U.S. GOVERNMENT ACCOUNTABILITY OFFICE

441 G St. N.W.
Washington, DC 20548

B-327146

August 6, 2015

Richard J. Hirn
General Counsel
National Weather Service Employees Organization

Subject: *Department of Commerce—Disposable Cups, Plates, and Cutlery (Reconsideration)*

Dear Mr. Hirn:

In December, we issued a decision to the Department of Commerce (Commerce) regarding the use of appropriated funds to purchase disposable cups, plates, and cutlery for employee use. B-326021, Dec. 23, 2014. In that decision, we held that appropriated funds are not available to purchase such items since they constitute personal expenses of employees. This responds to your March 31, 2015, letter in which you asked us to reconsider that decision. Letter from General Counsel, National Weather Service Employees Organization (NWSEO), to General Counsel, GAO (Mar. 31, 2015) (March 31 Letter). You assert that our decision is unauthorized by law and is contrary to GAO policy. *Id.*, at 2.

GAO will modify or reverse a prior decision or opinion only if it contains a material error of fact or law. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006). *See, e.g.,* B-231210, June 4, 1990. As explained below, your letter did not identify any material errors of fact or law and we decline to reconsider the decision.

BACKGROUND

On September 26, 2009, Commerce and NWSEO signed a memorandum of understanding (MOU), which stated that Commerce would provide "disposable cups, plates, and utensils" to employees. B-326021, at 2. After signing the MOU, Commerce provided the disposable items but, in 2013, Commerce announced that it could not use appropriated funds for this purpose. *Id*. NWSEO objected, arguing that this action violated the MOU. *Id.* Commerce and NWSEO appeared before an arbitrator, who concluded that the disposable items could be purchased with appropriated funds. *Id*. In 2014, Commerce filed Exceptions to the Arbitration Award with the Federal Labor Relations Authority (FLRA). *Id.*, at 3. Commerce

requested that FLRA stay its decision on the Exceptions while it sought a decision from GAO pursuant to 31 U.S.C. § 3529(a). Letter from Assistant General Counsel for Administration, Commerce, to General Counsel, GAO (June 25, 2014).

In our decision to Commerce, we set forth the general rule regarding the purchase of personal items using public funds:

> "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. 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)."

B-326021, at 3. We noted that neither Commerce nor the arbitrator's opinion demonstrated that provision of the disposable items was an essential part of accomplishing a statutory mission of the agency. *Id*., at 5. Consequently, we concluded that appropriated funds were not available to pay for the cups, plates, and cutlery. *Id*., at 6.

DISCUSSION

You assert that the Federal Service Labor Management Relations Statute prohibits GAO from rendering a decision on the availability of appropriations for the personal expenses of federal employees if an arbitrator has opined on the matter.[1] March 31 Letter, at 3. This reflects a fundamental misunderstanding of GAO's statutory responsibility to issue decisions such as B-326021. GAO's authority in this matter is derived not from the Federal Service Labor Management Relations Statute but, instead, from our statutory authority to render advance decisions under 31 U.S.C. § 3529.

Our statutory responsibilities in this regard are widely understood and respected. The decisions of the Comptroller General (and the predecessor Comptroller of the Treasury) concerning the use and obligation of appropriations have a well-established and recognized heritage dating back to the mid-nineteenth century. The

[1] Commerce sent us a letter containing its views and asking us to deny NWSEO's request for reconsideration. Letter from Office of General Counsel, Commerce, to General Counsel, GAO (Apr. 20, 2015).

U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit), in a case on point, relied on decisions of the Comptroller General when it ruled that the Navy's appropriations were not available for the purchase of bottled water. *Navy v. FLRA*, 665 F.3d 1339 (D.C. Cir. 2012).". FLRA had concluded that the Navy was obligated to bargain with its employee unions before ceasing to provide bottled water. *Id.,* at 1343. On review, the D.C. Circuit noted that appropriations are available for bottled water only if tap water is unavailable or unwholesome, and pointed out that the "line of Comptroller General decisions articulating this rule dates back at least to 1923." *Id.,* at 1350 (*citing* 2 Comp. Gen. 776 (1923)).

The D.C. Circuit, while acknowledging that FLRA is entitled to deference when interpreting and applying the Federal Service Labor Management Relations Statute, its own enabling statute, noted that federal appropriations statutes are not within FLRA's area of expertise. *Id.,* at 1348. The D.C. Circuit went on to say that it regards the Comptroller General's decisions as an "expert opinion, which we should prudently consider." *Id.,* at 1349. Accordingly, the court vacated FLRA's decision, ruling that by law the Navy could not bargain over the provision of bottled water if the available tap water was safe and drinkable because appropriations are unavailable for the purchase of bottled water in that circumstance. *See also Air Force v. FLRA*, 648 F.3d 841 (D.C. Cir. 2011) (union proposal to use appropriated funds to pay for uniform cleaning was non-negotiable because this purpose was not authorized by law).

You also assert that our decision was issued contrary to prior GAO cases that state, for example, that we "will not otherwise issue a decision or comment on the merits of a matter which is subject to grievance procedures, *if* we find that it is more properly within the jurisdiction of the Federal Labor Relations Authority." March 31 Letter, at 2 (*citing* B-220119, Dec. 9, 1985) (emphasis added). It appears, due to the line of cases to which you cite, that you may be confusing GAO's former claims settlement authority with our continuing accounts settlement authority.

For many years, GAO had the authority to administratively and conclusively settle and adjust all claims against the United States. GAO's claims authority addressed the specific claims of individual employees with regard to such items as compensation and leave, travel, transportation, and relocation expenses and allowances.[2] In 1995, however, Congress transferred a number of GAO's claims settlement duties to other agencies. Pub. L. No. 104-53, § 211, 109 Stat. 514, 535 (Nov. 19, 1995). Notably, accounts settlement authority remained vested in the Comptroller General.

GAO, in the exercise of our former claims settlement authority, addressed the merits of an individual employee's claim for entitlement to particularized dollar amounts or

[2] For more on the history of GAO's claims settlement authorities, see the discussion in chapter 14, section B, in volume III of the third edition of *Principles of Federal Appropriations Law.*

leave. To the extent that such disputes were already being adjudicated pursuant to grievance procedures, GAO would not assert jurisdiction. Your letter references a 2003 decision where we stated that we "may not overrule a specific arbitration award." March 31 Letter, at 2; B-288992, Mar. 17, 2003. Your letter neglects to include, however, the next two sentences in the decision that distinguish our former claims settlement authority from our continuing accounts settlement authority. "The Comptroller General has the authority to settle the accounts of the United States government and thus ensure the legality of government expenditures. 31 U.S.C. § 3526(a). Also, the Comptroller General is required to respond to agencies' requests for decisions on questions involving payments the agency will make. 31 U.S.C. § 3529." B-288992, at 2.

GAO's former claims settlement authority and continuing accounts settlement authority are rooted in different statutes. We have long distinguished, and continue to distinguish, claims settlement and account settlement. In 1992, we explained that "we will continue to issue decisions to accountable officers and agency heads, in accordance with 31 U.S.C. § 3529, on questions that do not involve specific claims within the scope of negotiated grievance procedures." *Procedures for Decisions on Appropriated Fund Expenditures Which Are of Mutual Concern to Agencies and Labor Organizations*, 57 Fed. Reg. 31272 (July 14, 1992); *see also* 71 Comp. Gen. 374 (1992).

GAO's accounts settlement authority remains unchanged. Congress has charged the Comptroller General to settle the accounts of the United States. 31 U.S.C. § 3526. Since 1921, Congress has provided accountable officers and the heads of agencies the right to request decisions from the Comptroller General in advance of an audit and settlement of an account. 31 U.S.C. § 3529. Questions regarding the legal availability of appropriations for particular purposes, including purposes that might constitute unauthorized personal expenses, as opposed to specific disputes over amounts owed to individuals, are a primary component of almost 100 years of Comptroller General decisions and opinions. The Comptroller General's appropriations law decisions and opinions serve to advance Congress's constitutional prerogatives of the purse, including Congress's constitutional power to decide the purposes for which federal agencies may obligate and spend public money. They serve, also, to effect federal agency stewardship and accountability for the proper use of public money. As explained by the D.C. Circuit, FLRA's jurisdiction extends only to those statutes that were "fashioned for the purpose of regulating the working conditions of employees." *United States Department of Homeland Security v. FLRA,* 784 F.3d 821, 823 (D.C. Cir. 2015) (*quoting United States Department of Treasury v. FLRA*, 43 F.3d 682, 691 (D.C. Cir. 1994)). Where agency appropriations are not legally available for a particular purpose, such a purpose cannot constitute a "working condition" within FLRA's jurisdiction.

Our conclusion in the Commerce decision, which is that public funds are not available for the purchase of the cups, plates, and cutlery for the personal use of public employees, is well rooted in the Constitution, statute, and the precedents of

this office. U.S. Const., art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law"); 31 U.S.C. § 1301 ("Appropriations shall be applied only to the objects for which the appropriations were made"); 37 Comp. Gen. 360 (1957); 3 Comp. Gen. 433 (1924). As we noted in the decision, we are aware of the memorandum of understanding between Commerce and NWSEO. B-326021, at 2. However, an agency may obligate appropriated funds only for the purposes for which Congress has appropriated them. 31 U.S.C. § 1301. "The 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) (plurality opinion); *see also Navy*, 665 F.3d at 1348 ("all uses of appropriated funds must be affirmatively approved by Congress; the mere absence of a prohibition is not sufficient"); B-288266; B-300192, Nov. 13, 2002.

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. B-326021, at 3. Here, Congress has not provided that appropriations are available for the disposable cups, plates, and cutlery at issue. Therefore, Commerce may not use appropriated funds to provide the items. This conclusion holds notwithstanding the contents of the MOU:

> "Federal collective bargaining is not exempt from the rule that funds from the Treasury may not be expended except pursuant to congressional appropriations. Indeed, the statute governing federal labor relations explicitly relieves agencies of the duty to bargain over any matter that would be inconsistent with Federal law or any Government-wide rule or regulation. 5 U.S.C. § 7117(a)(1). Therefore, under Section 7117, *a collective bargaining proposal is contrary to law, and hence not subject to bargaining, if it requires expenditure of appropriated funds for a purpose not authorized by law*."

Navy, 665 F.3d at 1347 (internal quotation marks and citations omitted) (emphasis added).

The question Commerce put before us fell within our statutory duty under 31 U.S.C. § 3529 to issue advance decisions to agencies on the legal availability of appropriations for a particular purpose. As discussed above, in this case Commerce had no authority to use appropriations to pay the personal expenses at issue. As we have pointed out on multiple occasions, it "is well accepted in the law that *ultra vires* behavior is, *ab initio*, legally ineffective." B-324987, Jan. 30, 2014; B-302230, Dec. 30, 2003. *See Riley v. Kennedy*, 553 U.S. 406 (2008). As Commerce had no authority to use appropriations to provide disposable cups, plates, and cutlery, the matter was not properly within the scope of the memorandum of understanding between Commerce and NWSEO and not properly before the arbitrator or FLRA.

CONCLUSION

GAO will modify or reverse a prior decision or opinion only if it contains a material error of fact or law. As explained above, your letter did not identify any material facts or law not previously considered by this office. The law does not allow Commerce to use public funds to provide personal items such as disposable cups, plates, and cutlery to its employees in this circumstance. The collective bargaining process gives Commerce no mechanism to circumvent this prohibition. Therefore, we decline to reconsider the decision and stand by the holding.

Sincerely,

Susan A. Poling
General Counsel