehouse. Mr. Hanson indicates that GSA has terminated the lease and that the transfer to the Coast Guard will free the District from the responsibility of maintaining the entire building.

Section 2546 states that the secretary of a military department may provide shelter to the homeless in "military installations under his jurisdiction. . . ." The Department of Defense implementing regulations likewise say that the secretary of a military department may make "military installations under his or her jurisdiction" available for providing shelter to the homeless. 32 C.F.R. § 226.3(b). Hence, the issue is whether the portion of the warehouse building housing the homeless shelter and controlled by the Army pursuant to a permit from the Coast Guard qualifies as a "military installation" under the Army's "jurisdiction."

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[2] In this letter, we decide only whether reimbursing the shelter for transportation is lawful. We do not address the question whether such reimbursement is consistent with Army policy. You should be aware that under a memorandum, dated March 26, 1996, the Assistant Chief of Staff for Installation Management has indicated that it is Army policy that "[t]ransportation/travel costs of shelter residents to/from the shelter outside the immediate shelter area are not eligible for reimbursement."

Neither the statute nor the regulation define the term "military installation." However, the Congress has defined the term in other contexts and, although not strictly applicable to section 2546, we look at those definitions for some indication of what the Congress may have meant.

In a section authorizing commanders of installations to contract for commercial activities, the Congress states that "in this section, the term 'military installation' means a base, camp, post, station, yard, center, or other activity under the jurisdiction of the Secretary of a military department . . . ." 10 U.S.C. § 2468(e).

In a provision which requires notification to the Congress before the closure of an installation, the law provides that "[t]he term 'military installation' means a base, camp, post, station, yard, center, homeport facility for any ship, or other activity under the jurisdiction of the Department of Defense, including any leased facility . . ." 10 U.S.C. § 2687(e)(1).

For the entire chapter dealing with military construction, "[t]he term 'military installation' means a base, camp, post, station, yard, center, or other activity under the jurisdiction of a military department or, in the case of an activity in a foreign country, under the operational control of a military department or the Secretary of Defense." 10 U.S.C. § 2801(c)(2). This law defines a "facility" separately as "a building, structure, or other improvement to real property." 10 U.S.C. § 2801(c)(1).

Each of these definitions contains a list of specific designations, followed by the catchall "other activity under the jurisdiction" of a military secretary or the Department of Defense. One definition distinguishes between "jurisdiction" and "administrative control," implying that having jurisdiction over an installation is something more than controlling it administratively. Another definition specifically includes "any leased facility."

In our opinion, consistent with the other definitions of the term "military installation," when the Congress uses the term "military installation" in 10 U.S.C. § 2546 it is referring to real property that is under the physical control of a military department and is subject to the laws and regulations that apply generally to that department. Absent definitional guidance in section 2546 or applicable regulatory guidance, we see no basis to reject the application of the other statutory uses of this term in construing section 2546. Accordingly, even after the transfer of the building housing the shelter to the Coast Guard, the shelter space will still be real property that, with the permitted use, will be under the control of the Secretary of the Army. The transfer of the building to the Coast Guard with a permit back to the Army to continue to use the space is certainly a change in form and perhaps the degree of control that the Secretary of the Army can exercise over the facility. In substance,

however, the Secretary's authority with respect to the space appears to be functionally no less than it was prior to the transfer. While the matter is not free from doubt, under the circumstances, we will not object to the continued application of section 2546.[3]

Sincerely yours,

Gary L. Kepplinger
Associate General Counsel

[3] Although we conclude that the portion of the building that the Seattle District will occupy under permit qualifies as a military installation under the jurisdiction of the Secretary of the Army for the purposes of 10 U.S.C. § 2546, we harbor some doubts whether in authorizing military departments to provide space and incidental services for homeless shelters the Congress contemplated a situation like this. The building housing the shelter was transferred from GSA to the Army in 1985 for the sole purpose of using the authority of section 2546 to enlarge the existing shelter. As you point out in your letter, "Were it not for the Shelter, Seattle District would have no requirement for a real property interest in the warehouse." In its Disposal Report No. 801, dated October 29, 1999, the Army justifies transferring the building to the Coast Guard by stating that the property is "excess to Army requirements." We are left with the anomalous situation that the Army has no mission-related need for the building but is retaining control over the shelter area solely to retain authority to subsidize the shelter operation.