



B-328477

September 26, 2017

The Honorable Robert B. Aderholt
Chairman, Subcommittee on Agriculture, Rural Development,
Food and Drug Administration, and Related Agencies
Committee on Appropriations
House of Representatives

Subject: *U.S. Department of Agriculture—Economy Act Transfers for Details of Personnel*

Dear Mr. Chairman:

This responds to your September 16, 2016, request for a legal opinion regarding certain U.S. Department of Agriculture (USDA) Economy Act agreements for details of personnel. The Economy Act authorizes agencies to enter into reimbursable agreements for the interagency provision of goods and services. 31 U.S.C. § 1535. As explained below, USDA improperly used the Economy Act to execute interagency agreements (IAA) for the provision of services through personnel details that did not actually occur. Under these IAAs, USDA obligated its appropriations for (1) Rural Development Salaries and Expenses, (2) Food and Nutrition Service, Nutrition Programs Administration, and (3) Office of Civil Rights, for the expenses of other USDA offices that had received separate appropriations.

USDA violated the purpose statute, 31 U.S.C. § 1301, when it did not use the correct appropriations. Further, the agency improperly augmented the appropriations of these other offices. USDA should adjust its accounts to charge the correct appropriations for the salaries and benefits in question. If sufficient amounts are not available in those accounts, USDA has also violated the Antideficiency Act and must report its violation(s). 31 U.S.C. §§ 1341(a), 1351.

In accordance with our regular practice, we contacted USDA for factual information and its legal views on this matter. Letter from Assistant General Counsel for Appropriations Law, GAO, to Associate General Counsel, USDA, *Subject: U.S. Department of Agriculture—Economy Act Transfers for Details of Personnel* (Nov. 16, 2016); GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), available at www.gao.gov/products/GAO-06-1064SP. USDA provided its legal analysis and factual information pertaining to the IAAs and positions of the employees. Email

from Associate General Counsel, USDA, to Assistant General Counsel for Appropriations Law, GAO, *Subject: RE: Development Letter from GAO* (Apr. 6, 2017) (Final Response); Email from Associate General Counsel, USDA, to Assistant General Counsel for Appropriations Law, GAO, *Subject: re: 328477* (Jan. 23, 2017) (Position Descriptions Email); Email from Associate General Counsel, USDA, to Assistant General Counsel for Appropriations Law, GAO, *Subject: FW: Interim response re: 328477*(Jan. 19, 2017) (Interim Response).

BACKGROUND

USDA entered into four IAAs pursuant to which the Rural Development agency, the Food and Nutrition Service, and the Office of Civil Rights obligated funds for personnel services to be provided by the Office of the Under Secretary for Rural Development, the Office of the Under Secretary for Food, Nutrition, and Consumer Services, and the Office of the Assistant Secretary for Civil Rights, respectively. Each IAA used a similar framework, so for ease of discussion, this opinion focuses on the Rural Development IAA.

USDA's Rural Development agency entered into an IAA with its leadership office, the Office of the Under Secretary for Rural Development, for services to be provided in fiscal year (FY) 2015. The Rural Development agency and the Office of the Under Secretary for Rural Development are funded from separate appropriations. Under the agreement, Rural Development (the "Requesting Agency") would reimburse the Office of the Under Secretary for Rural Development (the "Servicing Agency") purportedly for the salaries and benefits of 13 detailees to be provided by the Under Secretary's office to the Rural Development agency from October 1, 2014, through September 30, 2015. IAA No. SE.DR.RD00.15-9252015, at 2 (Sept. 21, 2015). Pursuant to this agreement, USDA obligated \$1.255 million from its Rural Development Salaries and Expenses appropriation to reimburse the appropriation for the Office of the Under Secretary for the salaries and benefits of the detailees. *Id.* The agency cited to the Economy Act as its authority to transfer the funds from one appropriation to the other.¹ *Id.*

However, according to USDA, 10 of the individuals that were to be detailed to the Rural Development agency under the IAA actually worked for the Office of the Under Secretary for Rural Development or the immediate Office of the Secretary of Agriculture during FY 2015, rather than performing work for the Rural Development agency in the Rural Development agency mission areas.² Final Response Email,

¹ The Economy Act authorizes agencies to enter into reimbursable agreements for the interagency provision of goods and services. 31 U.S.C. § 1535.

² The Rural Development agency consists of three components—Rural Housing Service, Rural Utilities Service, and Rural Business-Cooperative Service. Each

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Attachment 2. For example, during the period of performance of the IAA, one individual served as Deputy Under Secretary for Rural Development (Operations and Management) and another as Deputy Under Secretary for Rural Development (Policy), positions that are meant to share in the Under Secretary's responsibilities and are further described by USDA as "extension[s] of the Under Secretary's position." Position Descriptions Email, Attachments. Another individual served as the Under Secretary's Chief of Staff, which USDA describes as the Under Secretary's "alter-ego." Position Descriptions Email, Attachment 1. Several others served as Senior Advisors, advising and reporting directly to the Deputy Under Secretary for Rural Development or the Secretary of Agriculture. Final Response Email, Attachment 2; Position Descriptions Email, Attachment 2. USDA, nevertheless, still obligated the salaries and benefits of all 13 individuals described in the IAA for FY 2015 from the Rural Development Salaries and Expenses appropriation, which funds the Rural Development agency not the Office of the Under Secretary.³

DISCUSSION

At issue in this opinion is, first, whether, through the Rural Development IAA, USDA violated the purpose statute, 31 U.S.C. § 1301(a), by obligating and expending amounts from its Rural Development Salaries and Expenses appropriation for the salaries and benefits of employees who worked for separately funded USDA offices; and second, whether USDA improperly augmented its appropriations for the Office of the Under Secretary for Rural Development and the immediate Office of the Secretary by expending amounts transferred from the Rural Development Salaries and Expenses appropriation to compensate employees who were not detailed to Rural Development, but instead worked in those offices. If USDA violated the purpose statute and improperly augmented its appropriations for the Office of the Under Secretary for Rural Development and the immediate Office of the Secretary, it would need to adjust its accounts to charge the proper appropriations for the salaries and benefits of the employees. The final issue then becomes whether, upon

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component has a distinct mission. See USDA Rural Development, *About RD*, available at www.rd.usda.gov/about-rd/agencies (last visited Sept. 21, 2017).

³ Regarding the three remaining IAAs—two between the Food and Nutrition Service agency and the Office of the Under Secretary for Food, Nutrition, and Consumer Services, and one between the Office of Civil Rights and the Office of the Assistant Secretary for Civil Rights—USDA has similarly asserted that the employees who were compensated pursuant to the agreements performed work for the servicing agency, rather than for the agency requesting services. See IAA No. SE.DR.FNCS.16; IAA No. SE.DR.MAND.16; IAA No. SE.RA.ASCR.16; Final Response Email, Letter.

adjustment of its accounts, USDA will have obligated in excess of those appropriations in violation of the Antideficiency Act, 31 U.S.C. § 1341(a). In order to answer these questions, we must first consider the requirements of the Economy Act and the purpose statute, as well as the appropriations law rule that an agency may not augment its given appropriation without statutory authority.

The Economy Act provides that “[t]he head of an agency or major organizational unit within an agency may place an order with a major organizational unit within the same agency or another agency for goods or services if . . . amounts are available,” among other requirements. 31 U.S.C. § 1535(a). The agency requesting services incurs an obligation for the services when the agreement is made, and may transfer funds to the servicing agency for payment in advance or upon request. 31 U.S.C. §§ 1535(b), (d). Importantly, an agency’s appropriation is only available for the purposes for which the appropriation was made, whether obligated under the Economy Act or otherwise. 31 U.S.C. § 1301(a). This purpose limitation extends to an agency’s obligation of amounts transferred from one appropriation to another. Transferred amounts are available “for the same purpose and subject to the same limitations provided by the law appropriating the amount.” 31 U.S.C. § 1532. See *also* 18 Comp. Gen. 489, 490-91 (1938).

Recognizing that Congress does not enumerate every possible use of an appropriation, we have long interpreted the purpose statute to permit expenses that are reasonably necessary to accomplish the purpose for which the funds were appropriated. See, e.g., B-303170, Apr. 22, 2005; 71 Comp. Gen. 527, 528 (1992); 6 Comp. Gen. 619, 621 (1927). However, if an expense falls specifically within the scope of one appropriation, though it may be reasonably related to the purpose of a more general appropriation, the agency must use the more specific appropriation for the expense, unless otherwise authorized by Congress. B-327003, Sept. 29, 2015; B-318426, Nov. 2, 2009; B-256172, Apr. 8, 1997. These purpose limitations are a means of preserving Congress’s constitutional power of the purse.

It also logically follows that a congressional appropriation establishes a maximum authorized program level. Thus, an agency may not, absent statutory authority, operate beyond the level that can be paid for by its appropriations. B-300248, Jan. 15, 2004. To circumvent this limitation would similarly usurp Congress’s power of the purse. *Id.*

The Economy Act permits agreements for details of personnel between agencies or separately funded components of the same agency on a reimbursable basis, but it does not authorize one agency or component to simply cover the costs of another. In B-256172 we considered whether the Economy Act authorized the Forest Service, a component office of USDA, to transfer amounts to USDA’s Office of General Counsel (OGC) to reimburse USDA OGC for legal services provided to the Forest Service. The Forest Service and USDA OGC received separate lump sum appropriations for necessary expenses. USDA OGC’s appropriation was specifically

available for the purposes of providing legal services to all of USDA's offices and agencies, so we determined that the Forest Service appropriation was not available for those expenses. Accordingly, USDA OGC could not properly be reimbursed for its legal services under the Economy Act. The Economy Act does not authorize the transfer of funds to cover an agency's cost of doing what it is otherwise required to do out of its own appropriation. *Id.* See also 61 Comp. Gen. 419 (1982) (emphasizing that conducting an appeals hearing that the agency was required to provide and for which it received appropriations was not a "service" under the Economy Act).

Similarly, here, the Rural Development agency improperly relied on the Economy Act as authority for its agreement with the Office of the Under Secretary for Rural Development. Rather than the Rural Development agency reimbursing the Office of the Under Secretary for the salaries and benefits of *detailees*—a proper use of the Economy Act authority—amounts from the Rural Development Salaries and Expenses appropriation were obligated and expended for the salaries and benefits of employees who worked in the Office of the Under Secretary and the immediate Office of the Secretary during FY 2015. Indeed, USDA asserts that 10 of the individuals described in the IAA as details, performed work that benefitted the Office of the Under Secretary and the immediate Office of the Secretary, such that those offices "should have directly paid those employees' salaries, rather than receiving reimbursement from the [Rural Development] agency[y]." See Final Response Email, Letter, Attachment 2.

The titles and position descriptions of the employees support USDA's assertion. For example, two individuals were Deputy Under Secretaries, positions that USDA describes as "extension[s] of the Under Secretary's position," expected to share in the Under Secretary's responsibilities, and to resolve "major problems with which the Under Secretary is concerned." Position Descriptions Email, Attachments. One individual worked as Chief of Staff, a position that USDA describes as "the Under Secretary's alter ego." Position Descriptions Email, Attachment 1. And several others served as Senior Advisors, responsible for providing advice and support to either the Deputy Under Secretary or the Secretary of Agriculture. Final Response Email, Attachment 2; Position Descriptions Email, Attachments. USDA's use of the Economy Act as merely a vehicle to transfer amounts from one appropriation to another was improper.

For FY 2015, USDA received a Rural Development Salaries and Expenses appropriation of \$224,201,000 "[f]or necessary expenses for carrying out the administration and implementation of programs in the Rural Development mission area" Pub. L. No. 113-235, div. A, title III, 128 Stat. 2130, 2147 (Dec. 16, 2014). Under a separate account heading, USDA received an appropriation for the associated leadership office— \$898,000 "[f]or necessary expenses of the Office of the Under Secretary for Rural Development." *Id.* Within USDA's Office of the Secretary appropriation, the agency also received a line item appropriation of "not to

exceed \$5,051,000,” derived from the larger lump sum, for the immediate Office of the Secretary. Pub. L. No. 113-235, 128 Stat. at 2147.

As previously discussed above, the Forest Service appropriation was not available to reimburse USDA OGC for legal services the office was responsible to provide, and for which it had received an appropriation. B-256172. Similarly, the Rural Development Salaries and Expenses appropriation was not available here to cover the costs necessary for the Under Secretary and Secretary to carry out their functions. Congress requires that the Department of Agriculture operate under the supervision and control of a Secretary. 7 U.S.C. § 2202. The Secretary is authorized to establish the position of Under Secretary for Rural Development, among others, and is directed to delegate certain responsibilities to such an appointee.⁴ 7 U.S.C. § 6941. Congress provided separate appropriations for the necessary expenses of the Office of the Secretary and the Office of the Under Secretary, in addition to a separate appropriation for the implementation and administration of programs in the Rural Development mission area.⁵ Although the Secretary, Under Secretary, and their immediate staffs function as leadership for the Rural Development agency, and USDA overall, the appropriations for the Office of the Under Secretary for Rural Development and the immediate Office of the Secretary were specifically available to finance the expenses of those offices. The specific appropriations for those offices should have been obligated to the exclusion of the more general appropriation for Rural Development Salaries and Expenses.

⁴ On June 12, 2017, the Secretary of Agriculture named a new Assistant to the Secretary for Rural Development, pursuant to a departmental reorganization plan announced in May 2017. USDA, *Secretary Perdue Names Anne Hazlett to Lead Rural Development at USDA*, Press Release No. 0058.17 (June 12, 2017), available at <https://www.usda.gov/media/press-releases> (last visited Aug. 23, 2017). The plan elevates the Rural Development agency to report, through the Assistant to the Secretary, directly to the Secretary of Agriculture. USDA, Report to Congress, Report on the Proposed 2017 Reorganization of the Department of Agriculture to Establish an Under Secretary for Trade and Foreign Agricultural Affairs (updated June 16, 2017), available at <https://www.usda.gov/sites/default/files/documents/report-proposed-2017-reorg-usda-under-secretary-trade-foreign-ag-affairs.pdf> (last visited Aug. 23, 2017). Under the previous structure, which existed at the time of the Rural Development IAA, the Under Secretary for Rural Development served as leadership over the Rural Development agency, reporting to the Deputy Secretary, who reports to the Secretary of Agriculture. *Id.*

⁵ See *Appendix, Budget of the United States Government for Fiscal Year 2015*, “Department of Agriculture” (Mar. 4, 2014), at 126, available at www.gpo.gov/fdsys/pkg/BUDGET-2015-APP/pdf/BUDGET-2015-APP-1-5.pdf (last visited July 18, 2017).

Where Congress has clearly demonstrated intent, multiple appropriations may be available for the same purpose. For example, in B-327003, Sept. 25, 2015, both the Commodity Futures Trading Commission's (CFTC) lump-sum appropriation and the earmark for the Office of the Inspector General (OIG), within the lump-sum appropriation, were available to pay CFTC OIG expenses, because the earmark was merely a minimum. Here, a proviso in USDA's appropriation for the Office of the Secretary does permit the Secretary "to transfer funds appropriated for any office of the Office of the Secretary to any other office of the Office of the Secretary" within certain limits. Pub. L. No. 113-235, 128 Stat. at 2135. However, USDA did not point to this transfer authority as providing any support for the obligation of its Rural Development appropriation for the IAA in question. We are not aware of any other clearly demonstrated intent that multiple appropriations be available for the Secretary or Under Secretary expenses, nor has USDA asserted that any such statutory authority exists.

USDA agrees that the employees in question were paid from the Rural Development Salaries and Expenses appropriation for performing work in other USDA offices, but maintains that this staffing practice was only *possibly* a violation of the purpose statute. Final Response Email, Attachment 2. In support of its actions, USDA asserts that in response to the committee's inquiry, the agency, several times, has submitted information to the House Committee on Appropriations informing Congress that these positions were funded from Rural Development appropriations, rather than the specific appropriation for the Office of the Under Secretary. *Id.*, Letter. According to USDA, included in the information provided to the committee was that this funding practice also existed in FYs 2012, 2013, 2014, and 2016. *Id.*, Letter, Attachment 1. USDA asserts that "the appropriators' silence on this matter" demonstrates "tacit congressional acquiescence to its staffing practices." *Id.*, Letter. We disagree with USDA's implication that a committee's silence with regard to a practice could somehow create an exception to law. See, e.g., 72 Comp. Gen. 317, 319 (1993) (rejecting the General Services Administration's rationale that its improper reserve of appropriations "was developed in conjunction" with appropriations subcommittees after the enactment of the appropriation, due to the "well-established principle that post-enactment statements of legislators . . . cannot serve to change the legislative intent expressed in statutes").

Since the Rural Development Salaries and Expenses appropriation was not available for the salaries and benefits of employees in the Office of the Under Secretary and immediate Office of the Secretary, the use of the Salaries and Expenses appropriation to compensate employees in those offices improperly augmented those appropriations. As previously noted, for FY 2015, Congress appropriated \$898,000 for the necessary expenses of the Office of the Under Secretary for Rural Development, and \$5,051,000 for the immediate Office of the Secretary. USDA should adjust its accounts to charge these appropriations for the salaries and benefits of the 10 employees, who, rather than being detailed to the Rural Development agency, performed work for the Office of the Under Secretary

and the immediate Office of the Secretary. If insufficient amounts are available in these accounts USDA should report its Antideficiency Act violation(s). 31 U.S.C. §§ 1341(a), 1351.

The three remaining IAAs mentioned at the outset of this opinion—two between the Food and Nutrition Services agency and the Under Secretary for Food, Nutrition, and Consumer Services, and one between the Office of Civil Rights and the Office of the Assistant Secretary for Civil Rights—raise the very same concerns as the Rural Development IAA. In each, the agency requesting services under the agreement obligated its appropriation for the salaries and benefits of employees performing work for other USDA offices that had received separate appropriations for their expenses. As such, our legal reasoning and conclusions apply to the Food and Nutrition Service IAAs and the Office of Civil Rights IAA in the same manner.

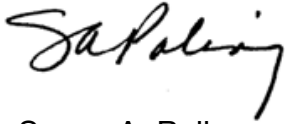
CONCLUSION

USDA violated the purpose statute and improperly augmented its appropriations for the Office of the Under Secretary for Rural Development, immediate Office of the Secretary, Office of the Under Secretary for Food, Nutrition, and Consumer Services, and Office of the Assistant Secretary for Civil Rights. Specifically, the agency improperly obligated its Rural Development Salaries and Expenses appropriation for the salaries and benefits of 10 employees in FY 2015, and its appropriations for Food and Nutrition Service, Nutrition Programs Administration and the Office of Civil Rights for the salaries and benefits of 6 employees⁶ in FY 2016. Accordingly, USDA should adjust its accounts to charge the proper appropriations for the identified expenses. The Antideficiency Act prohibits obligations or expenditures in excess of available amounts. 31 U.S.C. § 1341(a). If sufficient amounts are not available upon adjustment, USDA must report its Antideficiency Act violation(s). 31 U.S.C. § 1351.

⁶ This number includes one employee described in the Office of Civil Rights IAA and four employees described in the Food and Nutrition Service IAAs, as well as the Deputy Under Secretary for Food, Nutrition, and Consumer Services, who was compensated from the Nutrition Programs Administration appropriation, though not named in either of the Food and Nutrition Service IAAs. USDA explained that one additional person was also compensated from the Nutrition Programs Administration appropriation, but unnamed in either IAA. This individual served as a White House Fellow. As USDA does not have a position description for the White House Fellow, we are unable to opine here on whether this position served a purpose of the Nutrition Programs Administration appropriation. USDA should evaluate whether this position was properly compensated from the Nutrition Programs Administration appropriation based on our analysis in this opinion.

If you have any questions, please contact Edda Emmanuelli Perez, Managing Associate General Counsel, at (202) 512-2853, or Julia C. Matta, Assistant General Counsel for Appropriations Law, at (202) 512-4023.

Sincerely,

A handwritten signature in black ink, appearing to read "S. Poling". The signature is fluid and cursive, with a prominent loop at the end.

Susan A. Poling
General Counsel