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B-205342 (RCP) December 8, 1981

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The Honorable J. Paul McGrath Assistant Attorney General Civil Division U.S. Department of Justice Washington, D.C. 2053

Attention: Robert E. Kopp, Acting Director, Appellate Staff

Dear Mr. McGrath:

Subject: American Federation of Government Employees, AFL-CIO, Local 32 and Office of-Personnel Management, 6 FLRA No. 76.

Your letter of October 19, lg81 (reference JPM:REK: DNLetter:lcb) requests our views in connection with your recommendation to the Solicitor General as to whether a petition for review of the above-captioned decision should be filed. We have no factual knowledge of the case beyond that contained in the decision. We offer no comment on the Federal Labor Relations Authority's interpretation of the management rights in 5 U.S.C. Sec. 7106(a)(1), or its interpretation of conditions of employment in 5 U.S.C. 7103(a)(14).

Our response is limited to the third question considered by the FLRA; namely, whether the proposal 'that "[M]anagement shall establish free day care facilities for the children of OPM employees" is inconsistent with provisions of Federal law which authorize and make appropriations to that agency. Constrained as we are by our limited knowledge Of the background and factual development of this case, we offer the following observation concerning the "necessary expense rule" as it applies to expenditures of appropriated funds under 31 U.S.C. Sec. 628.

Under the rule expressed in 31 U.S.C. Sec. 628, public funds may be used only for the purpose' or purposes for which they were appropriated. Generally, such authorized purposes or objects of an appropriation may be determined from the appropriation act itself and its legislative history. If the appropriation is general, the purposes will be found in the appropriations authorization legislation, if any, and in the underlying program or organic legislation, together with their legislative histories. In this manner the Treasury, Postal Service, and General Government Appropriations Act, 1980, P.L. 96-74, 93 Stat. 559, 570, provides among other things for certain amounts for "necessary expenses to carry out functions of the Office of Personnel Management". See also the Joint Resolution continuing appropriations for Fiscal Year 1981, P.L. 96-536, 94 Stat. 3166.

However, as a matter of longstanding construction 31 U.S.C. Sec. 628 does not

require - nor would it be reasonably possible - that every item of expenditure be specified in the appropriation act. Thus, under the "necessary expense rule," the spending agency has reasonable discretion in determining how to carry out the objects of the appropriation. An early statement of the rule is contained in 6 Comp. Gen. 619, 621 (1927):

"It is a well-settled rule of statutory construction that where an appropriation is made for a particular object, by implication it confers authority to incur expenses which are necessary or proper or incident to the proper execution of the object, unless there is another appropriation which makes more specific provision for such expenditures, or unless they are prohibited by law, or unless it is manifestly evident from various precedent appropriation acts that Congress has specifically legislated for certain expenses of the Government creating the implication that such expenditures should not be incurred except by its express authority."

For an expenditure to be justified under the necessary expense rationale it must not be prohibited by law since the necessary expense construction of an appropriation act is not sufficiently definite as to overcome a statutory prohibition. 38 Comp. Gen. 758, 762-63 (1959); 4 Comp Gen. 1063 (1923). While not capable of absolute qualification, a necessary expense must bear a logical relationship to the appropriation sought to be charged. In other words, it must mace a direct contribution to carrying out either a specific appropriation or an authorized agency function for which more general appropriations are available. 34 Comp. Gen. 599 (1955).

The comptroller General has never established a precise formula for determining the application of the necessary expense rule. In view of the vast differences among agencies, any such formula would almost certainly be unworkable. Rather, the determination must be made essentially on a case-by-case basis. The evident difficulty in stating a precise rule emphasizes the role and importance of agency discretion. It is in the first instance up to the administrative agency to determine that a given item is reasonably necessary to accomplishing an authorized purpose. Once the agency makes this determination, the Comptroller General will normally not substitute his own judgment for that of the agency. In other words, the agency's administrative determination of necessity will be given considerable deference. However' the administrative determination is not binding on the Comptroller General. 18 Comp. Gen. 285 (1938).

As a result, a decision on a "necessary expense" question involves (1) analyzing the agency's appropriations and other statutory authority to determine whether the purpose is authorized, and (2) evaluating the adequacy of the administrative justification, to decide whether the agency has properly exercised or exceeded its discretion.

Under this rationale, in order for expenses of a day care center to be borne by the Office of Personnel Management, the Director must determine that these are necessary expenses incident to the execution of the functions of the agency and that such action is necessary to the effective operation of the agency and management of personnel. Where this necessary determination can be made no legal impediment exists to the use of appropriated funds for this purpose. Just as surely however, in the absence of the necessary determination and justification, appropriated funds are not available under 31 U.S.C. Sec. 628 for the purpose of funding a day care center.

The test remains one of necessity and determinations must be made on a case-by-case basis. Here, we believe it is helpful to note that we are unaware of any agency which currently funds a day care center using appropriated funds without specific legislation authorizing the operation. For example, our decision 57 Comp. Gen. 357 (1978) (copy enclosed) involved the statutory authority which authorized the former Department of Health, Education, and Welfare to donate space for day care centers. In other cases, there wan authority to conduct research programs or demonstration pilot projects under the Comprehensive Employment and Training Act, etc. No agency to date has asserted a purely administrative justification for funding free day care centers with appropriated funds.

Sincerely yours,

Harry R. Van Cleve Acting General Counsel

Enclosure