



Decision

Matter of: Department of Commerce—Disposable Cups, Plates, and Cutlery

File: B-326021

Date: December 23, 2014

DIGEST

The Department of Commerce may not use appropriated funds to purchase disposable cups, plates, and cutlery for employee use. An agency may not use appropriated funds to purchase items considered personal expenses without specific statutory authority to do so, unless the agency can demonstrate that the provision of items that would otherwise constitute a personal expense directly advances the agency's statutory mission and the benefit accruing to the agency clearly outweighs the ancillary benefit to the employee. Here, the disposable cups, plates, and cutlery are primarily for the convenience of agency employees and thus constitute a personal expense.

DECISION

The Department of Commerce (Commerce) requests a decision under 31 U.S.C. § 3529(a) regarding the use of appropriated funds to purchase disposable cups, plates, and cutlery for use by certain employees of the National Weather Service (NWS).¹ Letter from Assistant General Counsel for Administration, Commerce, to General Counsel, GAO (June 25, 2014) (Request Letter). As explained below, because Commerce has not demonstrated that the provision of items that would otherwise constitute a personal expense directly advances its statutory mission, and

¹ Our practice when rendering decisions is to obtain the legal views of the relevant agency and to establish a factual record on the subject of the request. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), available at www.gao.gov/legal/resources.html. The request letter provided relevant facts and the agency's views, as well as a copy of the opinion issued by an arbitrator on this issue. We considered those in reaching this decision.

the primary benefit of these items does not inure to the agency, Commerce may not use appropriated funds to purchase these items.

BACKGROUND

On September 25, 2009, Commerce² and the National Weather Service Employees Organization (NWSEO)³ signed a Memorandum of Understanding (MOU) on the implementation of the H1N1 Preparedness Plan of Action. Request Letter, at 1. This MOU provides in part that Commerce “will hereafter provide hand sanitizer at each work station and in each cubical or office, disinfectant spray or wipes for shared services, and tissues, paper towels, disposable cups, plates an[d] utensils.” *Id.* Commerce requested our decision only with regard to the purchase of disposable cups, plates, and cutlery.

After signing the MOU in 2009, Commerce purchased and provided disposable cups, plates, and utensils for everyday use by NWS employees in regional offices. *Id.*, Attachment 1, at 3. On March 26, 2013, Commerce announced that appropriated funds could not be spent to purchase disposable plates, cups, and cutlery and directed that purchases of these items be discontinued. Request Letter, at 1. NWSEO objected, arguing that this action violated the MOU. *Id.* On May 17, 2013, the Office of the General Counsel for Commerce advised the National Oceanic and Atmospheric Administration (NOAA) that appropriated funds could not be expended to purchase these items “because the purchase was for the primary benefit of the employees.” *Id.*

Given this dispute, Commerce and NWSEO appeared for arbitration on December 19, 2013. *Id.* The arbitrator found that disposable items could help Commerce maintain a healthy work environment and that employee sickness could be an inconvenience to the agency. Request Letter, Attachment 2, at 14–15. The arbitrator also noted that employees might spend less time away from their work stations if they were provided disposable items than if they had to wash non-disposable items in the break rooms. *Id.*, Attachment 2, at 20. The arbitrator concluded that the disposable items could be purchased with appropriated funds

² For purposes of this decision, “Commerce” will generally refer to the Department of Commerce, the National Oceanic and Atmospheric Administration (NOAA), and the National Weather Service (NWS). NOAA is a bureau within the Department of Commerce. NOAA is comprised of several subagencies, one of which is the NWS. NWS signed the Memorandum of Understanding at issue in this decision.

³ NWSEO is a labor and professional association that represents 4,000 employees of NOAA in Commerce. NWSEO, *Home*, available at www.nwseo.org/ (last visited Dec. 19, 2014).

because these benefits accrued to the agency and the decision by the agency, therefore, to stop providing those items violated the MOU. *Id.*, Attachment 2, at 15.

On June 3, 2014, Commerce filed Exceptions to the Arbitration Award with the Federal Labor Relations Authority (FLRA). Commerce requested that FLRA stay its decision on the Exceptions pending GAO's decision herein. Request Letter, at 2, 4.

DISCUSSION

There can be no doubt that disposable plates, cups, and cutlery are personal items, and that the benefit of their use (and thus the cost of acquiring them) inures to the individuals who use them. It is axiomatic that public funds are generally not available for the cost of personal items for the public's employees. Stewardship of public money, and accountability to Congress for the proper use of public money appropriated to agencies, demands an exceptionally high bar to overcome this overarching principle.⁴ An expense will not overcome this principle where it "would serve no purpose other than accommodating employees' personal tastes—a purpose that generally cannot justify the expenditure of public funds." *Navy v. Federal Labor Relations Authority*, 665 F.3d 1339, 1350 (D.C. Cir. 2012).

Congress itself, as a matter of public policy, may enact a statute authorizing an agency to use public money for what is otherwise a personal expense. Congress has enacted statutes authorizing agencies to pay for otherwise personal expenses such as per diem allowances to employees traveling on official business. 5 U.S.C. § 5702. Also, Congress has authorized agencies to provide transit benefits to employees to encourage commuting by means other than single-occupancy motor vehicles. 5 U.S.C. § 7905. Otherwise, an agency must present a compelling justification for the use of public money for a personal expense. For example, we found that the use of appropriated funds to purchase samples of food for a cultural awareness ceremony was appropriate where the samples were served as an integral part of a formal cultural awareness program to advance Equal Employment Opportunity (EEO) objectives and the agency determined that the provision of food was offered as part of the larger program to serve an educational function. B-301184, Jan. 15, 2004. On the other hand, we found that funds were not available to purchase food for a Combined Federal Campaign (CFC) kick-off event, where the agency asserted that food would simply contribute to the "celebratory nature" of the kick-off event. B-325023, July 11, 2014.

⁴ The Supreme Court has stated that "[t]he established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress." *United States v. MacCollom*, 426 U.S. 317, 321 (1976).

GAO accepts justifications for the use of appropriated funds for personal expenses only rarely. B-318386, Aug. 12, 2009 (noting that “[b]ecause of the clear potential for abuse, we find exceptions to the general rule only rarely”). See, e.g., 60 Comp. Gen. 633 (1981) (employees must bear the costs of transportation between their residences and official duty locations, even when unusual conditions may increase commuting costs); 37 Comp. Gen. 360 (1957) (agency could not use appropriated funds to purchase Christmas cards to send to “important individuals” in countries where the agency had overseas posts); B-193104, Jan. 9, 1979 (raincoats and umbrellas for employees who must frequently go out in the rain are personal items that the employee must furnish). We will consider exceptions to the general rule against using appropriated funds for personal expenses only after careful consideration of particular factual circumstances in which an agency can demonstrate that the item will directly advance an agency’s statutory mission and objectives. B-318386, Aug. 12, 2009. Any exception, therefore, is necessarily case-specific. In order to find such an exception, we must conclude that the benefit of the expense accrues to the government, notwithstanding collateral benefit to the individual. B-318499, Nov. 19, 2009. For example, we permitted the Veterans Benefits Administration (VBA) to use appropriated funds to pay for incentives in the form of refreshments or light meals to increase participation in and the effectiveness of focus groups, where VBA had a statutory requirement to measure and evaluate veterans benefit programs to assess their effectiveness. B-304718, Nov. 9, 2005. On the other hand, we did not permit the use of appropriated funds to pay for lunch for a focus group where the agency did not identify a specific statutory objective advanced by the focus group. B-318499. The fact that there may be a collateral benefit to the agency—such as increased participation in a focus group—is not enough to overcome the general principle.

With regard to the personal items at issue here, Commerce has offered no rationale in support of using its appropriation for this purpose. Indeed, Commerce, which is responsible for the legal and proper use of its appropriation, has concluded that “there is no legal basis for expending appropriated funds to purchase disposable plates, cups and cutlery for [agency] employees.” Request Letter, at 4.

The handful of rare occasions where GAO has permitted the use of appropriated funds to purchase disposable cups, plates, cutlery, and similar items are easily distinguishable from the facts presented here. In 1996, when Combined Federal Campaign (CFC) regulations in place at the time specifically authorized the use of CFC campaign funds to be spent on refreshments to recognize workers for the completion of a successful campaign, we did not object to the use of appropriated funds on paper plates, forks, and napkins. B-247563, Dec. 11, 1996. This result was consistent with GAO’s longstanding position that agencies may spend reasonable amounts of appropriated funds specifically to promote the CFC. However, the CFC regulations were subsequently amended to prohibit the use of CFC funds for food or refreshments at a special event. See B-325023, July 11, 2014, at 3. The answer in the present case, however, is clear. In contrast to the

1996 case, no such regulatory scheme exists here to support the use of appropriated funds to purchase disposable cups, plates, and cutlery.

We have also permitted the use of appropriated funds for the temporary purchase of paper napkins to be provided to employees in a newly constructed cafeteria, located at an Internal Revenue Service (IRS) facility. B-204214, Jan. 8, 1982. In that case, napkins were temporarily made available to remedy the shortage of paper towels in the restrooms, which employees had been using in the absence of available napkins. In 1971, we permitted the Federal Aviation Administration to use appropriated funds to provide employees with stainless steel cooking utensils if “a responsible official . . . determined that these utensils are essential for the proper performance of the air traffic control facility involved.” B-173149, Aug. 10, 1971. It is important to note that the cooking utensils were not intended solely for the use of any one employee.

Here, Commerce has not demonstrated, nor does the arbitrator’s opinion demonstrate, that the provision of individual disposable cups, plates, and cutlery would directly advance its statutory mission or that the benefit accruing to the government through the provision of such items outweighs the personal nature of the expense. Commerce has not shown that employees will work more efficiently if provided with disposable utensils, noting instead that “employees can indeed forecast the weather and perform other work duties without the agency’s provision of [these items].” Request Letter, at 2.

As noted above, the dispute between Commerce and NWSEO was presented for arbitration, and Commerce provided us with the arbitrator’s opinion, *In the matter of Arbitration between [NWSEO], Union and [Commerce], Agency*, FMCS Case No. 13-02394-1, Opinion and Award, May 5, 2014. Request Letter, Attachment 2. In finding that Commerce violated its collective bargaining agreement with NWSEO when it discontinued providing free disposable plates, cups, and cutlery, the arbitrator concluded that Commerce’s appropriation is available for this purpose. Request Letter, Attachment 2, at 15. The arbitrator said that Commerce is the primary beneficiary of these items because paper products facilitate food consumption by permitting employees to spend less time in the kitchenette away from their work stations as they prepare their meals, and eliminate the need to spend time washing dishes and returning them to the cupboards. *Id.*, Attachment 2, at 20. The arbitrator also noted that disposable products would contribute to healthy staff, minimizing the spread of illness—a benefit, according to the arbitrator, that accrues to the agency. *Id.*, Attachment 2, at 14–15.

An agency may cite to empirical evidence to help support its assertion that an expenditure of this nature is an essential part of accomplishing a statutory responsibility of the agency. See B-325023; B-304718. No such empirical evidence has been presented in this case. Although the arbitrator asserts that disposable cups, plates, and cutlery could benefit Commerce by both helping to prevent

employee sickness and allowing employees to spend less time away from their work stations, we have been provided with no empirical evidence supporting either assertion. In fact, Commerce's Pandemic Flu Index does not recommend the use of goods such as disposable cups, plates, or cutlery as an effective way to prevent the spread of disease. Request Letter, Attachment 1, at 12–13. Further, the pandemic influenza plan issued by the Department of Health and Human Services (HHS) advises that "[s]eparation of eating utensils for use by a patient with influenza is not necessary, as long as they are washed with warm water and soap." HHS, *HHS Pandemic Influenza Plan*, available at www.flu.gov/planning-preparedness/federal/hhspandemicinfluenzaplan.pdf (last updated Nov. 2005), at S5-7. Finally, employees could easily bring their own disposable cups, plates, or cutlery when they bring their own meals to work.

Consequently, we have no legal basis on which to conclude that Commerce's appropriations are available to provide free disposable plates, cups, and cutlery to Commerce employees. Appropriations are not available for the personal expenses of an agency's employees unless the agency articulates a reasonable and compelling justification, establishing a clear benefit to the agency, contributing to the fulfillment of express statutory duties, requirements, or functions.

CONCLUSION

Disposable cups, plates, and cutlery clearly constitute a personal expense. Commerce has not demonstrated that using appropriated funds to provide these items would directly advance its statutory mission and that the benefit accruing to the government through the provision of these items outweighs the personal nature of the expense. Accordingly, appropriated funds are not available to pay for cups, plates, and cutlery for Commerce employees.



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