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Mr. York E Onnen Director of Programs Development The President's Council on Physical Fitness and Sports Washington, D. C. 20001

Dear Mr. Onnen:

This is in response to your letter dated October 12, 1984, requesting the help of this office in clarifying the use of appropriated funds by Federal managers for fitness programs. The first part of this letter is a brief compilation and explanation of the various pertinent laws and regulations. In our view, 5 U. S. C. Sec. 7901 (1982), provides as adequate statutory basis for the expenditure of appropriated funds for employee physical fitness facilities. The problem is the restrictive nature of the implementing regulations, which limit the use of appropriated funds by Federal agencies for preventive health to educational programs only. The second section and attachments to this letter set forth our suggestions regarding changed to the relevant regulations to remit the use of appropriated funds for such facilities. We also suggest an expanded Executive Order which approves a broader view of preventive health programs and which may stimulate the Office of Management and Budget (OMB) and the other implementing agencies to broaden the scope of their regulations as well.

Section 7901 (a) provides:

"The head of each agency of the Government of the United States may establish, within the limits of appropriations available, a health service program to promote and maintain the physical and mental fitness of employees under his jurisdiction."

Subsection (c) of that section provides:

"A health service program is limited to- (1) treatment of on-the-job illness and dental conditions requiring emergency attention; (2) preemployment and other examinations; (3) referral of employees to private physicians and dentists; and (4) preventive program relating to health." (Emphasis added.)

In our view, the fourth category, "preventive programs relating to health," is of sufficient breadth to encompass employee physical fitness programs.

Heads of agencies are required under 5 U. S. C. Sec. 7901 (b) to consult with and consider the recommendations of the Secretary of Health and Human Services (HHS) before establishing any health service program. Section 2 of Executive Order 12345, 47 Fed. Reg. 5189 (1982), established The President's Council on

Physical Fitness and Sports to act as an advisory committee to the Secretary of HHS on ways and means of enhancing opportunities for participation in physical fitness and sports activities. (The Council's existence has been extended until September 30, 1985, pursuant to Executive Order12489, 49 Fed. Reg 38927 (1984).)

Although section 1 of Executive Order 12345 clearly expresses the President's high regard for physical fitness activities, and orders the Secretary to "develop and coordinate a national program for physical fitness and sports, ' it does not specifically authorize the use of appropriated funds for Federal employee physical fitness facilities. Moreover the regulations which have been issued under 5 U.S.C. Sec. 7901 are more restrictive than the statute itself, and do not permit the use of appropriated funds to establish employee physical fitness activities. In general, these regulations limit "preventive programs relating to health" to education and preventive medical services, such as inoculation or screening tests, but do not include physical fitness programs.

The first pertinent regulation is OMB Circular No. A-72, June 18, 1965, which established criteria to be followed by Federal agencies in providing health services under 5 U. S. C. Sec. 7901. Circular A-72 provides that agency heads are "authorized and encouraged to establish and occupational and health program to deal constructively with the health of the employees of [their] department or agency in relation to their work." However, section 4 of the Circular specifically limits permissible employee health services to six categories:

a) emergency diagnosis and treatment during work hours, b) preemployment examinations, c) in-service examinations of employees, d) administration of prescribed treatments, e) preventive services to appraise the work environment, provide health education and provide specific disease screening and provide specific disease screening, and f) referral of employees to private physicians.

From a fair reading of these categories, we find that none of them reasonable includes the operation of as employee physical fitness facility.

The Federal Personnel Manual, issued by the Office of Personnel Management, includes more detailed provisions for Federal employee health and counseling program. Fed. Personnel Manual, ch. 792 (Inst. 261, December 31, 1980). However, permissible health programs are limited to sex categories virtually identical to those of OMB Circular No. A-72, explained above. Id. At Sec. 1-3 (c). Similarly, the Federal Property Management Regulations, issued by the General Service Administration (GSA), provide for the establishment and operation of Federal employee health services in buildings managed by GSA. 41 C.F.R. Sec. 101-5.3 (1983). These regulations also specifically limit permissible programs to the six categories detailed in OMB Circular No. A-72. Id. At Sec. 101- 5.304.

GSA has also issued "Guidelines for Establishment of Physical Fitness Facilities in Federal Space." Public Buildings Service, Notice 6820-23-m, 43 Fed. Reg. 56733 (1978). These "guidelines" set forth criteria for the establishment of "various types of physical fitness facilities for Federal agencies." However, these guidelines do not purport to authorize the use of appropriated funds to establish physical fitness facilities. They merely set forth criteria for the development of such facilities once funds have been authorized. The GSA guidelines conclude with the following caveat: "All cost connected with the installation, operation and maintenance of a physical fitness facility shall be borne by the requesting agency."

Although the Secretary of HHS is charged with reviewing and commenting upon Federal employee health programs established under 5 U.S.C. Sec. 7901. HHS has not issued regulations pursuant to that section. However, HHS has published "An Administrative Guide for Federal Occupation Health Units," DHEW Publication No. (HAS) 77-2033 (1969). This "administrative Guide" groups permitted "preventive programs relating to health" into four categories, including "screening programs," "immunization programs," "health education," and "maintenance of safe work conditions," none of which reasonable includes the operation of a physical fitness facility. Id. At 26-27.

In your October 12 letter, you requested the help of this office in amending the relevant regulations to permit the use of appropriated funds for employee physical fitness programs. Accordingly, we have attached illustrative amended versions of OMB Circular A-72, the Federal Personnel Manual, and the Federal Property Management Regulations, with suggested changes underscored.

In general, as the attachments indicate, our suggested amendments merely add "physical fitness programs and facilities" to the list of permissible "preventive programs relating to health."

We also suggest that the Executive Order be amended to give more explicit sanction to the establishment of physical fitness programs and facilities. If The President signs it, it may provide the impetus for the proposed regulatory changes across the board. We have attached possible language to that effect.

We caution that these suggested amendments are provided only as a courtesy, and are meant to illustrate the sort of regulatory change which would be necessary to permit the use of appropriated funds for employee physical fitness programs. The amendment of any agency's regulations is the responsibility of that agency, and GAO has no authority to compel an amendment to a regulation which otherwise complies with the law.

If we can be of further help to you in this area, please contact us.

Sincerely yours,

(Mrs.) Rollee H. Efros Associate General Counsel