



B-330935.2

Federal Appropriations Law Practitioners

October 24, 2019

Subject: *Reconsideration: Use of Appropriated Funds to Subsidize Employees' Long-Distance Home-to-Work Travel*

Enclosed is the U.S. Government Accountability Office's (GAO) reconsideration of three appropriations law decisions on the availability of appropriated funds to subsidize federal employees' long-distance home-to-work travel costs. B-330935.1, Oct. 18, 2019. GAO will reconsider a decision if it might have resolved the matter differently if it had had the benefit of relevant and material information not reasonably available at the time of the original decision.

At the time we issued these prior decisions internally, and when we subsequently released them publicly in May 2019,¹ Department of Transportation (DOT) guidance did not interpret the term "commute" as used in 5 U.S.C. § 7905. On September 25, 2019, however, DOT issued a memorandum providing its view of the term "commute" and the factors an agency head should consider in determining whether an employee's commute is eligible for federal transit subsidies. DOT, *Interpretation of "Commute" for Purposes of Transit Benefit Eligibility under 5 U.S.C. § 7905* (Sept. 25, 2019), available at <https://www.transportation.gov/transerve/ogc-memo-long-distance-commute-under-5-usc-7905> (last visited Oct. 23, 2019).

As discussed more fully in the enclosed reconsideration, we regard DOT's recently issued guidance as relevant and material to our necessary expense analysis and, in light of that new guidance, conclude that section 7905 authorizes GAO to provide transit subsidies for home-to-work travel costs an employee incurs within or outside of GAO's local travel area, provided the transportation (1) is directly between the employee's residence and official place of work, with no intervening stay elsewhere; (2) is the type of regular or frequent roundtrip travel between home and work that could reasonably be expected to occur on a daily basis, even if it does not actually occur every workday; and (3) involves a transit pass as defined by 26 U.S.C.

¹ We publicly issued these decisions on May 20, 2019, after becoming aware of possible uncertainty among federal agencies regarding the proper use of appropriated funds for these purposes. B-330935, May 20, 2019.

§ 132(f)(5). DOT also indicated that the head of the agency can and should take into account certain practical considerations, including travel time, distance, and other geographic considerations relevant to the agency's workforce and the commuting realities of the agency's office locations.

Enclosed you will find the October 18, 2019, reconsideration described above. If you have any questions, please contact me at (202) 512-8156, or Omari Norman, Assistant General Counsel for Appropriations Law, at (202) 512-8272.

A handwritten signature in black ink that reads "Shirley A. Jones". The signature is written in a cursive style with a large initial 'S' and a long, sweeping tail on the 'J'.

Shirley A. Jones
Managing Associate General Counsel

Enclosure



Memorandum

B-330935.1

Date: October 18, 2019

To: Controller, Financial Management & Business Operations - William L. Anderson

From: General Counsel - Thomas H. Armstrong

Subject: Reconsideration: Use of Appropriated Funds to Subsidize Employees' Long-Distance Home-to-Work Travel

The purpose of this decision is to reconsider three appropriations law decisions we issued regarding the use of GAO's appropriations to subsidize an employee's long-distance home-to-work travel costs. GAO will reconsider a decision if it might have resolved the matter differently if it had had the benefit of relevant and material information not reasonably available at the time of the original decision. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP, at 9 (Washington, D.C.: Sept. 2006), available at www.gao.gov/products/GAO-06-1064SP; see B-306663, Jan. 4, 2006.

In the appropriations law decisions we issued between September 2016 and August 2017, we concluded, based on a necessary expense analysis,¹ that under 5 U.S.C. § 7905 appropriated funds are available to provide a transit subsidy only for commuting expenses an employee incurs within the local travel area defined by the agency. At that time, Department of Transportation (DOT) guidance did not interpret the term "commute" as used in section 7905.² On September 25, 2019, however, DOT issued a memorandum providing its view of commute and the factors an agency should

¹ As with any analysis under the purpose statute, in determining whether an expenditure is authorized we apply the necessary expense rule, including an evaluation of whether the expenditure constitutes a personal expense. See B-323449, Aug. 14, 2012, at 4.

² Congress has authorized DOT to establish standards related to programs authorized under section 7905. See, e.g., Pub. L. No. 116-6, div. G, title I, § 190, 133 Stat. 13, 430 (Feb. 15, 2019) ("The Secretary of Transportation is authorized to carry out a program that establishes uniform standards for developing and supporting agency transit pass and transit benefits authorized under section 7905 of title 5, United States Code . . ."); see also 5 U.S.C. § 7905(d)(1); Exec. Order No. 13150, *Federal Workforce Transportation*, 65 Fed. Reg. 24613, 24613 (Apr. 21, 2000).

consider in determining whether an employee's commute is eligible for federal transit subsidies. Because DOT has certain responsibilities related to the administration of section 7905, we regard DOT's September 25, 2019, memorandum as relevant and material to a reconsideration of the availability of appropriations for this purpose. As such, DOT's September 25, 2019 interpretation leads us to address anew the necessary expense analysis of the proper use of appropriated funds under section 7905. In this reconsideration, we conclude that section 7905 authorizes GAO to use appropriated funds to provide transit subsidies for an employee's home-to-work travel costs, subject to defined limitations and the agency head's discretion, within or outside of GAO's local travel area.

BACKGROUND

Between September 2016 and August 2017, we responded to three GAO requests related to the agency's authority to use appropriated funds to subsidize an employee's long-distance home-to-work travel. Pursuant to GAO's statutory responsibilities under 31 U.S.C. § 3529, we issued three separate decisions in response to each distinct set of facts. GAO, *Transit Benefits and Long-Distance Travel* (Aug. 28, 2017) (August 2017 Decision); GAO, *Transit Benefits for Employees Residing at Long-Distance Locations* (July 25, 2017) (July 2017 Decision); GAO, *Appropriations for Transit Benefits for Field Office Employees* (Sept. 19, 2016) (September 2016 Decision). In these decisions, we addressed, respectively, (1) whether GAO's appropriations were legally available to provide a transit subsidy to an employee who used bus or rail to travel long-distance from his or her residence to his or her official duty station at a GAO field office; (2) whether GAO's appropriations were legally available to provide a transit subsidy to an employee who used bus or rail to travel long-distance from his or her residence to his or her official duty station at GAO headquarters; and (3) how to administer the GAO Transit Benefits Program in a manner that ensures that GAO's appropriations are used to provide transit subsidies only to the extent authorized by law. September 2016 Decision, at 1; July 2017 Decision, at 1; August 2017 Decision, at 1. Having become aware of possible uncertainty among federal agencies regarding the proper use of appropriated funds for federal transit benefits programs, we publicly issued these decisions on May 20, 2019. B-330935, May 20, 2019, at 6.

Appropriated funds are available only for the purpose or purposes for which Congress has provided. 31 U.S.C. § 1301. Absent affirmative authority from Congress, appropriated funds generally are not available for the personal commuting expenses of an employee. *E.g.*, B-330935, May 20, 2019, at 6. In that regard, our decisions noted that Congress enacted section 7905 to permit agencies to reimburse employees for certain commuting expenses. *E.g.*, *id.*, at 7. To determine the scope of the authority

Congress provided in section 7905, we evaluated the language of the statute itself, focusing specifically on the term “commute.” *E.g., id.*, at 8. We also considered DOT guidance, but, at that time, DOT guidance did not provide an interpretation of commute. We concluded in response to each factual scenario that GAO may not use appropriated funds to subsidize an employee’s long-distance home-to-work travel. *Id.*, at 9; August 2017 Decision, at 2; July 2017 Decision, at 2; September 2016 Decision, at 1.

On September 25, 2019, after we had publicly issued these decisions, DOT issued a legal memorandum providing its interpretation of the term commute for purposes of transit benefit eligibility under section 7905. DOT, *Interpretation of “Commute” for Purposes of Transit Benefit Eligibility under 5 U.S.C. § 7905* (Sept. 25, 2019), available at <https://www.transportation.gov/transerve/ogc-memo-long-distance-commute-under-5-usc-7905> (last visited Oct. 18, 2019) (DOT Memorandum). DOT has been designated as having certain responsibilities related to the administration of federal transit benefits programs. *See supra*, note 2, at 1. In its September 25, 2019, memorandum, DOT explained, as did we when we publicly released our decisions, that the statutes governing transit programs do not define the term commute. DOT Memorandum, at 3; B-330935, May 20, 2019, at 8. DOT, referring to Google Dictionary, Webster’s Third New International Dictionary, and Merriam-Webster Online Dictionary, concluded that “‘to commute’ as used in section 7905 means to transit on a regular basis back and forth between the employee’s place of residence and the employee’s official duty station.” DOT Memorandum, at 1, 3. DOT also enumerated three elements that an employee’s commute must satisfy to be eligible for a subsidized transit pass: the transportation must (1) be directly between the employee’s residence and official place of work, with no intervening stay elsewhere; (2) be the type of regular or frequent roundtrip travel between home and work that could reasonably be expected to occur on a daily basis, even if it does not actually occur every workday; and (3) occur via a mass transit facility or a commercial van-pool or shuttle-bus service. *Id.*, at 1–2, 4–5, 7.

Though DOT concluded that the ordinary meaning of commute does not prescribe a definite distance limitation, DOT cited travel time, distance, and other geographic considerations as practical factors that an agency head can and should consider in establishing a transit benefits program. *Id.*, at 1, 4, 7. DOT offered no additional guidance with regard to how agencies should consider travel time and distance—or what “other geographic” factors DOT had in mind—thereby leaving these considerations to the agency head’s discretion. *Id.*, at 1-7.

Just as we considered DOT’s guidance in our prior decisions, we find that DOT’s September 25, 2019, memorandum provides relevant and material information here. In light of this new guidance, we now reconsider whether appropriations are available to provide transit subsidies for an employee’s long-distance home-to-work travel.

DISCUSSION

Appropriated funds are available only for the purpose or purposes for which Congress has provided. 31 U.S.C. § 1301(a) (purpose statute); *United States v. MacCollom*, 426 U.S. 317, 321 (1976). Because each authorized expense is not stated explicitly in an appropriation, application of the purpose statute involves a necessary expense analysis, including a determination as to whether an expenditure bears a reasonable, logical relationship to the appropriation. See, e.g., B-303170, Apr. 22, 2005, at 3.

As part of this analysis, we must also consider whether an expenditure constitutes a personal expense, because appropriated funds generally are not available for the personal expenses of an employee. *Navy v. Federal Labor Relations Authority*, 665 F.3d 1339, 1349 (D.C. Cir. 2012); B-329316, Nov. 29, 2017; B-326021, Dec. 23, 2014. Congress may, however, enact a statute that authorizes an agency to use its appropriations for what would otherwise be considered a personal expense. B-326021, Dec. 23, 2014, at 3. That is what Congress did when it enacted section 7905.

In general, commuting costs constitute a personal expense and, thus, must be borne by the employee absent Congress enacting a statute providing otherwise. B-318229, Dec. 22, 2009; B-305864, Jan. 5, 2006; B-261729, Apr. 1, 1996; B-202370, Apr. 2, 1984; B-202044, Aug. 6, 1981. In that regard, Congress enacted section 7905 to permit agencies to reimburse employees for certain commuting expenses. See Federal Employees Clean Air Incentives Act, Pub. L. No. 103-172, 107 Stat. 1995, 1995 (Dec. 2, 1993), *codified at* 5 U.S.C. § 7905; see also Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Pub. L. No. 109-59, title III, § 3049, 119 Stat. 1144, 1711–12 (Aug. 10, 2005) (requiring that agencies in the National Capital Region implement a transit benefits program as described in section 2 of Executive Order No. 13150); Exec. Order No. 13150, *Federal Workforce Transportation*, 65 Fed. Reg. 24613 (Apr. 21, 2000). Section 7905(b)(1) provides that “[t]he head of each agency may establish a program to encourage employees of such agency to use means other than single-occupancy motor vehicles to *commute* to or from work.” 5 U.S.C. § 7905(b)(1) (emphasis added).

Where Congress, as here, authorizes an agency to use appropriations for what is otherwise a personal expense, we interpret the statutory language to determine, as a matter of appropriations law, the scope of expenditures to which it applies. See, e.g., B-291208, Apr. 9, 2003 (section 7905 does not provide an agency with authority to pay parking fees for employees with disabilities); B-193104, Jan. 9, 1979 (5 U.S.C. § 7903, which provides that an agency may use appropriated funds to purchase “special clothing and equipment for the protection of personnel,” does not authorize agency to purchase raincoats or umbrellas for employees). In determining the scope of

expenditures to which a statute applies, we refer, among other things, to relevant guidance from the agency or agencies of jurisdiction. See, e.g., B-323449, Aug. 14, 2012;³ 70 Comp. Gen. 210 (1991).⁴ An expenditure of public funds nonetheless can be justified only to the extent authorized by the text of the statute. See B-288266, Jan. 27, 2003;⁵ see *Navy*, 665 F.3d at 1350 (D.C. Cir. 2012).⁶

It is in this regard that DOT's September 25, 2019, memorandum is relevant here. Now that DOT has addressed the term "commute" and offered federal agencies parameters in establishing federal transit benefits programs, we take such guidance into account as we determine the scope of expenditures authorized by the statute in a new necessary expense analysis.

In its September 25, 2019 memorandum, DOT concluded that the term commute refers to regular or frequent travel that can reasonably be expected to occur on a daily basis. DOT Memorandum, at 1, 3, 4, 7. DOT further noted that travel time and distance are practical factors for an agency to consider in establishing a transit benefits program, but nevertheless concluded that the term commute does not prescribe a definite geographic distance and that reimbursement under section 7905 is not limited to the local travel

³ We concluded that a federal court could not use appropriated funds to reimburse an employee for the health insurance expenses of his spouse where the cost of employee health benefits constitutes a personal expense and the Office of Personnel Management, the agency charged with administration of the Federal Employee Health Benefits Program, had prescribed guidance that did not permit such reimbursement. B-323449, Aug. 14, 2012.

⁴ After Congress enacted a statute pertaining to the provision of child care in federal workplaces, federal agencies asked us about the proper use of appropriated funds for activities related to such authority. See, e.g., 70 Comp. Gen. 210 (1991); 67 Comp. Gen. 443 (1988). After issuing our interpretation of the provision in 1988, in 1991 we overruled part of our 1988 decision based on new facts provided by the General Services Administration (GSA) showing that the intent of the legislation would be defeated by a contrary interpretation of the statutory language at issue. 70 Comp. Gen. 210 (1991).

⁵ We concluded that GSA did not have statutory authority to authorize agencies to pay for light refreshments at conferences for employees in nontravel status. B-288266, Jan. 27, 2003. Because the Comptroller General has authority to settle the accounts of the government, we also noted that certifying officers should not rely on GSA's travel regulation to authorize payment for such personal expenses. *Id.*

⁶ An expenditure cannot be justified merely because it would accommodate the personal tastes of an employee. *Navy*, 665 F.3d at 1350 (D.C. Cir. 2012).

area defined by the agency. *Id.*, at 1, 2, 4, 5–6. DOT articulated a three-part test for eligibility for a subsidized transit pass under section 7905. DOT advised that “[a]gency heads have discretion to define appropriate limitations on eligibility for benefits and, in so doing, can and should take into account travel time, distance, and other geographic considerations suitable to the agency’s workforce and the commuting realities of the agency’s particular office locations.” DOT Memorandum, at 2; see *id.*, at 4, 6.

The importance of DOT’s September 25, 2019, memorandum to a necessary expense analysis is that it enumerates limits on an eligible commute. It also leaves with the agency head discretion to consider geographic factors in defining the agency’s transit benefits program. Upon reconsideration, taking into account DOT’s recently issued interpretation, we conclude that section 7905 authorizes agencies to reimburse an employee’s transit costs, subject to defined limitations and the agency head’s discretion, within or outside of the agency’s local travel area.

In our prior decisions, we also cited to 5 U.S.C. § 5702. We noted that it is section 5702, which addresses employees’ long-distance travel, that provides authority for agencies to reimburse costs an employee incurs while traveling outside of the local travel area defined by the agency. See, e.g., B-330935, May 20, 2019, at 8–9; see also 5 U.S.C. § 5702.

In addition to providing its interpretation of the term commute, in its September 25, 2019, memorandum, DOT asserted that section 5702 and section 7905 apply to separate categories of travel-related expenses—that is, that section 7905 applies to employees’ personal transportation expenses for home-to-work travel, while section 5702 applies to official business travel expenses. DOT Memorandum, at 6. Because the General Services Administration (GSA) is the agency charged with administering section 5702, we contacted GSA’s Office of General Counsel to request GSA’s views on this matter. Telephone Conversation with GSA Officials (Oct. 1, 2019) (GSA Conversation); see 5 U.S.C. § 5702 (authorizing allowances “[u]nder regulations prescribed pursuant to 5 U.S.C. § 5707”); *id.* § 5707 (charging the GSA Administrator with prescribing travel regulations). A GSA official told us by telephone that GSA’s Office of General Counsel views sections 5702 and 7905 as unrelated. GSA Conversation.

CONCLUSION

In light of DOT’s recently issued views, we conclude that section 7905 authorizes GAO to provide transit subsidies for home-to-work travel costs an employee incurs within or outside of GAO’s local travel area. However, an employee’s commute must satisfy three elements to be eligible for a transit subsidy under section 7905: the transportation must (1) be directly between the employee’s residence and official place of work, with

no intervening stay elsewhere; (2) be the type of regular or frequent roundtrip travel between home and work that could reasonably be expected to occur on a daily basis, even if it does not actually occur every workday; and (3) involve a transit pass as defined by 26 U.S.C. § 132(f)(5). In addition to these requirements, the Comptroller General should, consistent with DOT's guidance, "define appropriate limitations on eligibility for benefits" by "tak[ing] into account travel time, distance, and other geographic considerations" relevant to GAO's workforce and the commuting realities of GAO's office locations.